

MODERN PRINCIPLES OF COMPANY LAW IN GHANA

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PREFACE

The inspiration to write this book came from the many requests from my first batch of students in the modular session at the Faculty of Law, Ghana Institute of Management and Public Administration (GIMPA) in 2014. It was at the urging of these students that the decision was made to write a book which would serve as a standard textbook. At the time, it could be said that there was only one main textbook in Ghana for law students studying company law. The other textbooks were mainly introductory material for business students who were introduced to business and company law. The many reference textbooks were, and are still, books written by English authors on company law in England. This heightened my decision to write a standard textbook on company law in Ghana for students and legal practitioners.

The approach adopted in writing this book was also informed by my preference to have a book that comprehensively covers explanations on the relevant topics in company law, the main statute on company law, the Companies Act, 2019 (Act 992) and others, and the relevant cases – covering the foundational common cases and cases on the interpretation and application of the Companies Act. This book, therefore, covers explanation of the principles, reproduction of the relevant sections of applicable statutes, brief facts of cases and extracts of the relevant judgments. Given that the book is to serve as a reference book for both students and practitioners, the approach has been to have extracts of judgments rather than the usual approach of having a case brief. Whilst students may generally prefer a brief of the case, the extracts are to help them fully appreciate the reasoning of the judges. The advantage for the students is it avoids having to read from multiple sources on a topic to understand the principles. For the practitioner who requires authority on principles, it provides the ratio of the cases on each principle and state the relevant sections of the Companies Act. The book also avoids too many cross-references in one chapter to other chapters by repeating relevant statutes and cases in order to enable each chapter to be all inclusive.

Compiling this book for the past seven to eight years has been challenging in many respects but has been a great learning experience at the same time. The initial drafts of the book were written based on the Companies Act, 1963 (Act 179) as amended. In 2019, Act 179 was repealed by the Companies Act, 2019 (Act 992) which necessitated further review. In addition, the new Borrowers and Lenders Act, 2020 (Act 1052) was passed last year which also requires further revision of the chapter on debenture. The many revisions of each chapter have also taken into account discussions with my students and colleague lawyers, which have been very revealing and a great learning process. I, therefore, owe a great debt to the students who I have taught over the past eight years from the Faculty of Law, GIMPA and my many practicing colleagues. The discussions have greatly shaped this book.

This book has twenty-five chapters which can be understood in five parts. The first part deals with introduction to Company Law and companies. Even though the book is on company law, the second

chapter talks about other entities through which business can be undertaken or through which objects can be pursued. These entities include Sole Proprietorship, Partnership, Building Societies, Cooperative Societies, Incorporated Trust, Statutory Corporation and Non-Governmental Organisation under the proposed Non-Governmental Organisation Bill, 2018. Chapter 3 also comes under the first part which is an introduction to a company, requirements for the formation of a company and the types of companies that can be incorporated and registered in Ghana. Chapters 4 and 5 deal with the constitution of a company, which under the repealed Act 179 is the regulations of a company, and the role of the promoter respectively. The second part deals with company law concepts most of which were developed under common law and now given statutory backing. It covers principles on pre-incorporation contract, ultra vires and capacity of a company, corporate veil and the presumption of regularity. The third part covers governance issues including membership, general meeting, directors, Company Secretary and auditors. This is followed by the fourth part which deals with raising capital for companies including principles relating to shares and debentures, restructuring or reorganization of a company and rules relating to public companies. The last part deals with remedies available for corporate maladministration and liquidations. A new introduction in Ghana, the concept of administration of financial distress companies under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), is dealt with. The last chapter provides an overview of requirements for a company to keep books of accounts and prepare financial statements.

Whilst the primary objective of this book is to have a standard textbook on principles of company law in Ghana to assist students in the study of the subject and to serve as reference material for practitioners, the language adopted in the book is simplified so that other professional and persons engaged in business can also find it useful. As with all textbooks on company law, the book in no way seeks to cover every law applicable to companies particularly the sector specific legislations. However, it contributes to the body of knowledge on company law in Ghana and it is hoped that it will be a great addition to scholarship on the subject.

Acknowledgement

My overall thanks and gratitude to God for his mercies, grace and blessings in seeing me through authoring this book. Many people have contributed to make this publication possible. I stand indebted to AB & David for the opportunity afforded me by the firm and the learning garnered from working with Partners and Associates. The experience has been immeasurable. To the Associates who assisted in editing the work and providing invaluable comments that informed revisions to the book, I am immensely grateful. My gratitude especially goes to Sena Abla Agbeko and Marie-Isabelle Kyei-Manu who painstakingly edited the work and to Leonora Gobah, who single-handedly formatted and typed set the book. I am also grateful to Mrs. Victoria Oteng-Nyame for her support and encouragement. To Anita Abena Asante, who worked as my Research Assistant and tirelessly looked for the majority of the cases reflected in this book, I am truly grateful. I am also grateful to David, Senior Partner of AB & David for the many opportunities and our many discussions which have shaped my thinking on the subject. To Isabel, the Managing Partner of AB & David, whose ever encouraging words and motivation sped up work on this book, and Vera for having a listening ear to my many frustrations encountered on this project. I cannot name all those who contributed in many diverse ways. Thank you all.

Dedication

This book is dedicated to my children Jada Sesie, Maya Selikem and Ferdinand Setor who granted me the liberty to use their time to research and write, to my wife Nana Yaa for her support, to my mother Elizabeth for her unceasing prayers, and to all my students, past and present, of the Faculty of Law, GIMPA whose discussions have enriched this publication.

Table of Contents

1.0	INTRODUCTION TO COMPANY LAW	1
1.1	Meaning and Scope of Company Law	1
1.2	Historical background of the Companies Act.....	12
1.3	Sources of Company Law	17
2.0	UNINCORPORATED AND INCORPORATED ENTITIES.....	21
2.1	Introduction	21
2.2	Distinction between Unincorporated and Incorporated Entities.....	21
2.3	Incorporated and Unincorporated Entities	52
2.3.1	SOLE PROPRIETORSHIP	52
2.3.1.1	Registration of business name.....	68
2.3.2	PARTNERSHIP	71
2.3.3	STATUTORY CORPORATIONS	112
2.3.4	COOPERATIVE SOCIETIES.....	118
2.3.5	BUILDING SOCIETIES	130
2.3.6	INCORPORATED TRUST	138
2.3.7	TRUST & CHARITABLE TRUST	141
2.3.8	NON-GOVERNMENTAL ORGANISATION	144
3.0	COMPANIES	147
3.1	Introduction	147
3.2	Formation of a company	150
3.3	Name of the Company	160
3.4	Certificate of Incorporation	166
3.5	Minimum capital requirement	171
3.6	Characteristics of a company.....	172
3.7	Types of companies	198
3.7.1	Companies limited by shares	200
3.7.2	Companies Limited by Guarantee.....	202
3.7.3	Unlimited Companies	206

3.7.4	Private or Public Companies	207
3.7.5	Conversion of one type of company to another	210
3.7.6	External Companies.....	214
3.7.7	Other references	216
4.0	CONSTITUTION OF A COMPANY	223
4.1	Introduction	223
4.2	Registered constitution versus default constitution	224
4.3	Content of constitution of companies	226
4.4	Form and subscription to constitution.....	229
4.5	Effects of constitution of the company.....	230
4.6	Adoption, amendment and revocation of constitution	240
4.7	Shareholders' Agreement	244
4.7.1	Terms of shareholders' agreement	246
4.7.2	Priority between the constitution and shareholders' agreement	247
5.0	PROMOTERS.....	251
5.1	Introduction	251
5.2	Acts of a promoter.....	252
5.3	Statutory duties imposed on promoters.....	256
5.4	Remedies for breach of duties.....	264
5.5	Remuneration of promoters	268
6.0	PRE-INCORPORATION CONTRACTS.....	271
6.1	Introduction	271
6.2	Pre-incorporation contract under common law	271
6.3	Pre-incorporation contract under Ghanaian law.....	277
6.4	Ratification of pre-incorporation contracts	279
7.0	PRESUMPTION OF REGULARITY	285
7.1	Introduction	285
7.2	Common law position	285
7.3	Position under the Companies Act.....	288
7.4	Exceptions to the application of presumption of regularity	295

7.5	Effect of Fraud on Presumption of Regularity	307
7.6	Forms of Contract.....	307
7.7	Bills of exchange.....	308
7.8	Authentication	309
7.9	Execution of deed and use of seal of the company abroad.....	309
8.0	CAPACITY OF A COMPANY AND ULTRA VIRES RULE.....	312
8.1	Introduction	312
8.2	Capacity of a company	313
8.3	Limits on the capacity of a company.....	314
8.4	Doctrine of Ultra Vires	315
8.5	Ultra vires relating to directors or officers	324
8.6	Abrogation of ultra vires doctrine	330
8.7	Reason for ultra vires doctrine	332
8.8	Consequences of ultra vires act.....	333
8.9	Remedy Available for Ultra Vires Act	338
9.0	DOCTRINE OF CORPORATE VEIL	343
9.1	Introduction	343
9.2	Corporate veil	345
9.3	Inherent abuse of the concept of corporate veil.....	349
9.4	Lifting or piercing the veil of incorporation.....	349
9.4.1	Statutory prescription on piercing the veil of incorporation	353
9.4.2	Exception to the corporate veil doctrine by the courts	363
10.0	INTRODUCTION TO GOVERNANCE OF COMPANIES.....	392
10.1	Introduction to corporate governance	392
10.2	Definition of corporate governance.....	394
10.3	Principles of good corporate governance	395
10.4	Governance structure under the Companies Act.....	395
10.5	Rules of attribution or exercise of corporate powers	397
10.6	Delegation by the Board of Directors	401
10.7	Major Transaction	402

10.8	Authority to bind the company	404
10.8.1	Acts of the company	404
10.8.2	Acts of officers or agents	405
11.0	MEMEBERS OF A COMPANY	411
11.1	Introduction	411
11.2	Acquiring membership of a company	412
11.2.1	Subscription	412
11.2.2	Agreement	418
11.2.3	Transfer of shares	426
11.2.4	Transmission of shares by operation of law	431
11.3	Rights of members of a company	436
11.4	Liabilities and duties of members of a company	442
11.5	Cessation of membership of a company	445
12.0	GENERAL MEETINGS	455
12.1	Introduction	455
12.2	Annual General Meeting (AGM)	456
12.3	Extraordinary General Meeting (EGM)	462
12.4	Mechanics for convening and conducting general meetings	475
12.4.1	Venue of general meetings	475
12.4.2	Notice of general meetings	478
12.4.3	Content of notice of a general meeting	484
12.4.4	Service of notice of a general meeting	488
12.4.5	Failure to give notice of a general meeting	490
12.4.6	Attendance at general meetings	494
12.5	Quorum of a general meeting	495
12.6	Proxies	498
12.7	Representation of corporations at a general meeting	503
12.8	Chairperson of general meetings	504
12.9	Adjournment of a general meeting	505
12.10	Resolutions	507

12.11	Written resolution	509
12.12	Registration of certain resolutions	510
12.13	Procedure on voting at general meetings	512
12.14	Minutes of meetings	516
12.15	Class meetings	518
12.16	Informal decisions and acting without meeting	519
12.17	Statutory restatement of the Duomatic or Unanimity Principle	531
13.0	DIRECTORS OF COMPANIES	534
13.1	Introduction	534
13.2	Definition of directors.....	535
13.3	Director as an officer of the company	536
13.4	Requirement of directors – minimum number and residence	541
13.5	Appointment of directors.....	545
13.6	‘Director’ without an appointment.....	562
13.7	Qualifications of directors.....	580
13.8	Share qualification of a director	594
13.9	Publication of name of directors	595
13.10	Non-assignment of office of directors	596
13.11	Register of Directors & Registration of Particulars of Directors	596
13.12	Types of Directors	597
13.12.1	Executive and non-executive directors	597
13.12.2	The Managing Director	605
13.12.3	Substitute Directors.....	612
13.12.4	Alternate Directors.....	613
13.13	Remuneration and benefits of directors.....	616
13.14	Directors’ Meetings.....	622
13.14.1	Summoning directors’ meetings	624
13.14.2	Quorum of directors’ meetings.....	624
13.14.3	Chairperson of board meeting	626
13.14.4	Decision-making at meetings of directors	627

13.14.5	Minutes of Meetings	627
13.15	Powers and limitations on the powers of directors	629
13.15.1	Issue of new or unissued shares	632
13.15.2	Entry into major transactions	636
13.15.3	Voluntary contributions to charitable or other funds.....	638
13.15.4	Exercise of borrowing powers.....	639
13.15.5	Recommendation and payment of dividend	640
13.16	Bona fide third parties not affected by lack of approval	642
13.17	Duties of directors.....	642
13.17.1	Duty to act with utmost good faith	646
13.17.2	Duty to act in the best interest of the company	649
13.17.3	Duty to exercise diligent care and ordinary skill	660
13.17.4	Duty to exercise independent judgment.....	663
13.17.5	Duty to act within powers and for the rightful purpose.....	663
13.17.6	Duty to avoid conflict of duty and interest	665
13.17.7	Duty to declare interest in contracts in which directors are interested.....	676
13.17.8	Duty to keep company information confidential and not to use confidential information or special knowledge for a purpose other than the company's business	681
13.17.9	Duty not to compete against the company.....	685
13.14	Liabilities for breach of director's duties and enforcement of liabilities.....	687
13.14.1	Compensation.....	687
13.14.2	Liability to account for property and profit	688
13.14.3	Rescission of contract.....	692
13.14.4	Injunction to restrain a threatened breach.....	692
13.15	Legal action to enforce liabilities.....	693
13.16	Vacation of office of directors.....	695
13.17	Removal of directors.....	697
14.0	COMPANY SECRETARY	709
14.1	Introduction	709
14.2	Definition and status of a Company Secretary	709

14.3	Requirement, appointment and qualification of Company Secretary	713
14.4	Duties of a Company Secretary	716
14.5	Power of the Company Secretary to bind the company	717
14.6	Removal of a Company Secretary	718
15.0	AUDITORS	720
15.1	Introduction	720
15.2	Audit reporting requirement	720
15.3	Appointment of an auditor	721
15.4	Qualification of an auditor	725
15.5	Remuneration of an auditor	728
15.6	Functions of an auditor	730
15.7	Fiduciary duties of an auditor	732
15.8	Powers of auditors	755
15.9	Avoidance of conflict of interest by an auditor	757
15.10	Removal of an auditor	758
16.0	RAISING CAPITAL FOR COMPANIES	763
16.1	Introduction	763
16.2	Minimum capital requirement	763
16.3	Means of raising capital	765
16.4	Factors that affect decision on means to raise capital	770
16.5	General limitations on raising capital through shares	773
17.0	SHARES	776
17.1	Nature of shares	776
17.1.1	Shares as asset of the holder	776
17.1.2	Shares entitle the holders to distribution	777
17.1.3	Shares entitle the holder to rights and liabilities	778
17.1.4	Shares as chose in action rather than chose in possession	778
17.1.5	Shares as securities or financial instruments	779
17.1.6	Shares as transferable or tradable instruments	780
17.1.7	Shares must be paid for by the holder	781

17.1.8	Shares have no par value	781
17.2	Payment for Shares	782
17.3	Time for payment.....	784
17.4	Requirement for non-cash payment for shares.....	786
17.5	Return of issue of shares	788
17.6	Type & classes of shares	789
17.6.1	Preference Shares	790
17.6.1.1	Right of cumulation of dividend.....	793
17.6.1.2	Right of conversion	796
17.6.1.3	Right of redemption.....	796
17.6.2	Equity Shares	797
17.7	Classes of Shares.....	798
17.8	Variation of class right.....	799
17.9	Suspension of voting rights attached to shares	805
17.10	Rules of construction of class right.....	807
17.11	Acquisition of Shares	809
17.11.1	Acquiring shares by subscription	809
17.11.2	Acquiring shares by agreement with the company	815
17.11.3	Acquiring the shares by transfer from existing shareholders	822
17.11.4	Acquiring shares by transmission of shares by operation of law	826
17.12	Share certificate and effect of share certificate	832
17.13	Register of members and registration of transfer.....	839
18.0	CAPITAL MAINTENANCE AND DISTRIBUTIONS	842
18.1	Introduction	842
18.2	Stated capital.....	842
18.3	Capital maintenance rule	843
18.4	Lawful payment of dividend.....	855
18.5	Distribution Test.....	856
18.6	Unlawful payment of dividend	858
18.7	Unclaimed dividend	860

18.8	Capitalisation issue and non-cash dividends	861
18.9	Return or distribution of assets	863
18.9.1	Return of assets with court order	865
18.10	Reduction of stated capital	868
19.0	PROHIBITED TRANSACTIONS IN SHARES	871
19.1	General prohibitions	871
19.2	Alteration of the number of shares	873
19.3	Alteration of amount remaining payable on shares	875
19.4	Release of shareholder from liability	877
19.5	Prohibition of financial assistance	878
19.6	Acquisition by the company of its own shares	881
19.6.1	Redemption of redeemable preference shares	884
19.6.2	Purchase by a company of its own shares	886
19.6.3	Acquisition of shares of holding company	888
19.6.4	Voluntary transfer of shares	889
19.6.5	Acquisition pursuant to buy-out under section 222	889
19.6.6	Acquisition by forfeiture	890
19.7	Share Deals Account	894
20.0	DEBENTURES	898
20.1	Introduction	898
20.2	Debentures	900
20.3	Issue of a debenture or debenture stock	905
20.4	Specific Performance to enforce a debenture	907
20.5	Types of debentures	907
20.5.1	Perpetual debentures and redeemable debentures	908
20.5.2	Convertible debentures and non-convertible debenture	908
20.5.3	Secured debentures and unsecured debentures	909
20.6	Shares and debentures	913
20.7	Trustees for debenture holders	915
20.8	Meeting of debenture holders	917

20.9	Redemption and re-issue of debentures	918
20.10	Documents relating to debentures.....	919
20.10.1	Title document – debenture and debenture stock certificate.....	919
20.10.2	Register of debenture holders and registration of transfer.....	921
20.11	Transfer of debentures.....	923
20.12	Transmission of debentures by operation of law	924
20.13	Secured Debentures	926
20.14	Type of charges to secured debentures.....	929
20.15	Floating charges.....	931
20.16	Crystallization of floating charge.....	935
20.17	Priority of multiple charges	939
20.18	Hardening period of floating charge.....	942
20.19	Enforcement of charges	943
20.20	Registration of particulars of charge	951
20.21	Particulars required for registration of a charge	957
20.22	Evidence of registration of charge	959
20.23	Registration of discharge and enforcement of charge	961
20.24	Extension of time for registration and rectification of register.....	963
20.25	Registration constitutes notice	965
20.26	Receiver and manager	966
20.26.1	Appointment of a receiver or manager.....	967
20.26.2	Qualification of a receiver or manager.....	970
20.26.3	Duties of a receiver or manager	971
20.26.4	Powers of a receiver or manager.....	974
20.26.5	Liabilities of a receiver or manager	976
20.26.6	Accounts prepared by a receiver or manager	977
20.26.7	Remuneration of a receiver or manager	978
20.26.8	Termination of appointment of a receiver or manager	978
21.0	RESTRUCTURING OR REORGANISATION OF COMPANIES.....	980
21.1	Introduction	980

21.2	Definition of restructuring options.....	980
21.3	Requirements for restructuring.....	984
21.3.1	Merger by sale of undertaking.....	984
21.3.2	Arrangement or compromise with Court approval.....	989
21.3.3	Mergers.....	994
21.3.3.1	Merger proposal.....	995
21.3.3.2	Approval of the merger proposal.....	997
21.3.3.3	Short form of merger.....	999
21.3.3.4	Registration of merger proposal.....	1001
21.3.3.5	Approval of constitution of transferee company.....	1002
21.3.3.6	Certificate of merger.....	1003
21.3.3.7	Power of the Court relating to merger proposal.....	1004
21.3.4	Division.....	1005
21.3.5	Acquisition.....	1007
21.3.5.1	Asset purchase arrangement.....	1008
21.3.5.2	Share purchase arrangement.....	1009
21.3.5.3	Compulsory acquisition of shares of minority.....	1010
21.3.6	Takeover.....	1016
21.3.6.1	Procedure of takeover under the Code.....	1019
22.0	PUBLIC COMPANIES.....	1024
22.1	Introduction.....	1024
22.2	Invitation to the public.....	1024
22.3	Right to make public invitation.....	1027
22.4	Prospectus and statements in lieu of prospectus.....	1028
22.4.1	Statement in lieu of prospectus.....	1029
22.4.2	Prospectus.....	1034
22.4.3	Requirements to be satisfied by a prospectus.....	1035
22.4.3	Exemptions.....	1042
22.4.4	Registration of prospectus.....	1043
22.5	Binding obligations on making an offer and the withdrawal of an offer.....	1046

22.6	Refusal of permission to list on stock exchange	1047
22.7	Minimum subscription.....	1049
22.8	Remedy for mis-statement or omissions in a prospectus.....	1051
22.8.1	Compensation.....	1052
22.8.2	Rescission	1055
22.8.3	Fine and imprisonment	1056
22.9	Public invitation to deposit money with public companies	1057
22.10	Waivers and modifications	1059
22.11	Listing of securities of a public company	1059
23.0	REMEDIES FOR CORPORATE WRONGS	1064
23.1	Introduction	1064
23.2	Rule in Foss v. Harbottle.....	1065
23.2.1	Justification for the rule in Foss v. Harbottle	1070
23.2.2	Exceptions to the rule in Foss v. Harbottle.....	1075
23.3	Statutory position on remedies	1078
23.3.1	Right of members to sue.....	1079
23.3.1.1	Action by a member for wrong affecting the member	1079
23.3.1.2	Action by a member for wrong affecting the company.....	1081
23.3.2	Action to enforce breach of duties by directors.....	1082
23.3.3	Action against illegal or irregular activity.....	1086
23.3.4	Action against oppression.....	1088
23.3.4.1	Persons that can bring the action under section 219	1088
23.3.4.2	Scope of acts that can lead to action under the section.....	1090
23.3.4.3.1	Oppression	1091
23.3.4.3.2	Disregard of proper interest of members or debenture holders	1093
23.3.4.3.3	Unfair discrimination	1094
23.3.4.3.4	Unfair prejudice.....	1094
23.3.4.4	Remedies that the court can grant	1102
23.4	Representative Action	1107
23.5	Derivative Action	1109

23.5.1	Powers of the court in derivative action.....	1114
23.6	Self-help remedy - remedy of buy-out.....	1115
23.7	Administrative Remedies – Inspection and Investigation of Companies	1123
23.7.1	Enquiries by the Registrar.....	1123
23.7.2	Investigation of affairs of a company	1125
23.7.2.1	Proceeding with Investigation	1128
23.7.3	Proceedings after investigation.....	1131
23.7.4	Investigation of ownership of shares and debentures.....	1133
24.0	ADMINISTRATION & LIQUIDATION	1137
24.1	ADMINISTRATION	1138
24.1.1	Appointment of an administrator.....	1140
24.1.2	Administration proceedings by the administrator	1143
24.1.3	Powers of the administrator	1144
24.1.4	Consequences of administration.....	1144
24.1.5	Meeting with creditors	1146
24.1.5.1	First meeting	1147
24.1.5.2	Watershed meeting	1148
24.1.6	Restructuring Agreement and related matters	1149
24.1.7	Termination of administration	1153
24.1.8	Liability of administrator	1154
24.1.9	Power of the Court in administration of a company	1154
24.1.10	Notices required in administration	1155
24.1.11	Protection of creditors	1156
24.2	PRIVATE LIQUIDATION	1157
24.2.1	Steps involved in private liquidation.....	1157
24.2.2	Affidavit of solvency	1158
24.2.3	Special resolution by members	1159
24.2.4	The liquidator and winding up.....	1161
24.2.5	Disqualification of liquidators.....	1162
24.2.6	Status and powers of liquidator.....	1163

24.2.7	Conduct of the winding up.....	1166
24.2.8	Effect or consequences of private liquidation.....	1167
24.2.9	Books and accounts in private liquidation	1169
24.2.10	Bank account for liquidation	1170
24.2.11	Reversion of the private liquidation.....	1171
24.2.12	Insolvency in private liquidation.....	1172
24.2.13	Dissolution and restoration	1173
24.2.14	Dissolution without winding up	1176
24.3	OFFICIAL LIQUIDATION	1179
24.3.1	Mode of official liquidation	1180
24.3.1.1	Conversion from administration	1180
24.3.1.2	Conversion from private liquidation	1182
24.3.1.3	Official liquidation by special resolution.....	1182
24.3.1.4	Petition to the Registrar.....	1184
24.3.1.5	Petition to the Court.....	1186
24.3.2	Grounds for court order of official liquidation.....	1190
24.3.3	Consequences of official liquidation	1201
24.3.4	Powers and duties of official liquidator.....	1211
24.3.5	Powers of the Court	1218
24.3.6	Duty of the directors to prevent insolvent trading	1220
24.3.7	Liquidation Fund and Fee Account.....	1220
24.3.8	Termination of official liquidation.....	1221
24.3.9	Dissolution	1222
24.3.10	Liquidation of other body corporates	1224
24.3.11	Application to foreign bodies corporate	1225
24.3.12	Insolvency Practitioner.....	1226
25.0	ACCOUNTING RECORDS, FINANCIAL STATEMENTS AND REPORTS	1229
25.1	Introduction	1229
25.2	Accounting Records and Financial Statements	1229
25.3	Consolidated Financial Statement	1246

25.4	Directors' Report	1250
25.5	Auditor's Report.....	1252
25.6	Circulation of financial statements and reports.....	1255
25.7	Non-compliance with requirements of accounting records, financial statements and report	1256
25.8	Annual Returns	1257

INDEX OF CASES

A-G v. Edison Telephone Co of London Ltd (1880) 6 QBD 244	477
A.L. Underwood Ltd. v. Bank of Liverpool [1924] 1 K.B. 775	304
Aberdeen Rail Co. v. Blaikie Brothers [1843-60] All E.R. Rep. 249; (1854) 1 Macq HL 461 ...	537, 540, 645, 676, 677
Aboagye v. Tetevi [1976] 1 GLR 217	1089
Adams and Others v. Cape Industries PLC. And Another [1984 A. No. 2597] - [1990] Ch. 433 ...	220, 365, 372-3, 374, 388
Adehyeman Gardens Ltd v. Assibey [2003-2004] 2 SCGLR 1016 ...	230, 231, 233, 413, 417, 424, 429, 442, 451, 453, 628, 696, 784, 811, 826, 892
Adryx Mining and Metals Ltd. v. Ashanti Goldfields Company Ltd. [09/02/00] SUIT NO. MISC. 32/2000 ...	472
Akoto v Akoto [2011] SCGLR 533	371
Al Saudi Banque v. Clark Pixley (a firm) [1989] 3 All ER 361, [1990] 2 WLR 344	738
Amartey v. Social Security Bank; Social Security Bank v. Robertson Consolidated [1987-88] 1 GLR 497 ...	351
Ampah v. The Republic [1976] 1 G.L.R. 403	590
Anciens Etablissements Panhard et Levassor S.A. v. Panhard Levassor Motor Co. Ltd. [1901] 2 Ch. 513 ...	162
Anderson Ltd. v. Daniel [1924] 1 K.B. 138	81
Anderson v. Midland Railway Co [1902] 1 Ch 369	1087
Antoniades v. Villiers [1988] 3 All ER 1058 at 1067, [1990] 1 AC 417	850, 851
Appenteng and others v. Bank of West Africa Ltd and others [1961] GLR 196 (H.C.) ...	39, 189, 1070, 1073, 1077
Armitage v. Nurse [1997] 2 All ER 705, [1998] Ch 241	650
Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd. [1911] 2 K.B. 143, C.A. ...	1205
Asafu-Adjaye v. Agyekum and Others [1984-86] 1 GLR 382	469, 475, 529, 1104
Ashbury Railway Carriage and Iron Co. v. Riche (11875) LR 7 HL	3, 316, 323, 333

Assam Railway and Trading Co. Ltd. v. The Commissioners of Inland Revenue [1935] A.C. 445, H.L. ... 5	
Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223	657
Attorney General of Hong Kong v. Reid and Others [1993] 3 LRC 548	258, 265, 689
Attorney General v. Balkan Energy Ghana Ltd, Balkan Energy LL.C, and Philip David Elders, Supreme Court, Ghana No. J6/1/2012 ...	356
Attorney-General v. Wilson (1840) Cr & Ph 1	37, 187, 1066
Attorney-General v. Sillem (1864) 2 H & C 431	4
Attorney-General's Reference (No. 2 of 1982) [1984] Q.B. 624	329
Automatic Self Cleansing Filter Syndicate Co Ltd v. Cuninghame [1906] 2 Ch 34 CA	538, 644
Aveling Barford Ltd v. Perion Ltd [1989] BCLC 626	847, 849, 851, 853, 854
B. Liggett (Liverpool), Limited v. Barclays Bank, Limited [1923] 1 KB 48	299
Bagshaw v. Eastern Union Railway Co (1849) 7 Hare 114	1070, 1071
Baidoo v. Sam [1987-88] 2 GLR 666	55, 57, 59, 72, 82, 87
Baillie v. Oriental Telephone Electric Co. Ltd [1915] 1 CH 503	485, 491
Bank of Africa Ltd v. Gracefield Merchants Ltd & Others Civil Appeal, Suit No. J4/35/2016 in which the Supreme Court gave judgment on 5 February, 2020 ...	910, 964
Bank of West Africa v. Appenteng [1972] 1 GLR 153	36, 39, 186, 188, 1070
Barclays Bank (D.C.O.) Ltd. v. Perseverance Transport Services Ltd [1961] GLR 665	291, 640
Barclays Bank Ghana Limited v. Lartey & Others [1978] GLR 282	41, 51, 53, 59, 61, 68
Barclays Bank plc v. British & Commonwealth Holdings plc [1996] 1 BCLC 1	852
Barnett, Hoares, & Co. v. South London Tramways Co. (1887) 18 Q.B.D. 815, C.A.	468, 711, 712
Bhullar v. Bhullar [2016] 1 BCLC 106	650, 669, 682
Billy v. Kuwor [1991] 1 GLR 522	1104, 1105, 1160, 1188, 1193, 1195, 1200
Black v. Smallwood [1966] 117 CLR 52	274
Bloomenthal v. Ford [1897] AC 156; 76 LT 205; 13 TLR 240	835
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582	742
Bond v. Barrow Haematite Steel Co [1902] 1 Ch 353	794
Boohene Foods Ltd. v. National Savings and Credit Bank and Another [1992] 1 GLR 175	290

Boston Deep Sea Fishing and Ice Co v. Ansell (1888) 39 Ch.D. 339, C.A.	707
Bousiako Co. Ltd. v. Ghana Cocoa Marketing Board; Kwabo-Osekyere Construction Works Ltd. v. Ghana Cocoa Marketing Board (Consolidated) [1982-83] GLR 824	296, 407, 602
Bowman and Others v. Secular Society Ltd [1917] AC 406	168
British Homes Assurance Corporation, Ltd. v. Paterson, (1902) Ch. 404	73
Brown v. Hoeks (Ghana) Ltd [1977] 2 GLR 15	1204
Burland v. Earle [1902] AC 83	1072, 1073
Byng v. London Life Association (1989) 1 All ER 560; [1990] 1 Ch 170	476, 623
Cadogan v. Kennett (1776) 2 Cowp. 432	384
Candler v. Crane Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164	736, 734
Candlewood case [1985] 2 All ER 935 at 945	735
Cane v. Jones [1980] 1 WLR 1451	527, 529, 530
Caparo Industries plc v. Dickman and others [1990] 1 All ER 568; [1990] UKHL 2	734
Charles Forte Investments Ltd v. Amanda [1963] 2 All ER 940	1187, 1200
Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62	328
Cheah Theam Swee v. Equiticorp Finance Group Ltd [1992] 1 AC 472	939
Chellaram & Sons (Ghana) Limited v. Halabi [1963] 1 GLR 214	301, 381
Clydebank Football Club Ltd v. Steedman 2002 SLT 109	852, 853
Collier v. Sunday Referee Publishing Co. Ltd [1940] 2 K. B. 647	608
Commodore v. Fruit Supply (Ghana) Ltd [1977] 1 GLR 241	296, 563, 666
Conte v. Kpeglo and another [1964] GLR 311	420, 786, 816
Cooper v. Gordon (1869) LR 8 Eq 249	1072
Corporation of Sheffield Crop v. Barclay & Company Ltd and others [1905] UKHL 556; [1905] AC 392, [1904-7] All ER 747; 21 LTR 642 ...	837
Cowries Finance v. Pako Bay [1999-2000] 1 GLR 514	165, 240
Cranworth L.C. in Eastern Counties Ry. Co. v. Hawkes (1855) 5 H.L. Cas. 331	322, 325
Currie v. Misa LR 10 Ex 153; LR 1 App Cas 554	783
Dafen Tinsplate Co. v. Llanelly Steel Co. [1920] 2 Ch 124	657
Daimler Co. Ltd v. Continental Tyre & Rubber Co (Great Britain) Ltd [1916] 2 AC 307 HL.	364

Dallas v. Dallas [1979] 1 All ER 801	351
Davis & Co. Ltd. v. Brunswick (Australia) Ltd. [1936] 1 All E.R. 299 at 309, P.C.	1195
Davis Investments Pty Ltd v. Comr. of Stamp Duties (New South Wales) (1958) 100 CLR 392	851
Dawson International Plc v. Coats Patons Plc [1989] BCLC 233	650
Dhalomal v. Pupulampu and Others [1984-86] 1 GLR 341	530
DHN Food Distributors v. Tower Hamlets [1976] 1 WLR 852	373
Dikyi & Others v. Ameen Sangari Industries Ltd [1992] 1 GLR 61	539, 644
Dimbleby v. National Union of Journalists [1984] 1 WLR 427	353
Dolphyne v. Speedline Stevedoring & Co. Ltd and Another [1992-93] GBR 353	553, 561
Dorchester Finance Ltd and another v. Stebbing and Others [1989] BCLC 498	649, 661, 688
Dugdale v. Lovering (32 L.T. Rep. 155, L. Rep. 10 C.P. 196)	838
Dunston v. Imperial Gas Light and Coke Company (1882) B&Ad 125	616
Dupaul Wood Treatment v Asare [2005-2006] SCGLR 667	11, 158, 167, 228, 230, 232, 242
Eastern Counties Ry. Co. v. Hawkes (1855) 5 H.L. Cas. 331	322, 325
Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360	1192, 1197
Edwards v. Halliwell [1950] 2 All ER 1063	1073, 1075, 1077, 1078
EIC Services Ltd v. Phipps [2003] EWHC 1507	522
Elder v. Elder and Watson, Ltd. 1951 S.C. 49	1093
Eley v. Positive Government Security Life Assurance Co Ltd (1876) 1 Ex D 88 CA.	236
Erlanger v. New Sombrero Phosphate Co. (1878) 3 App Cas 1218	198, 254, 262, 267
Eshun v. Poku [1989-90] 2 GLR 572	458
Evans v. River Granite Quarries Ltd [1910] 2 KB 979	938
Exxon Corporation v. Exxon Insurance Consultants Int. Ltd [1991] BCLC 476	162
Farley v. Bonham (1861) 30 L.J.Ch. 239	5
Foss v. Harbottle (1843) 2 Hare 461 ... 3, 25, 36, 37, 39, 175, 186, 694, 1065, 1069, 1070, 1072, 1073, 1075, 1076, 1077, 1078, 1079, 1082, 1084, 1085, 1086,	
Foster v. Foster [1916] 1 Ch. 532	400
Fraser v. Whalley (1864) 2 H. & M. 10	634

Freeman v. Pope (1870) 39. L.J.Ch. 689	384
Gbogbolulu (Chief) v. Hodo (Chief) (1941) 7 WACA 164	63
George Cohen (WA) Ltd, v. Comet Construction Co Ltd; Ghana Commercial Bank (Claimants) [1966] GLR 777 at 779 (HC) ... 9, 933, 937, 941, 952, 953, 954, 955	
George Whitechurch Ltd. v. Cavanagh [1902] A.C. 117	468, 711, 712
Ghana Ports and Harbours Authority v. Issoufou [1993-94] 1 GLR 20	40, 62, 63
Gilford Motor Co Ltd v. Hone [1933] Ch 935, [1962] 1 WLR 832	366, 368, 372
Gluckstein v. Barnes [1900] AC 240	257, 260, 261, 264
Golden Gates Services Ltd v. Ghana Ports and Harbours Authority and Others Commercial Court, Accra, suit number Misc 4/09, unreported decision of Amadu Tanko J dated 17 March 2009 ...	1082
Governments Stock and Other Securities Investment Co Ltd v. Manila Railway Co Ltd [1897] AC 8 ...	932
Gramophone & Typewriter Ltd v. Stanley [1908-10] All ER 833 CA.	46, 194, 362
Grant v. Tikobo (1968) C.C. 28	40, 189
Great Eastern Railway Company v. Turner [1872] 8 Ch 149	540, 645
Greenhalgh v. Arderne Cinemas Ltd and Another [1946] 1 All ER 512, [1951] Ch. 286 ...	652, 800, 804
Grill v. General Iron Screw Collier Co. (1866) L. R. 1 C. P. 600	659
Guinness Plc v. Saunders [1990] 2 AC 663	618, 688
Guinness v. Land Corporation of Ireland (1882) 22 ChD 349	844
Gwembe Valley Development Co Ltd v. Koshy [2003] EWCA Civ 1048; [2004] 1 BCLC 131	650
H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd. [1957] 1 Q.B. 159	408, 535
Handelmij NV v. Jebeille Brothers High Court, Accra, 24 April 1967; digested (1960) C.C. 93	385
Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L. (1968) 121 C.L.R. 483 ...	632
Harold Holdsworth & Co (Wakefield) Ltd v. Caddies [1955] 1 All ER 725; [1955] 1 WLR 352	606
Hedley Byrne v. Heller & Partners [1964] A.C. 465	737, 734
Heinrich Koch & Another v. Horteng Limited & Another [15/01/04] Suit No. FTC14/2001 15th January 2004 ...	698, 700
Hickman v. Kent Romney Marsh Sheep-Breeders' Association [1915] Ch.708	237

Hilder v. Dexter [1902] A.C. 474	5
Hill v. Permanent Trustee Co of New South Wales Ltd [1930] AC 720	845, 854
Hogg v. Cramphorn Ltd [1967] Ch. 254	631, 653, 664, 692
Hollman v. Pullin (1884) Cab & EI 254	274
Howard Smith Limited v. Ampol Petroleum Limited and Others [1974] AC 821 ...	324, 629, 632, 653, 654, 664, 1073
Hussey v. Horne-Payne (1879) 4 App Cas 311	710
Hutton v. West Cork Railway Co (1883) 23 ChD 654	617
Illingworth v. Houldsworth [1904] AC 355 at 358 ...	932
In Re Assessment of Income Tax by the Commissioner of Internal Revenue: Chapel Hill School v. Attorney-General and Internal Revenue Service [2009] SCGLR 432 ...	204
In re Astec (B.S.R.) Plc. [1998] 2 B.C.L.C. 556	1098
In re Brazilian Rubber Plantations and Estates, Ltd. [1911] 1 Ch. 425	659, 661
In re Bugle Press Ltd [1961] Ch. 270	366
In re City Equitable Fire Insurance Company, Limited [1925] Ch. 407	645, 649, 659
In re Darby. Ex Parte Brougham [1911] 1 KB 95	259, 351, 387
In re David Payne & Co Ltd [1904] 2 Ch 608	328, 329
In re Diamond Fuel Co. (1879) 13 Ch.D. 400, C.A.	1195
In re Diplock [1948] Ch. 465, C.A.	322
In re Duomatic Ltd [1969] 2 Ch 365; [1969] 1 All ER 161	520, 522, 523, 529, 530
In Re Exchange Banking Co. (Flitcroft's Case) (1882) 21 ChD 519	641
In re Express Engineering Works, Ltd [1920] 1 Ch 466	523, 528, 530
In re George Newman & Co [1895] 1 Ch 674	524, 525, 528, 616, 852
In re Grosvenor Metal Co., Ltd. [1950] Ch. 63	1205
In re Halt Garage (1964) Ltd [1982] 3 All ER 1016	328, 329, 849, 850, 852, 854
In Re Harris Simons Construction Ltd [1989] 1 WLR 368	1139, 1140, 1142
In re Horsley & Weight Ltd. [1982] Ch. 442, 454	329
In Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180	568, 569, 574, 579
In Re Jermyn Street Turkish Baths Ltd. [1970] 1 WLR 1194	1104

In re Kingston Cotton Mill Co (No. 2) [1896] Ch 279	739, 746, 751, 753, 754, 755, 854
In re Leeds and Hanley Theatres of Varieties, Limited [1902] 2 Ch. 809	265
In re London And General Bank (No. 2) [1895] 2 Ch. 673	743, 746, 752, 755
In Re London, Hamburg, And Continental Exchange Bank (Evans's Case) (1867) L.R. 2 Ch.App. 427 ... 413, 416, 811, 813	
In Re Moorgate Metals Ltd [1995] 1 BCLC 503	569
In Re Panama, New Zealand and Australian Royal Mail Company (1870) LR 5 Ch App 318	934
In re Peveril Gold Mines Ltd [1898] 1 Ch. 122 CA.	224, 248, 249, 1188
In re Polly Perk International plc (in administration) [1996] 2 All ER 433	372
In Re Richborough Furniture Ltd [1996] 1 BCLC 507	569
In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14	1094, 1096, 1099
In Re Smith & Fawcett Ltd [1942] Ch 304	647, 649, 653
In re State of Wyoming Syndicate [1901] 2 Ch. 341	468, 712
In re Suidair International Airways, Ltd [1951] Ch. 165	1205
In re Thomas Gerrard & Son Ltd [1968] Ch 455	749, 756
In Re Timber and Transport Kumasi - Krusevac Co. Ltd. Zastava v Bonsu & Another [1980] GLR 370 ... 249, 1189	
In re West Canadian Collieries Ltd [1962] Ch 370	491
In re West Coast Dyeing Industry Ltd: Adams and Another v. Tandoh [1984 – 86] 2 GLR 561 ... 4, 341, 419, 586, 705, 727, 815, 1091	
In re Westbourne Galleries Ltd. [1973] A.C. 360	1057, 1099
In Re Westmid Packing Services Limited [1998] 2 BCLC 646	643
In Re Whitchurch Insurance Consultants Ltd. [1993] BCLC 1359	473
In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426	1197
In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others [1979] GLR 477 ... 321, 325, 336, 397, 413, 415, 424, 429, 467, 480, 485, 488, 490, 491, 711, 712, 717, 810, 813, 820, 825	
In York Tramways Co., Ltd. v. Willows (1882) 8 Q.B.D 685 at p. 694, C.A.	558, 559
Industrial Development Consultants Ltd v. Cooley [1972] 1 WLR 223; [1972] 2 All ER 162	670, 683

Jadbranska Slobodna Plovidra, Split v. Oysa Ltd [1979] GLR 129	279, 283
Janet Livingstone Loch & Another v. John Blackwood Ltd [1924] A.C. 783	1198
JEB Fasteners Ltd v. Mark Bloom & Co [1981] 3 All ER 289	741
JJ Harrison (Properties) Ltd v. Harrison [2002] 1 BCLC 162	648, 668, 677
John Shaw & Sons (Salford) Ltd v. Shaw [1935] 2 KB 113	399, 629, 631
Jones and Another v. Lipman and Another [1962] 1 All ER 422; [1962] 1 WLR 832	351, 368, 375
Kelner v. Baxter (1866) LR 2 CP 174	271, 272, 273, 274, 275, 276, 277
Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] AC 993	531
Kuni v. State Gold Mining Corporation and Another [1978] GLR 205	219, 378
Kwame Charles Serbeh-Yiadom v. Stanbic Bank Ghana Limited [2003-2005] 1 GLR 86	492, 700
Kwapong v. Ghana Cocoa Marketing Board (Consolidated) [1985-86] 1 GLC 74	535
Lacontha Foundation v. GBI Investment Ltd [2010] EWHC 37	1191
Lagunas Nitrate Co. v. Lagunas Syndicate (1899) 2 Ch 392	263, 660
Lee v. Lee's Air Farming Ltd [1960] 3 All ER 420	25, 34, 175, 184
Leeds Estate Building and Investment Co. v. Shepherd 36 Ch. D. 802	744
Lemon v. Austin Friars Investment Trust Ltd [1926] Ch. 1	901, 926
Levandowsky v. Attorney-General [1971] 1 GLR 38	83
Lloyd Chayham & Co Ltd v. Littlejohn & Co [1987] BCLC 303	741
Macaura v. Northern Assurance Co. Ltd [1925] AC 619	44, 191, 352
MacDougall v. Gardiner (1875) 1 Ch.D. 13	322, 325, 1071
MacPherson v. European Strategic Bureau Ltd [2000] 2 BCLC 683	851
Mahama v. Soli & Another [1977] GLR 215	341, 1090, 1092, 1094
Mahony v. East Holyford Mining Co. (1875) L.R. 7 H.L. 869	305
Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd. [1962] 1 GLR 122	29, 42, 43, 180, 190, 191
Maynard v. West Midlands Health Authority [1985] 1 All ER 635, [1984] 1 WLR 634	742
Mercer Alloys Corporation v. Rolls Royce Ltd [1972] 1 All ER 211	63
Middleton v. Pollock (1876) 2 Ch.D. 104	384
Mills v. Mills, 60 C.L.R. 150	630

Mitchell’s Plain Town Centre Merchants Association v. McLeod 1996 (4) SA 159	148
Moore v. Hewitt [1947] 2 All E.R. 270	954
Morgan and ors v. Parkinson Howard Ltd. [1961] GLR 68	12
Morkor v. Kuma (East Coast Fisheries Case) [1998-99] SCGLR 620 ... 23, 25, 28, 30, 34, 150, 176, 179, 181, 184, 344, 345, 346, 349, 370, 373, 392, 1064, 1073	
Morris v. Kanssen and Others [1946] 1 All ER 586	297, 302, 304, 305, 570
Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd [1983] BCLC 461, [1983] Ch 258 ... 329, 662	
Munster v. Cammel Co. (1882) 21 Ch.D. 183	558, 559
Musselwhite v. C. H. Musselwhite & Son Ltd. [1962] Ch. 964	485
Natal Land Co & Colonization Ltd v. Pauline Colliery and Development Syndicate Ltd [1904] AC 120 PC ... 275	
New Patriotic Party v. Attorney-General (CIBA Case) [1997-98] 1 GLR 378	7, 18
Newborne v. Sensolid (Great Britain) Ltd [1953] 1 All ER 708	273
Noble Lowndes and Partners (A Firm) v. Hadfields Ltd [1939] 1 Ch 569	64
North of England Zoological Society v. Chester RDC [1959] 3 All ER 116	203
O’Neil v. Phillips [1999] 1 WLR 1092	1094, 1095
Oakes v. Turquand and Harding [1867] L.R. 2 J.L. 325	169
Ofori v. Ecobank Ghana Ltd and Others (J4/11/2016) [2018] GHASC 49 (25 July 2018)	428, 824
Okudjeto & Ors v. Irani Brothers & Ors [1974] 1 GLR 374	1104
Okudjeto and Others v. Irani Brother and Others [1974] 1 GLR 381	614, 779
Okudjeto and others v. Irani Brothers and others (no. 2) [1974] 1 GLR 389 (HC)	779
Ord v. Belhaven Pubs Ltd [1998] 2 BCLC 447	385
Orr v. Glasgow, Airdrie and Monklands Junction Railway Co (1860) 3 Macq 799	1071, 1074
Overend & Gurney Co. v. Gibb L. R. 5 H. L. 480	659
Owusu v. R.N Thorne Ltd [1966] GLR 90	27, 30, 36, 38, 178, 181, 186, 187, 347
Oxyair Ltd & Darko v. Wood & Others [2005-2006] SCGLR 1057	292
Panagiotopoulos v. Plastico Ltd. and Plastico Ltd v. Panagiotopoulos (Consolidated) [1965] GLR 176 ... 281	

Panhard et Levassor v. Panhard Levassor Motor Co [1901] 2 Ch 513	162
Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd [1971] 2 QB 711 ...	709, 712, 718
Paragon Finance plc v. D B Thakerar & Co [1999] 1 All ER 400	668
Parker & Cooper Ltd v. Reading [1926] Ch 975	523, 525, 528, 529, 530
Pearce v. Foster (1886) 17 Q.B.D. 536	708
Peel v. London and North Western Railway [1907] 1 Ch 5	168
Pender v. Lushington (1877) 6 Ch.D. 70	322
Percival v. Wright [1902] 2 Ch 401	651
Phonogram Ltd v. Lane [1981] 3 All ER 182	282
Piercy v. S. Mills & Co. Ltd. [1920] 1 Ch. 77	631, 633
Pinamang v. Abrokwa [1991] 2 GLR 284	341, 703, 1089, 1092
Pioneer Construction Products Ltd v. Faddool [1974] 1 GLR 76 (HC)	1202, 1207
Politis and Another v. Plastico Ltd (No. 2) [1967] GLR 24	326, 336, 436, 468, 483, 547 558, 831
Politis and Another v. Plastico Ltd [1967] GLR 9	432, 436, 449, 828
Prest v. Petrodel Resources Ltd [2013] UKSC 34; [2013] 2 AC 415	25, 175, 182, 351
Preston v. The Grand Collier Dock Company (1840) 11 Sim 327, SC	1067, 1068
Progress Property Co Ltd v. Moorgarth Group Ltd [2011] 2 BCLC 332; [2011] 1 WLR 1	846
Promexport International (Ghana) Ltd v. First Ghana Building Society [1989-90] 1 GLR 395, CA ...	539
Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2) [1982] Ch 204	1070
Punt v. Symons & Co. Ltd [1903] 2 Ch. 506 ...	633, 634
Quarcoopome v. Sanyo Electrical Trading Co. Ltd and Another [2009] SCGLR 213 ...	549, 567, 599, 619
Quartson v. Quartson [2012] 2 SCGLR 1077	27, 178
R v. Arnaud and Powell (1846) QB 115	45, 193
R v. Grantham [1984] 1 QB 675	359
R v. High Court, Accra; ex parte Brenya [2001–2002] 1GLR 483 (SC)	784
R v. Registrar of Companies, Ex parte Attorney-General [1991] BCLC 476	159

R v. Registrar of Companies, Ex parte Bowen [1914] 3 KB 1161	160
R. & H. Electrical Ltd. v. Haden Bill Electrical Ltd. [1995] 2 B.C.L.C. 280	1102
Rayfield v. Hands [1960] 2 All ER 194 (Ch.D) 194	232
Re a Company (No. 00477 of 1986) [1986] BCLC 376	1093, 1095
Re a Company (No. 005287 of 1985) [1986] 1 WLR 281	1102
Re a Company (No. 008699 of 1985) [1986] BCLC 382	1102
Re Blue Arrow plc [1987] BCLC 585	1093
Re Charnley Davies Ltd (No 2) [1990] BCLC 760	1144
Re Cosslet (Contractors) Ltd [1998] Ch 495	928
Re Crigglestone Coal Company Limited [1906] 2 Ch. 327	1187
Re D'Jan of London Ltd; Copp v D'Jan [1994] 1 BCLC 561	661, 663
Re Elgindata Ltd [1991] BCLC 959	1102
Re FG Films Ltd [1953] WLR 483	379
Re Florence Land and Public Works Co, Nicol's Case (1885) 29 ChD 421 ...	417, 422, 425, 429, 815, 818, 820, 825
Re German Date Coffee Co (1882) 20 Ch D 169	1196
Re Introductions, Ltd., Introductions, Ltd. v. National Provincial Bank Ltd. [1969] 1 All E.R. 887, [1970] Ch. 199 ...	328
Re Jon Beauforte (London) Ltd [1953] 1 All ER 634; [1953] 1 Ch. 131; [1953] 2 WLR 465 ...	319, 323, 334
Re Kaytech International Plc, Secretary v. Kaczer [199] 2 BCLC 351; [1998] All ER 665	568, 579
Re Kitson & Co Ltd [1946] 1 All ER 435	1196
Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227	1072
Re Leeds United Holdings plc [1996] 2 BCLC 545	1102
Re Lo-Line Electric Motors Ltd [1988] BCLC 698	569, 570
Re London Pressed Hinge Co Ltd [1905] 1 Ch 576	938
Re London School of Electronics Ltd [1986] Ch 211	1102
Re Mackenzie & Co. Ltd [1916-17] All ER 1018; [1916] 2 Ch 450	801, 804
Re Macro (Ipswich) Ltd [1994] 2 BCLC 354	1102

Re Marchday Group plc [1998] BCC 800	1102
Re Margart Pty Ltd [1985] BCLC 314	938
Re Sasu Twum (decd); Sasu-Twum v Twum [1976] 1 GLR 23	80
Re Sharpe [1892] 1 Ch 154	649
Re Spectrum Plus Ltd [2005] UKHL 41	933
Re Sticky Fingers Restaurant Ltd [1992] BCLC 84	470
Re Thomas Edward Brinsmead & Sons Ltd [1897] 1 Ch. 406	1198
Re Unisoft Group Limited (No 3) [1994] 1 BCLC 609	577, 1095
Re Walters' Deed of Guarantee, Walters' 'Palm' Toffee Ltd v. Walters [1933] Ch 321, [1933] All ER Rep 430 ...	852
Re Woodroffes (Musical Instruments) Ltd [1986] Ch 366 at 378	938
Re Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284	933
Reckitt & Coleman Ltd v. Borden Inc [1990] 1 All ER 873	162
Regal (Hastings) Ltd v. Gulliver and others [1942] UKHL 1; [1967] 2 AC 134 ...	538, 644, 674, 677, 689
Republic v. High Court, Accra, Ex parte Ploetner [1984-86] 2 GLR 107	727, 409, 585
Republic v. High Court, Accra; Ex parte Appiah and others [1999-2000] 2 GLR 420 ...	29, 49, 180, 196, 434, 784, 830
Republic v. James Town Circuit Judge; ex parte Annor [1978] 1 GLR 453	952
Ridge Securities Ltd v. IRC [1964] 1 All ER 275, [1964] 1 WLR 479	848, 849, 850, 851
Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation and Others [1986] Ch 246 ...	303, 327, 679, 848, 850
Royal British Bank v. Turquand (1856) 6 E&B 327	3, 286, 291, 292, 297, 300, 302
Ruben and another v. Great Fingall Consolidated and another [1907] AC 439	711, 836
Russell v. Northern Bank Development Corp Ltd [1992] 1 W.L.R. 588 HL.	244
S. A. Turki v. Dahabieh [1987-88] 2 GLR 486	41, 54, 55, 62
Salomon v. Salomon & Co. Ltd [1895-9] All ER 33; [1897] AC 22 ...	3, 23, 26, 28, 29, 30, 34, 36, 40, 43, 49, 149, 151, 173, 175, 177, 179, 180, 181, 184, 185, 189, 191, 196, 312, 329, 343, 347, 350, 351, 352, 353, 369, 375, 376, 392, 397, 519, 524, 529, 530, 776, 1064, 1069, 1073, 1137
Sanyo Electric Co. Ltd v. Quarcoopome [2001-200] 2 GLR 198 (CA)	779, 784

Scott v. Brown, Doering McNab & Co. [1892] 2 Q.B. 724	83
Scottish Co-operative Wholesale Society Ltd v. Meyer [1959] AC 324	669
Short v. Treasury Commissioners [1948] SCV 177; [1948] KB 116	47, 195, 776
Short v. Poole Corporation [1926] Ch. 66	658
Shuttleworth v. Cox Bros and Co (Maidenhead) [1927] 2 KB 9	656
Sidaway v. Bethlem Hospital Governors [1985] 1 All ER 643, [1985] AC 871	742
Simtel Communications Ltd v. Rebak and others [2007] 2 BCLC 202	672, 686
Sinclair v. Brougham [1914] A.C. 398, H.L.	322
Smith v. Anderson (1880) 15 Ch D 247	148
Smith v. Eric S Bush [1989] 2 All ER 514, [1989] 2 WLR 790	737
Smith, Stone and Knight v. Birmingham Corporation (1939) 4 All ER 116	376
Soon Boon Seo v. Gateway Worship Center [2009] SCGLR 1077	28, 42, 179, 190
Southern (Inspector of Taxes) v. Watson [1940] 3 All E.R. 439, C.A.	219, 378
Southern Foundries (1926) Ltd v. Shirlaw [1940] A.C. 701 HL.	244
Spitzel v. Chinese Corporation Ltd., (1899) 80 L.T. 347; 15 T.L.R. 281	423, 819
Staples v. Eastern Photographic Materials Co [1896] Ch. 303	796
State v. Andoh and others [1967] GLR 355	742
Stonegate Securities Ltd v. Gregory [1980] Ch 576	1191
Street v Mountford [1985] 2 All ER 289, [1985] AC 809	850
Suhner & Co. A.G. v. Suhner Ltd. [1967] F.S.R. 319	162
Summergreene v. Parker (1950) 80 CLR 304	276
Sutherland Shire Council v. Heyman (1985) 60 ALR 1	740
Symington v. Symington's Quarries Ltd (1905) 8 F. 121	1197
Tesco Supermarkets Ltd. v. Natrass [1972] A.C. 153	408
The Director: Mineral Development, Gauteng Region, Sasol Mining (Pty) Ltd. v. Save the VAAL Environment, Ronsand Ranch (Pty) Ltd & Others Suit No.133/98 (CA, 12 March 1999) ...	147
The Republic v. Ibrahim Adam, Dr. Samuel Dapaah, Kwame Preprah, Dr. George Yankey and Ato Dadzie (Quality Grain Case) [28/4/03] Suit No. FT/MISC.2/2000. HC ...	578
Thompson v. Goold & Co. [1910] A.C. 409 H.L.	588

Thompson v. Webster (1859) 4 Drew. 628	382
Torkington v. Magee [1902] 2 K.B. 427	56, 779
Touche v. Metropolitan Ry Warehousing Co (1871) L.R. 6 Ch. App. 671	268, 269
Transvaal Lands Co. Ltd v. New Belgium (Transvaal Land and Development Co. Ltd) [1914-15] All ER 987 ...	295, 301, 304
Trevor v. Whitworth [1886-90] All E.R Rep. 46: (1887) 12 App. Cas 409 (H.L.) ...	3, 843, 881, 854, 868
Tsatsu Tsikata v. The Republic (unreported) Criminal Appeal No J3/4/2004.	320
Tweedle v. Atkinson (1861) 1 B&S 393; (1861) 121 ER 762	271
Twycross v. Grant (1877) 2 CPD 469	253, 552
Twyne's Case (1602) 3 Co.Rep. 80b	383
Ultramares Corp v. Touche (1931) 255 NY 170	735, 737
Union Maritime et Commerciale v. Rabensteiner and another [1968] GLR 504 ...	1165, 1168, 1175, 1224
Union Mortgage Bank v. Serbeh-Yiadom [1997-98] 1 GLR 1025	1106
United States v. Milwaukee Refrigeration Co, 142 at 255	371, 372
Vambaris v. Altuna Limited & Another [1973] 2 GLR 41	1104
Vickers, Sons & Maxim Ltd. v. Evans [1910] A.C. 444 H.L.	588
Virdi v. Abbey Leisure Ltd. [1990] B.C.L.C. 342	1099
VTB Capital Plc. v. Nutritek International Corporation [2013] UKSC 5	388, 389
W Hill & Son v. Tannerhill [1944] KB 472	64
Weavers Mills Ltd v. Balkis Ammal & Others (1969) 2 MLJ 509	253
Welton v. Saffery [1897] A.C. 299	249
West African Express (Ghana) Ltd v. Craig [1963] 2 GLR 231	610
West Coast Dyeing Industry Ltd, In re; Adams v. Tandoh, Court of Appeal, 7 March 1985; digested in [1984-86] G.L.R.D 131 ...	4, 12, 341, 419, 586, 705, 727, 815, 1091
Whaley Bridge Calico Printing Co v. Green (1879) QBD 109	252
Whitaker v. Nunka-Bruce and another [1994-95] GBR 784	776, 777, 778
Whyte 1984 SLT	1102
Wood v. Odessa Waterworks Co. (1889) 42 Ch D 636	235

Woolfson v. Straithclyde Regional Council 1978 SLT 159	372
Worldwide Shipping & Agencies (GH) Ltd v. Darko [2001-2002] 2 GLC 488	368, 372
York Corporation v. Henry Leetham and Sons Ltd. [1924] 1 Ch. 557	320, 328, 335
York Tramways Co., Ltd. v. Willows (1882) 8 Q.B.D 685	558, 559
Young v. Bristol Aeroplane Co., Ltd. [1944] K.B. 718, C.A.	954

INDEX OF STATUTES & DIRECTIVES

Alternative Dispute Resolution Act, 2010 (Act 798) ... 987

Bank of Ghana (Amendment) Act, 2016 (Act 918) ... 10

Bank of Ghana Act, 2002 (Act 612) ... 10

Banking Act, 1970 (Act 339) ... 954

Banks and Specialised Deposit-Taking
Institutions Act, 2016 (Act 930) ... 9, 172, 209,
241, 354, 542, 580, 581, 771, 764, 779, 1025,
1058
s. 22(2) ... 363
s. 27 ... 241
s. 33(2) ... 363
s. 35(4) ... 363
s. 49 ... 771
s. 56 ... 392
s. 58(1) ... 580, 592
s. 92 ... 543, 548, 551, 580, 603, 663, 697
s. 138 ... 9

Bills of Exchange Act, 1961 (Act 55) ... 308

Bodies Corporate (Official Liquidation) Act,
1963 (Act 180) ... 481, 1165, 1169, 1189, 1190,
1202, 1203, 1204, 1207
s. 1 ... 1187, 1203, 1207
s. 6 ... 1203, 1204
s. 9(1) ... 1165, 1169
s. 13 ... 1203
s. 14 ... 1203
s. 17 ... 1202, 1203, 1204
s. 30(4) ... 1204

Borrowers and Lenders Act, 2008 (Act 773) ...
965

Borrowers and Lenders Act, 2020 (Act 1052) ...
900, 903, 905, 910, 927, 941
s. 1 ... 898
s. 2 ... 898
s. 4 ... 898, 903, 910, 926
s. 5 ... 911, 927
ss. 6(1), (2) ... 911, 929, 951
s. 7 ... 927, 928
s. 8 ... 911, 929
s. 9 ... 911, 929
s. 10 ... 911, 929, 930
s. 11 ... 930
s. 12 ... 930
s. 13 ... 930
s. 14 ... 926
ss. 22(1), (5), (6) ... 951, 957
s. 23 ... 957, 958
s. 24 ... 961
s. 25 ... 961
s. 26 ... 961
s. 27 ... 957, 957
s. 28 ... 959
s. 30 ... 963
s. 32 ... 966
s. 33 ... 941
s. 54 ... 939
s. 35 ... 942
s. 36 ... 939
s. 37 ... 930
s. 40 ... 942
s. 41 to 43 ... 942
s. 55 ... 903
s. 56 ... 903
s. 57 ... 904

s. 58 ... 903
s. 59 ... 903
ss. 60 to 75 ... 903
s. 60 ... 943
s. 60(8) ... 943
ss. 61 to 64 ... 946
s. 61 ... 944
s. 62 ... 944 – 945
s. 63 ... 945
s. 64 ... 945
s. 65 ... 946
s. 66 ... 946
ss. 67(1), (2) ... 947
s. 68 ... 947
s. 69 ... 947
s. 70 ... 947 – 948
s. 71 ... 948
s. 72 ... 949
s. 73 ... 949
s. 74 ... 950, 968
s. 75 ... 963
s. 85 ... 927, 928, 930
s. 89 ... 911

Building Societies (Amendment) Act, 1957
(No.9 Of 1957) ... 130

Building Societies (Amendment) Act, 1959
(No.59 Of 1959) ... 130

Building Society Ordinance, 1955 (No. 30) ...
130, 131,
s. 2 ... 130
s. 3 ... 131
s. 7 ... 131, 132, 134
s. 9 ... 132, 134
s. 10 ... 131, 132
s. 13 ... 134
s. 14 ... 135

s. 15 ... 135
s. 22 ... 134
s. 23 ... 134
s. 24 ... 134
s. 25 ... 134
s. 27 ... 135
2. 29 ... 135, 136
s. 30 ... 131
s. 35 ... 131
s. 48 ... 134
s. 63 ... 137
s. 64 ... 136
s. 65 ... 136
s. 66 ... 137

Central Securities Depository Act, 2007 (Act
733) ... 436, 441, 784, 826, 832, 834, 835, 841,
908, 920, 923, 1021
s. 60 ... 779, 905

Cinematograph Act, 1909 ... 657, 658

Cinematograph Films Act, 1938 ... 379, 381

Civil Service Act, 1993 (P.N.D.C.L. 327) ... 1211
Commission of Enquiry Ordinance of 1958
(Cap 249) ... 14

Companies (Amendment) Act, 1994 (Act 474)
... 15

Companies (Amendment) Act, 1997 (Act 531)
... 15

Companies (Amendment) Act, 2012 (Act 835)
... 15

Companies (Amendment) Act, 2016 (Act 920)
... 15

Companies (Consolidated) Act, 1908 ... 13,
160, 169, 901

Companies (Winding-up) Act, 1890 ... 526,
743, 746, 751

Companies Act, 1862 ... 12, 13, 24, 148, 170,
174, 235, 236, 316, 343

s. 23 ... 425, 429, 820, 825

s. 191 ... 523

s. 192 ... 523

s. 79 ... 248

s. 82 ... 248

Companies Act 1948 ... 13, 14, 232, 359, 360,
366, 379, 661, 1097, 1104, 1205

s. 10 ... 529, 530

s. 20 ... 232

s. 40 ... 737

s. 43 ... 737

s. 141 ... 491, 492, 528

s. 162 ... 749, 753

s. 199 ... 677

s. 209 ... 366, 367

s. 210 ... 1093

s. 332 ... 359, 360

schedule 1 ... 520, 680, 677

Companies Act 1985 ... 13, 386, 477, 738, 847

s. 263 ... 848

s. 317 ... 677

s. 320 ... 853

s. 371 ... 471

s. 378 ... 477

s. 384 ... 738

s. 459 ... 471

Companies Act, 1963 (Act 179) ... 2, 3, 4, 5, 6,
9, 10, 11, 12, 15, 16, 18, 19, 26, 28, 41, 51, 54, 59,

83, 150, 152, 177, 179, 190, 202, 203, 204, 219,
227, 278, 313, 314, 321, 335, 336, 337, 346, 347,
350, 378, 379, 402, 459, 539, 544, 562, 624, 678,
715, 716, 856, 890, 896, 1045, 1073

s. 5 ... 20

s. 6 ... 954

s. 7 ... 10, 11, 19

ss. 10, 10(3), (5) ... 203, 205

s. 13 ... 280

s. 14 ... 152, 153, 158, 223

s. 15 ... 166, 240

s. 24 ... 28, 179, 190

s. 27 ... 157, 169, 171, 564, 1106

s. 28 ... 157, 169, 171, 763

s. 30 ... 413, 414, 428, 429, 811, 824

s. 36 ... 428, 429, 825

s. 38 ... 183

s. 39 ... 777

s. 47 ... 805

s. 53 ... 419, 834

s. 54 ... 834

s. 94 ... 918

s. 95 ... 428, 825

s. 98 ... 428, 429, 825

s. 99 ... 433, 450, 828

s. 107 ... 953, 964

s. 111 ... 953

s. 115 ... 964

s. 136 ... 743, 758

s. 137 ... 407, 758

s. 139 to 143 ... 292, 297

s. 139 ... 293, 407, 310, 602

s. 140 ... 407, 410 602

s. 141 ... 293

s. 144 ... 294

s. 150 ... 468, 480, 483

s. 151 ... 470, 476

s. 152 ... 479

s. 155 ... 493

s. 156 ... 493
s. 162 ... 472
s. 181 ... 549, 620
s. 185 ... 470, 493, 566 to 567, 698, 703, 705
s. 186 ... 4
s. 194 ... 599, 620
s. 198 ... 566
s. 202 ... 419
s. 203 ... 644
s. 216 ... 11
s. 217 ... 432, 467, 468, 469, 828, 1105
s. 218 ... 586, 703, 705, 1104, 1105
s. 220 ... 1104
s. 230 ... 540
ss. 246 to 261 ... 1202
s. 247 ... 1160
s. 254 ... 1168
s. 260 ... 1168
s. 271 ... 466, 468, 483
s. 272 ... 561
s. 275 ... 1045
s. 279 ... 1045
s. 297 ... 466

Companies Act, 2006 ... 13, 674, 847

s. 15 ... 168
s. 33 ... 237
ss. 40-1 ... 537, 676
s. 829 ... 848, 851
s. 830 ... 848, 851

Companies Act, 2019 (Act 992)

s. 1 ... 2, 8, 118
s. 3 ... 147, 150
s. 4 ... 8, 9, 10, 172, 209, 542, 764
s. 5 ... 2, 11, 20, 256, 532
s. 6 ... 150, 151, 152, 411

s. 7 ... 11, 152, 159, 182, 199, 200, 202, 203, 206,
207, 213, 214, 411, 427, 446, 634, 765, 766, 769,
773, 774, 822, 869, 1024, 1057
s. 8 ... 159, 182, 202, 203, 205, 206, 355, 765
s. 9 ... 207, 210, 212, 241, 875
s. 10 ... 154, 202, 203, 251, 252, 256, 257, 260,
261, 264, 265, 266, 268, 279, 551
s. 11 ... 266, 277, 278, 279, 282
s. 12 ... 149, 150, 153, 154, 270, 551
s. 13 ... 116, 149, 150, 153, 154, 155, 156, 157,
159, 202, 224, 226, 227, 411, 412, 552, 709, 714,
721, 722, 723, 763, 809, 810, 873, 875, 915, 1030
s. 14 ... 22, 37, 149, 150, 153, 158, 166, 167, 171,
173, 186, 223, 312, 313, 714, 1064
s. 15 ... 167, 170, 241
s. 16 ... 167, 170
s. 18 ... 33, 37, 149, 167, 183, 186, 313, 314, 315,
331, 337
s. 19 ... 313, 314, 316, 330, 331, 332, 336, 337,
338, 339, 241, 1088
s. 20 ... 333
s. 21 ... 159, 160, 163, 164, 165, 212, 226, 240
s. 22 ... 160, 166
s. 23 ... 223, 224, 225
s. 24 ... 223, 225
s. 25 ... 223, 225, 873
s. 26 ... 226, 228, 242, 244, 247, 873
s. 27 ... 159, 205, 210, 227, 229, 244, 1166
s. 28 ... 159, 229, 412, 810
s. 29 ... 153, 224, 231, 236, 238, 239, 401, 442,
697, 778, 1080, 1107
s. 29 ... 244, 490, 551, 557, 704, 705, 805, 842
s. 30 ... 165, 211, 213, 240, 241, 242, 333, 873,
981
s. 31 ... 243
s. 32 ... 243
s. 33 ... 159, 201, 229, 411, 412, 418, 420, 426,
432, 437, 440, 442, 434, 446, 449, 450, 453, 763,
810, 815, 822, 827, 832, 839, 1009

s. 34 ... 437, 438, 495, 789, 805, 807, 816, 1080
s. 35 ... 425, 440, 821, 839, 840, 921
s. 36 ... 440, 840, 841, 921, 922
s. 37 ... 440, 841
s. 38 ... 426, 821, 841, 1080
s. 39 ... 425, 441, 821, 841
s. 40 ... 181, 201, 202, 206, 345, 443, 869, 877, 875
s. 41 ... 182, 183, 354, 411, 797, 886
s. 42 ... 201, 776, 777, 778
s. 43 ... 781, 832
s. 44 ... 418, 780, 782, 784, 785, 810
s. 45 ... 270, 418, 443, 781, 782, 783, 786, 787, 810, 815, 862
s. 46 ... 788, 832
s. 47 ... 787, 789
s. 48 ... 787, 788
s. 49 ... 780, 789, 798, 790, 797, 981
s. 50 ... 241, 799, 803, 804, 981, 982, 989, 1080
s. 51 ... 789, 790, 791, 792, 797
s. 52 ... 438, 495, 796, 798, 805, 806, 807, 1029
s. 53 ... 805, 1029
s. 54 ... 791, 792, 793, 794, 795, 798, 808, 890
s. 55 ... 832, 833, 834, 1080
s. 56 ... 833, 834, 835, 837
s. 57 ... 785
s. 58 ... 797, 971, 873, 875, 877, 878, 879, 881, 882, 886, 888, 889
s. 59 ... 241, 873, 874
s. 60 ... 779, 878, 879, 890, 1047
s. 61 ... 450, 635, 784, 797, 876, 877, 882, 883, 884, 886, 889, 891, 892, 893, 988
s. 62 ... 884, 885, 886, 894, 1107
s. 63 ... 886, 887
s. 64 ... 886, 887, 889
s. 65 ... 241, 884, 895, 896, 897, 1080
s. 66 ... 988
s. 67 ... 882, 886, 888, 889

s. 68 ... 156, 160, 171, 765, 768, 776, 842, 861, 879, 894, 896, 900, 1039, 1049
s. 69 ... 778, 883, 868, 869, 883, 913
s. 70 ... 856, 857, 896
s. 71 ... 856, 857, 897
s. 72 ... 439, 440, 641, 642, 777, 793, 794, 808, 855, 858, 859, 865, 913, 988, 1081, 1107
s. 73 ... 860
s. 74 ... 860
s. 75 ... 205, 439, 855, 859, 865, 988
s. 76 ... 439, 640, 795, 856, 858, 1081
s. 77 ... 768, 769, 778, 880, 861, 862, 863, 864
s. 78 ... 241, 440, 778, 864, 865, 869, 875, 876, 877
s. 79 ... 865, 866, 870, 877
s. 80 ... 867, 870, 876
s. 81 ... 867, 870
s. 82 ... 241, 778, 864, 865
s. 83 ... 50, 197, 765, 905, 906, 907, 913, 914, 915, 929, 1049
s. 84 ... 907
s. 85 ... 919, 988
s. 86 ... 921
s. 87 ... 907, 908
s. 88 ... 769, 908, 909
s. 89 ... 50, 197, 907, 909, 911, 912, 926, 927, 931, 943, 944, 951, 1107
s. 90 ... 931, 932, 935, 936, 938, 941, 966, 968
s. 91 ... 936, 939, 943, 950, 959, 966, 968
s. 92 ... 937
s. 93 ... 942, 1203, 1204
s. 94 ... 966
s. 95 ... 916, 917
s. 96 ... 917
s. 97 ... 918, 919
s. 98 ... 208, 426, 427, 430, 446, 447, 780, 822, 823, 1009
s. 99 ... 921
s. 100 ... 436, 905, 923, 954

s. 101 ... 429, 430, 431, 440, 441, 447, 448, 544,
823, 824, 826, 839, 841, 922, 923, 924, 1009
s. 102 ... 20, 431, 432, 434, 435, 449, 450, 827,
828, 830, 831, 924, 925
s. 103 ... 436, 440, 831, 832, 839, 926
s. 105 ... 784, 876, 877, 893
s. 110 ... 951, 956, 957, 958
s. 111 ... 959
s. 112 ... 956
s. 113 ... 956
s. 114 ... 957
s. 115 ... 959
s. 116 ... 960
s. 117 ... 962
s. 118 ... 963
s. 119 ... 969, 962, 963
s. 120 ... 960, 961
s. 121 ... 288, 965
s. 125 ... 160, 355
s. 126 ... 1257
s. 127 ... 733, 1124, 1229, 1230
s. 128 ... 721, 1250, 1252, 1253, 1255
s. 129 ... 1239, 1256
s. 130 ... 1231
s. 131 ... 1246-7, 1248
s. 132 ... 1243
s. 133 ... 1244
s. 134 ... 1242, 1243, 1256, 1256-7
s. 135 ... 1246, 1250
s. 136 ... 1250-1
s. 137 ... 720, 721, 730, 731, 733, 1124, 1252,
1253
s. 138 ... 159, 725, 726, 728, 757, 1252
s. 139 ... 159, 721, 722, 723, 724, 757, 757, 759,
1252
s. 140 ... 728, 729, 730
s. 141 ... 723, 758, 759, 760, 761, 762
s. 142 ... 720, 728, 732, 733, 755, 756, 757, 807,
1252

s. 143 ... 605, 758
s. 144 ... 279, 324, 397, 398, 400, 401, 403, 405,
411, 441, 455, 534, 537, 631, 626, 629, 717, 810,
915, 1027, 1072, 1079, 1081, 1109
s. 145 ... 401, 402, 403, 404, 405, 636, 637, 638,
1008, 1230
s. 146 ... 401, 537, 606
s. 147 ... 299, 301, 404, 455, 537, 602, 728,
s. 148 ... 183, 324, 406, 537, 601, 717, 757
s. 149 ... 288, 335
s. 150 ... 288, 289, 295, 300, 303, 307, 309, 335,
610, 718, 1088
s. 151 ... 307, 1088
s. 152 ... 307, 310
s. 153 ... 308
s. 154 ... 309
s. 155 ... 309
s. 156 ... 310
s. 157 ... 456, 460, 461, 462, 497, 717, 1256
s. 158 ... 458, 462, 463, 717
s. 159 ... 475
s. 160 ... 487
s. 161 ... 503
s. 162 ... 461, 470
s. 163 ... 509, 519, 1085
s. 164 ... 518
s. 165 ... 213, 510
s. 166 ... 516
s. 167 ... 517, 1081
s. 169 ... 455, 475
s. 170 ... 159, 535, 536, 562, 563, 573, 574, 580,
629
s. 171 ... 159, 183, 354, 541, 543
s. 172 ... 159, 218, 545, 546, 547, 548, 550, 551,
552, 553, 557, 558, 560, 561, 564, 703
s. 173 ... 159, 548, 550, 582, 585, 592, 593, 613,
695, 696
s. 174 ... 594, 695, 696
s. 175 ... 696, 697

- | | |
|---|--|
| s. 176 ... 218, 695, 697, 698, 702, 703, 704, 705 | s. 212 ... 483, 517, 712, 716 |
| s. 177 ... 582, 585, 591, 592, 696, 726, 727 | s. 213 ... 310, 715 |
| s. 178 ... 593 | s. 214 ... 598, 622 |
| s. 179 ... 594 | s. 215 ... 155, 506, 596, 597 715 |
| s. 180 ... 612, 613 | s. 216 ... 597, 715, 1058 |
| s. 181 ... 613, 614, 615, 619 | s. 217 ... 11, 537, 541, 646, 1089 |
| s. 182 ... 159, 543, 623 | s. 218 ... 242, 340, 241, 340, 401, 441, 805, 1081, 1086, 1087, 1088, 1089, 1091 |
| s. 183 ... 597, 598, 599, 605, 606, 619 | s. 219 ... 241, 242, 340, 401, 441, 779, 987, 1088, 1089, 1090, 1091, 1093, 1094, 1102, 1103, 1104, 1106, 1107, 1125, 1132, 1193 |
| s. 184 ... 605, 606 | s. 220 ... 889, 988, 1115-6, 1120, 1122 |
| s. 185 ... 598, 599, 600, 605, 606, 619, 621, 1244 | s. 221 ... 889, 890, 986, 1117, 1120 |
| s. 186 ... 594 | s. 222 ... 882, 889, 890, 988, 1117, 1118 |
| s. 187 ... 596 | s. 223 ... 890, 1118 |
| s. 188 ... 398, 463, 558, 623, 623, 624, 625, 626, 627, 628, 1109 | s. 244 ... 1120, 1122 |
| s. 189 ... 227, 324, 418, 634, 635, 636, 637, 639, 642, 772, 767, 815, 915, 1009, 1028 | s. 225 ... 1118 |
| s. 190 ... 324, 537, 643, 646, 649, 651, 652, 653, 660, 663, 664, 675, 692, 971 | s. 226 ... 1122 |
| s. 191 ... 629, 664, 665, 688 | s. 227 ... 1120, 1121, 1122 |
| s. 192 ... 665, 674, 675, 685, 692 | s. 228 ... 1126, 1130, 1090, 1125 |
| s. 193 ... 665, 666 | s. 229 ... 1090, 1125, 1126, 1127 |
| s. 194 ... 665, 676, 678 | s. 230 ... 1090, 1127 |
| s. 195 ... 678, 680 | s. 231 ... 1128, 1129 |
| s. 196 ... 680 | s. 232 ... 1128, 1129, 1130 |
| s. 197 ... 678 | s. 233 ... 1131 |
| s. 198 ... 324, 681, 665, 682, 692 | s. 234 ... 693, 1089, 1131, 1090 |
| s. 199 ... 330, 339, 340, 687, 688, 1084, 1086 | s. 235 ... 1132 |
| s. 200 ... 339, 340, 401, 441, 688, 692, 693, 778, 1079, 1081, 1082, 1085, 1086, 1088, 1107, 1109, 1111, 1132 | s. 236 ... 1127, 1128, 1130, 1133, 1134, 1135, 1136 |
| s. 201 ... 401, 441, 694, 1110, 1111, 1112, 1113 | s. 237 ... 1130, 1136 |
| s. 202 ... 1114 | s. 238 ... 984, 985, 986, 988, 989, 995, 1123, 1125 |
| s. 203 ... 1114, 1115 | s. 239 ... 241, 981, 984, 989, 991, 992, 1007 |
| s. 204 ... 1115 | s. 240 ... 992 |
| s. 205 ... 239, 401, 694, 886, 912, 943, 1080, 1081, 1107, 1109 | s. 242 ... 995, 1001 |
| s. 206 ... 621 | s. 243 ... 997, 998, 1001 |
| s. 207 ... 621 | s. 244 ... 999 |
| s. 211 ... 159, 709, 713, 714, 715, 718 | s. 245 ... 1001 |
| | s. 246 ... 1002-3 |
| | s. 247 ... 1002 |

s. 248 ... 1003
s. 249 ... 1003
s. 251 ... 1004-5
s. 252 ... 1005
s. 254 ... 1006
s. 255 ... 1006, 1007
s. 256 ... 1007
s. 258 ... 1007
s. 259 ... 1010, 1012, 1014, 1015, 1016
s. 260 ... 1014, 1015, 1016
s. 261 ... 967, 970
s. 262 ... 968
s. 263 ... 972, 973, 974
s. 264 ... 937, 974, 967, 971
s. 265 ... 976
s. 266 ... 966, 967, 974
s. 267 ... 950, 968, 971
s. 268 ... 969, 971, 976, 978
s. 269 ... 976, 977
s. 270 ... 969, 970
s. 271 ... 977
s. 272 ... 977
s. 273 ... 966, 977
s. 274 ... 167, 1167
s. 275 ... 1158
s. 276 ... 986, 1159
s. 277 ... 1167, 1168
s. 280 ... 1162
s. 278 ... 986, 1159, 1160, 1161
s. 279 ... 1161
s. 280 ... 1162
s. 281 ... 1163
s. 282 ... 1163, 1168
s. 283 ... 1084, 1161, 1163, 1165
s. 284 ... 1166, 1169, 1170
s. 285 ... 1170
s. 286 ... 1166, 1172, 1182
s. 287 ... 1171
s. 288 ... 1173, 1178

s. 289 ... 1176, 1178
s. 292 ... 1246
s. 294 ... 209, 1025, 1028
s. 295 ... 209, 766, 1025, 1027
s. 296 ... 1025, 1027
s. 298 ... 1260
s. 299 ... 463, 465, 466
s. 300 ... 218, 550, 552, 553
s. 301 ... 209, 398, 519, 531, 533
s. 302 ... 214, 1030
s. 303 ... 212, 214, 774, 1029, 1032, 1033, 1059
s. 302 ... 210
s. 304 ... 261, 1029, 1034, 1035, 1043
s. 305 ... 261, 1035
s. 306 ... 1042, 1044
s. 307 ... 1043, 1044
s. 308 ... 1035, 1043, 1044, 1045
s. 309 ... 1046
s. 210 ... 1047
s. 311 ... 1047, 1048
s. 312 ... 1049, 1051
s. 313 ... 1047, 1052, 1053, 1055
s. 314 ... 261
s. 315 ... 1029, 1055
s. 316 ... 1025, 1028, 1057, 1058, 1059
s. 317 ... 1059
s. 318 ... 1056, 1059
s. 319 ... 774, 1059
s. 321 ... 858
s. 322 ... 208, 427, 446, 822, 923
s. 323 ... 1262
s. 324 ... 463, 464, 466
s. 325 ... 218, 552, 553, 555
s. 326 ... 550, 552, 555
s. 327 ... 556, 698
s. 329 ... 214
s. 330 ... 215
s. 332 ... 216, 427
s. 335 ... 200

s. 337 ... 215
s. 342 ... 200
s. 343 ... 221
s. 351 ... 154
s. 353 ... 69, 75, 154, 1123
s. 363 ... 154
s. 378 ... 488, 489
s. 380 ... 118
s. 381 ... 2, 18
s. 383 ... 149
s. 384 ... 18, 19
First Schedule ... 50, 149, 197, 217, 221, 229,
412, 439, 536, 551, 641, 709, 717, 726, 777, 778,
779, 855, 865, 900, 901, 903, 905, 913, 926, 927,
966, 968, 969, 972, 981, 982, 983, 984, 1035,
1157, 1161
Second Schedule ... 229, 330, 331, 452, 453,
803, 891, 894
Third Schedule ... 229, 330, 331, 453, 499, 803,
877, 891, 892, 894
Fourth Schedule ... 203, 205, 223, 226, 229,
330, 331, 418, 420, 532
Fifth Schedule ... 1258
Sixth Schedule ... 1232, 1239, 1243, 1246, 1248
Seventh Schedule ... 731, 1253, 1254
Eighth Schedule
p. 1 ... 478, 479, 480, 483, 756
p. 2 ... 240, 484, 486
p. 3 ... 488, 489, 490
p. 4 ... 491
p. 5 ... 486
p. 6 ... 487
p. 7 ... 483, 494, 495, 756, 913
p. 8 ... 496, 497, 625
p. 9 ... 487, 498, 499, 500, 501, 504, 506
p. 10 ... 502
p. 11 ... 503, 508
p. 12 ... 504
p. 13 ... 479, 490, 505, 506

p. 14 ... 218, 240, 507
p. 15 ... 508
p. 16 ... 504, 512, 514, 515, 626
p. 17 ... 516
p. 18 ... 516
p. 19 ... 509
Ninth Schedule ... 1030, 1033
Tenth Schedule ... 261, 1035, 1036, 1037, 1043,
1044, 1050, 1052, 1056

Companies Bill, 2018 ... 6, 14, 15, 16, 330, 337,
758

Companies Code (Amendment) Act, 2001 (Act
609) ... 15

Companies Code (Amendment) Act, 2002 (Act
627) ... 15

Companies Ordinance (Gold Cost Companies
Ordinance of 1907)
... 12, 13, 14, 302, 420, 421, 424, 816, 817, 820

Constitution, 1992 ... 6, 7, 8, 18, 113, 117, 354,
392
art. 2 ... 8
art. 11 ... 17, 20
art. 181 ... 18, 356, 357, 358
art. 190 ... 112
art. 192 ... 112
art. 295 ... 112
art. 296 ... 77

Cooperative Societies (Amendment) Decree,
1968 (N.L.C.D. 292) ... 119

Cooperative Societies (Amendment) Law,
1986 (P.N.D.C.L. 158) ... 119

Cooperative Societies Decree, 1968 (N.L.C.D.
252) ... 119

s. 1 ... 121

s. 3 ... 122

s. 5 ... 121

s. 6 ... 121

s. 10 ... 125

s. 16 ... 121

s. 17 ... 122

s. 19 ... 122

s. 20 ... 122

s. 21 ... 122

s. 22 ... 122

s. 23 ... 123, 129

s. 24 ... 123, 129

s. 25 ... 123, 129

s. 26 ... 124

s. 27 ... 124

s. 28 ... 125

s. 29 ... 125

s. 33 ... 129

s. 36 ... 125

s. 37 ... 125

s. 38 ... 126

s. 39 ... 126

s. 40 ... 126

s. 41 ... 126, 129

s. 42 ... 127

s. 43 ... 127

s. 44 ... 127

s. 45 ... 127

s. 46 ... 127

s. 47 ... 127

s. 48 ... 128

s. 49 ... 128

s. 54 ... 128

s. 55 ... 128

s. 56 ... 128, 129

s. 57 ... 129

s. 58 ... 129

s. 60 ... 130

s. 61 ... 130

s. 66 ... 125

Corporate Insolvency & Restructuring Act,
2020 (Act 1015) ... 9, 117, 137, 354, 478, 503,
866, 912, 925, 927, 968, 974, 977, 987, 1009,
1137, 1138, 1140, 1154, 1157, 1172, 1190, 1224

s. 1 ... 1138, 1139, 1225

s. 2 ... 1143, 1153

s. 3 ... 950, 1138, 1140, 1141, 1142, 1153, 1173,
1224

s. 4 ... 1142

s. 5 ... 1155

s. 6 ... 1142

s. 7 ... 1142

s. 8 ... 1142, 1143

s. 10 ... 1143

s. 11 ... 1144

s. 12 ... 1144

s. 13 ... 1144

s. 14 ... 1145

s. 15 ... 1145

s. 17 ... 1143

s. 18 ... 1143

s. 20 ... 1146, 1147

s. 21 ... 1147

s. 22 ... 951, 1147

s. 23 ... 1147, 1148

s. 24 ... 1148, 1149, 1150, 1180

s. 25 ... 1155

s. 26 ... 1180, 1181

s. 28 ... 1149, 1150

s. 21 ... 1145

s. 30 ... 1145

s. 32 ... 1145

s. 33 ... 1145, 1155

s. 34 ... 1145

- | | |
|--|--|
| s. 35 ... 1145, 1152 | s. 84 ... 341, 411, 951, 1104, 1180, 1186, 1187, 1189-1190, 1199, 1200, 1201 |
| s. 37 ... 1145, 1155 | s. 85 ... 1172, 1182 |
| s. 38 ... 1145 | s. 86 ... 1181 |
| s. 39 ... 1149, 1150 | s. 87 ... 1201, 1206 |
| s. 40 ... 1149, 1184 | s. 89 ... 1201 |
| s. 41 ... 1155 | s. 90 ... 1206 |
| s. 42 ... 1150 | s. 91 ... 1207 |
| s. 44 ... 1149, 1150 | s. 92 ... 1207, 1208 |
| s. 45 ... 787, 1151 | s. 93 ... 1202, 1218 |
| s. 48 ... 1151 | s. 94 ... 1206, 1218 |
| s. 49 ... 1151 | s. 95 ... 1162, 1179, 1211 |
| s. 50 ... 1151 | s. 96 ... 1211 |
| s. 51 ... 1151 | s. 97 ... 1084 1164, 1165, 1202, 1212 |
| s. 52 ... 1145, 1151, 1152, 1155, 1156 | s. 98 ... 1165, 1218 |
| s. 53 ... 1152, 1156 | s. 99 ... 1218 |
| s. 54 ... 1152, 1155 | s. 100 ... 1220 |
| s. 55 ... 1152 | s. 101 ... 1213 |
| s. 56 ... 1152, 1153 | s. 102 ... 1207, 1208, 1213 |
| s. 57 ... 1152, 1153, 1155 | s. 103 ... 1213 |
| s. 58 ... 1180 | s. 104 ... 1214, 1215 |
| s. 59 ... 1152, 1180, 1181 | s. 107 ... 937, 1215, 1217 |
| s. 60 ... 1154 | s. 108 ... 1143, 1213 |
| s. 61 ... 1154 | s. 109 ... 1214 |
| s. 64 ... 1153, 1155 | s. 111 ... 1214 |
| s. 65 ... 1155, 1156 | s. 112 ... 1214 |
| s. 66 ... 1155 | s. 116 ... 1218 |
| s. 67 ... 1155 | s. 117 ... 358, 359, 381, 1219 |
| s. 68 ... 1155 | s. 118 ... 360, 1219 |
| s. 69 ... 1155 | s. 119 ... 361, 1220 |
| s. 70 ... 1155 | s. 121 ... 1209, 1213 |
| s. 71 ... 1155 | s. 122 ... 1209, 1210, 1213 |
| s. 72 ... 1155 | s. 123 ... 1213 |
| s. 73 ... 1156 | s. 126 ... 1213 |
| s. 74 ... 1156 | s. 127 ... 1221 |
| s. 75 ... 1156 | s. 129 ... 1221 |
| s. 80 ... 951, 1181, 1182 | s. 130 ... 1216 |
| s. 81 ... 1180 | s. 131 ... 1216, 1217 |
| s. 82 ... 1183, 1184, 1185 | s. 133 ... 1221 |
| s. 83 ... 1186, 1226 | |

s. 134 ... 1221
s. 135 ... 1222
s. 136 ... 1222, 1223
s. 137 ... 1223
s. 138 ... 1219
s. 139 ... 1219
s. 141 ... 1219
s. 142 ... 1219
s. 143 ... 1211
s. 145 ... 118, 1224, 1225
s. 146 ... 118, 1224
s. 147 ... 1225
s. 148 ... 1225
s. 149 ... 1226
s. 151 ... 1226
s. 152 ... 1226
s. 154 ... 970, 1162, 1226
s. 155 ... 970, 991, 1227
s. 156 ... 970, 1227
s. 158 ... 1227, 1228
s. 159 ... 1228
s. 160 ... 1228
s. 161 ... 1228
s. 169 ... 1138, 1148, 1149, 1179, 1184, 1226
s. 171 ... 1228
schedule ... 1226

Council of Indigenous Business Associations
Law, 1993 (PNDCL 312) ... 7

Criminal Code, 1960(Act 29) ... 578
s. 2(3) ... 743
s. 124 ... 590
s. 179A ... 320

Dentists Act, 1878 ... 160, 161

Dower Act, 1833 ... 5

Electronic Transactions Act, 2008 (Act 772) ...
489

Environmental Protection Agency Act 1994
(Act 490) ... 8

Finance Lease Law, 1993 (PNDCL 331) ... 10

Ghana Investment Promotion Centre Act,
2013 (Act 865) ... 8, 152, 172, 764

Ghana National Petroleum Corporation Law,
1983 (P.N.D.C.L. 64) ... 10

High Court (Civil Procedure) Rules, 2004 (C.I.
47) ... 40, 55, 61, 62, 63, 83, 90, 436, 831, 926

Income Tax Act 1952 ... 848

Income Tax Act, 2015 (Act 896) ... 198, 354
s. 1 ... 67, 198
s. 5 ... 67
s. 32 ... 361
s. 58 ... 198
s. 59 ... 198
s. 101 ... 544-5

Incorporated Private Partnership Act, 1962
(Act 152) ... 56, 57, 58, 71, 80, 81, 113, 152, 726,
757, 1224
s. 1 ... 82
s. 2 ... 71, 95
s. 3 ... 71, 74, 96
s. 4 ... 71, 74, 80, 81, 82, 83, 84
s. 5 ... 75, 76, 77, 87
s. 6 ... 77
s. 7 ... 84
s. 8 ... 78
s. 9 ... 78, 79, 81, 82, 83, 84

s. 12 ... 22, 30, 32, 33, 34, 78, 84, 89, 91
s. 13 ... 78, 79
s. 14 ... 84, 85, 89
s. 16 ... 37, 89, 91
s. 17 ... 91, 92
s. 18 ... 90, 91
s. 20 ... 93
s. 21 ... 95
s. 22 ... 96, 97, 98
s. 24 ... 97
s. 25 ... 97
s. 26 ... 98
s. 27 ... 98
s. 28 ... 98
s. 29 ... 97
s. 30 ... 98
s. 31 ... 98
s. 32 ... 99
s. 33 ... 100
s. 34 ... 84, 86, 88
s. 35 ... 88
s. 36 ... 89, 107
s. 37 ... 94
s. 38 ... 94
s. 39 ... 100, 101
s. 40 ... 33, 102
s. 41 ... 103
s. 44 ... 104
s. 45 ... 104
s. 47 ... 105, 106
s. 48 ... 107
s. 49 ... 106
s. 50 ... 108, 109
s. 51 ... 110
s. 52 ... 110
s. 53 ... 111
s. 54 ... 112
s. 55 ... 112
s. 58 ... 71, 84

Insolvency Act 1986
s. 214 ... 568, 575, 662
s. 251 ... 575

Insolvency Act, 2006 (Act 708) ... 92, 100, 101,
104, 105, 106, 107, 341, 925, 1162, 1163, 1226
s. 37 ... 105
s. 47 ... 109
s. 54 ... 109

Insurance Act, 2006 (724) ... 172, 764

Interpretation Act, 2009 (Act 792)
s. 10 ... 3, 6, 16, 17

Joint Stock Companies Act 1855 ... 13

Joint Stock Companies Act, 1844 ... 13, 176,
286

Joint Stock Companies Arrangement Act, 1870
... 13

Joint Stock Companies Winding Up Act, 1848
... 13

Labour Act, 2003 (Act 651) ... 8, 601

Land Act, 2020 (Act 1036) ... 8, 912, 941

Limitation Decree, 1972 (NRCD 54)
s. 4 ... 642

Minerals and Mining (Amendment) Act, 2010
(Act 794) ... 10,

Minerals and Mining Act, 2006 (Act 703) ... 10

Minerals Commission Act, 1993 (Act 450) ...
10

Mortgages Decree, 1972 (NRCD 96) ... 947

Non-Banking Financial Institutions Act, 2008
(Act 774) ... 9, 209, 1025, 1058

Non-Profit Organisation Bill, 2019 ... 141

s. 1 ... 141

s. 3 ... 141

s. 5 ... 141

s. 6 ... 141

s. 7 ... 142

s. 8 ... 142

s. 20 ... 142

s. 21 ... 142, 143

s. 23 ... 143

s. 24 ... 143

s. 27 ... 144

s. 28 ... 144

ss. 30 – 42 ... 144

s. 44 – 58 ... 144

s. 59 – 64 ... 144

s. 92 ... 144

s. 94 ... 144, 145

s. 95 ... 146

s. 96 ... 145

s. 102 ... 146

s. 120 ... 142

s. 122 ... 142

s. 123 ... 142

Petroleum (Exploration and Production) Act,
2016 (Act 919) ... 10

Petroleum Commission Act, 2011 (Act 821) ...
10

Petroleum Revenue Management Act, 2015
(Act 893) ... 10

Protection Against Unfair Competition Act,
2000 (Act 589)

s. 1 ... 163

s. 2 ... 163

s. 3 ... 164

s. 8 ... 164

Public Finance Management Act, 2016 (Act
921)

s. 73 ... 50

s. 74 ... 50

s. 102 ... 112, 115

Public Property Protection Decree,
1977(SMCD 140)

s. 1(2) ... 320

Public Services Commission Act, 1994 (Act
482) ... 117

Registration of Business Names Act, 1962 (Act
151) ... 41, 42, 51, 54, 56, 57, 61, 66, 67, 68

s. 1 ... 58, 68, 69, 70

s. 2 ... 69

s. 4 ... 68

s. 5 ... 70

s. 5A ... 69

s. 6 ... 69

s. 7 ... 70

s. 8 ... 70

s. 9 ... 70

s. 10 ... 41, 54, 59

s. 15 ... 70

s. 71

Revenue Administration Act, 2016 (Act 915)
... 157

Sale of Goods Act, 1962 (Act 137) ...8

Securities Industry Act, 2016 (Act 929) ... 10,
172, 764, 1035

s. 42 ... 1060

s. 43 ... 1060

s. 45 ... 1061

s. 46 ... 1061

s. 109 ... 1060

s. 147 ... 1062

s. 148 ... 1062

s. 149 ... 1062

s. 150 ... 1062

s. 151 ... 1062

s. 152 ... 1062

s. 153 ... 1062

s. 154 ... 1062

s. 216 ... 780, 905

Stamp Duty Act, 2005 (Act 689) ... 431, 239,
824, 957, 958

s. 42 ... 957

State Interest and Governance Act, 2019 (Act
990) ... 117

s. 3 ... 117

s. 4 ... 117

Statutory Corporation Act, 1964 (Act 232)

s. 113 ... 113

s. 3 ... 22, 37, 112, 114

Statutory Corporations (Conversion to
Companies) (Schedule Amendment)
Instrument, 1998 (LI 1648) ... 116

Statutory Corporations (Conversion to
Companies) Act 1993, (Act 461)

s. 2 ... 116

s. 3 ... 116

Stock Exchange (Ghana Stock Exchange)
Listing Regulations (Securities Legislation),
1990 (LI 1509) ... 766, 1060, 1061

r. 1 ... 1061

r. 2 ... 1059, 1061

r. 3 ... 1061

r. 4 ... 1061

r. 5 ... 1061

r. 7 ... 1061

r. 8 ... 581, 1061

r. 10 ... 1061

r. 21 ... 1061

r. 22 ... 1061

Part V. 1061

Sunday Entertainments Act, 1932 ... 657

Trustees (Incorporation) (Amendment) Law,
1993 (PNDC L 311) ... 138

Trustees (Incorporation) Act, 1962 (Act 106) ...
138, 141

s. 1 ... 138, 139, 140

s. 3 ... 139

s. 4 ... 139

s. 5 ... 140

s. 7 ... 139, 140

Others

Banking Business – Corporate Governance
Directive, 2018 ... 548, 551, 580, 603, 663

p. 31 ... 604

p. 42 ... 697

p. 58 ... 543

Ghana Alternative Market Rules ... 1062

Ghana Stock Exchange Listing Rules (2006) ...
10, 1061

r. 3 ... 1061

r. 4 ... 1061

r. 5 ... 1061

r. 6 ... 1061

r. 7 ... 1061

r. 10 ... 1061

r. 11 ... 581

r. 12 ... 1061

r. 20 ... 1061

r. 22 ... 1061

r. 23 ... 1061

r. 24 ... 1061

Part V ... 1061

Part VII ... 1062

Securities Exchange Commission Code on
Takeovers & Mergers, 2008 ... 10, 984, 995,
1004, 1016

r. 2. ... 1017

r. 3 ... 1018

r. 4 ... 1017, 1018

r. 5 ... 1019

r. 6 ... 1019

r. 7 ... 1019, 1020

r. 8 ... 1020

r. 9 ... 1020

r. 10 ... 1020

r. 12 ... 1020

r. 14 ... 1020

r. 20 ... 1020

r. 21 ... 1020, 1021

r. 22 ... 1021

r. 23 ... 1021

r. 24 ... 1021

r. 25 ... 1021

r. 26 ... 1021

r. 28 ... 1022

r. 30 ... 1022

r. 31 ... 1023

r. 32 ... 1021, 1023

r. 33 ... 1023

r. 34 ... 1023

r. 35 ... 1023

The Fit & Proper Person Directive, 2018 ... 580

1.0 INTRODUCTION TO COMPANY LAW

1.1 Meaning and Scope of Company Law

The easiest way to understand the meaning of company law is to refer to other subject areas of the law such as contract law, constitutional law, land law, commercial law, etc. In that sense, company law is used in reference to the categorisation of laws that apply to a specific subject, a company. That is, the collection of laws that regulates a company. Definition about the subject matter requires an appreciation of the use of the subject matter, the 'company'. In everyday common usage, the word 'company' refers to an association. That is, two or more things together. In business usage, it may be used to refer to a company in the technical sense or a body corporate in the broader sense. Even though the word company may be used in any of these diverse ways, more restricted use of the word is adopted in this book. A 'company' refers to a legal entity or body corporate which is incorporated, registered or continued in existence under the Companies Act, 2019 (Act 992).

From the above, company law in Ghana may be understood as the laws that regulate companies in Ghana. These are laws that regulate the activities relating to companies including the following:

- (a) Pre-incorporation activities
- (b) Incorporation and registration requirement
- (c) Incorporation and registration process
- (d) Registrar of companies and functions to be performed
- (e) Requirements for the commencement of operations or business by the companies
- (f) Conduct of affairs of companies
- (g) Governance system of companies and distribution of powers among stakeholders
- (h) Relationship between the company and its stakeholders – promoters, directors, shareholders/members, auditors, secretary, regulators, creditors, employees, receivers, managers, and liquidators.
- (i) Qualification of various internal stakeholders of a company
- (j) The rights, duties, powers and liabilities of companies
- (k) The rights, duties, powers and liabilities of the internal stakeholders of companies
- (l) Record keeping – filings, books of accounts, reporting requirements
- (m) Raising of capital for companies
- (n) Restructuring of companies
- (o) Winding up of companies
- (p) Company improprieties and remedies
- (q) Legal concepts relating to operations of companies
- (r) Offences, punishment and liabilities for acts and omissions relating to companies

Notwithstanding the above attempt at defining company law, the exact scope of the law that is referred to as company law is still confusing to students and practitioners. The confusion stems from the fact that the above-listed activities, requirements and prescriptions, which are not exhaustive, are affected by other branches of the law. This confusion may be minimized by understanding company law in its specific sense as different from a reference to all laws that affect the activities of companies.

The use of company law in the specific sense relates to limiting the scope of company law to the Companies Act and applicable laws expressly referred to by the Companies Act. In this case, company law can be deduced from three (3) sources:

- (a) Statute – that is the specific legislation enacted to apply to all companies in Ghana. This is the Companies Act, 2019 (Act 992). Section 1 of Act 992 which provides for the scope of application of the Act states *“(1) Except as otherwise provided, this Act applies to companies formed in the Republic, whether before or after the commencement of this Act.”* In effect, the Companies Act, 2019 applies to all companies formed in Ghana. In essence, defining company law as the law applicable to companies may simply be a reference to the Companies Act, 2019 (Act 992).

The above position is reinforced by the fact that the Companies Act, 2019, which repealed and replaced the Companies Act, 1963 (Act 179) as amended, is codified legislation, where provisions affecting a particular subject are brought together and contained in one statute. This understanding does not take into account other legislations passed to regulate activities that the company may be engaged in outside the scope of the codified statute. However, this understanding includes enabling subsidiary legislations passed for the implementation of the Companies Act, 2019 (Act 992).¹

- (b) Decided Cases – based on the doctrine of judicial precedent, the *rationes decidendi* of judicial decisions are another source of company law in the strict sense. Decided cases serve as a source of company law as the cases provide authoritative and binding interpretations of statutes. Additionally, there are concepts, principles or doctrines relating to companies developed through case law, common law and doctrines of equity, which have subsequently found expression in the statute or continue to apply as supplements to the statute. Such cases, therefore, are foundational common law principles and rules of equity of company law which are either expressly stated in the Act or permitted to continue to apply. This position is recognised by the Companies Act, 2019 when it provides in section 5 that *“The rules of equity*

¹ See section 381 of Act 992 which empowers the Minister of Justice on the advice of the Governing Board of the Registrar of companies to enact legislative instrument that empowers the Registrar to implement the Companies Act, 2019.

and of common law applicable to companies continue in force unless they are inconsistent with a provision of this Act.”

A number of cases that established fundamental principles of company law include:

- ***Salomon v. Salomon & Co. Ltd***², which established the separate legal personality doctrine;
- ***Trevor v. Whitworth***³, which explains the rationale of the capital maintenance principle;
- ***Royal British Bank v. Turquand***⁴, which established the indoor management principle or the presumption of regularity, as opposed to the constructive notice concept;
- ***Foss v. Harbottle***⁵, which established the majority rule principle and the proper plaintiff rule; and
- ***Ashbury Railway Carriage and Iron Co. Ltd v. Riche***⁶, which established the application of ultra vires rule and its consequence.

These cases established legal principles that in some instances have been codified under the Companies Act, 2019 and are now statutory provisions.⁷ In addition to principles established by case law and now codified under the statute, case law continues to serve as an authoritative source for interpretation and application of the statute, Companies Act, 2019.

- (c) Commentaries, Memorandum and Textbooks – these secondary sources explain the underlying theories of company law and provide a source for understanding the statute and common law principles. Even though commentaries, memorandum and textbooks are secondary legal texts and do not provide binding authoritative texts, they aid in understanding and interpretation of the primary legal text especially in instances of ambiguity.⁸ In relation to the now repealed Companies Act, 1963 (Act 179) as amended, the commentaries of the drafter deserve special mention. Detailed explanatory commentaries on each provision of the Companies Act, 1963 (Act 179) were provided in the Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana by L.C.B Gower (the Commissioner), shortly called the Gower’s Report. The Gower’s Report provided explanatory comments on the general approach to the drafting of

² [1895-9] All ER 33; [1897] AC 22.

³ [1886-90] All E.R Rep. 46: (1887) 12 App. Cas 409 (H.L.).

⁴ (1856) 6 E&B 327.

⁵ (1843) 2 Hare 461.

⁶ (1875) LR 7 HL.

⁷ Gower’s Report stated at page 9 that “*The principal feature of the attached Draft Companies Code which distinguished it from other Act based on the English model is that it attempts to codify Company Law whereas the other Acts, despite their elaboration, merely superimpose a number of statutory rules on existing body of common law and equity.*”

⁸ Section 10 of Interpretation Act, 2009 (Act 792).

the Companies Act, 1963 (Act 179) as amended, as well as a detailed explanation of each of the provisions in the Act. The original intent was for the Gower's Report to be used as an authoritative binding text on the interpretation of the Companies Act, 1963 (Act 179). However, that was rejected by the legislature in the passage of the Act in 1963.

*In re West Coast Dyeing Industry Ltd: Adams and Another v. Tandoh*⁹ - Abban JA stated @ pgs. 589 to 590 in relation to the use of Gower's Report for the interpretation of the provisions of Act 179 as follows:

"Learned counsel also referred to the interpretation which Professor Gower has put on section 186(1)(c) as contained in his Final Report. The full title of the report is— Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana. It was Professor Gower who drafted our Act 179. In that Final Report the learned draftsman put forward his views as to when and how section 186(1)(c) of the Act 179 should be invoked; and learned counsel submitted that, according to the learned draftsman, this section 186(1)(c) was intended to be invoked only in the course of winding up proceedings. What exactly did the learned draftsman state? At p. 134, para. 4 of the said Final Report the following can be found:

"4. Subsection (1)(c) deals with misconduct in relation to bodies corporate. The English Act is limited to misconduct coming to light in the course of winding up. Paragraph (c) is not so limited, though it is as a result of winding up proceedings that it is most likely to be invoked."

The passage clearly shows that the learned draftsman acknowledged the fact that unlike the English Company Act, the application of section 186(1)(c) of our Code is not restricted to fraudulent misconduct coming to light only in the course of winding up proceedings.

In any case, I do not think the comments of the learned draftsman should be taken to be the intention of the legislature. The unquestionable rule is that such views and comments made by framers of enactments are generally not admissible to explain the meaning of the enactments. The Code as drafted by the learned draftsman having been passed into law, its language could no longer be regarded as that of his. The language is regarded as that of the legislature that passed it into law; and so the meaning attached to it by the learned draftsman cannot control its construction: see Attorney-General v. Sillem (1864) 2 H & C 431 where Bramwell B. in delivering his judgment said at 537:

"As has been excellently said, 'Better far be accused of a narrow prejudice for the letter of the law', than set up or sanction vague claims to discard

⁹ [1984 – 86] 2 GLR 561.

it in favour of some higher interpretation, more consonant with the supposed intentions of the framers or the spirit which ought to have animated them."

It may be recalled that in Farley v. Bonham (1861) 30 L.J.Ch. 239, Wood V.C. construed the Dower Act, 1833 (3 & 4 Will 4, c. 105) to apply to gravel kind lands although this was avowedly contrary to the intention of the Real Property Commissioners who prepared that Act; for they stated in their report that it was their intention that the Act should not extend to lands of that tenure. So also in Assam Railway and Trading Co. Ltd. v. The Commissioners of Inland Revenue [1935] A.C. 445, H.L. the report of a Royal Commission was not admitted to show the intention of an Act. The judgment of Lord Wright in particular is very instructive. At 457-458 the learned lord said:

"Mr. Latter sought to introduce into his argument certain recommendations from a Report of a Royal Commission on Income Tax in 1920; he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the Legislature in enacting the section ... But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the Legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate."

The court must always bear in mind the general warning of Lord Halsbury L.C. in Hilder v. Dexter [1902] A.C. 474, H.L. to the effect that the worst person to construe a statute is the person who is responsible for the drafting. The said warning is found at 477 of the report and it is as follows:

"My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done."

Notwithstanding the above, Gower's Report continues to serve as an aid to the interpretation of the Companies Act, 1963 (Act 179). Even though the Companies Act, 1963 (Act 179) has been repealed and replaced with the Companies Act, 2019 (Act 992), the substantial

reproduction of the provisions of the Companies Act, 1963 (Act 179) in the Companies Act, 2019 (Act 992) will mean the continued use of the Gower's Report as an aid to the interpretation of the Companies Act, 2019 (Act 992). The memorandum to the Companies Bill, 2018, that was passed into the Companies Act, 2019, recognised this when it provides that: *"The present re-enactment maintains as much as possible the language of the 1963 legislation so that the Final Report of the Commission of Enquiry into the working and administration of the Company Law of Ghana would still be of assistance when problems of interpretation arise bearing in mind section 10 of the Interpretation Act, 2009 (Act 792)."* The Gower's Report will, therefore, continue to be a useful source of clarification on the provisions of the Companies Act, 2019 even though it would not have a binding effect.

Additionally, the Memorandum to the Companies Bill, 2018 provides explanatory notes that are to aid in the interpretation of the Companies Act, 2019 (Act 992). Also, textbooks by well-established legal scholars on company law are secondary legal texts that assist in the understanding and interpretation of the primary legal text.¹⁰

In summary, the scope of company law in the specific sense confines company law to the understanding of the provisions of the Companies Act, 2019 (Act 992). This restricts company law to the actual application of the provisions of the Act, authoritative interpretations of those provisions and statutory restatement of positions developed under common law and equity. This will require reading of Companies Act, 2019, (Act 992), decided cases and secondary texts that offer further and detailed explanations on the provisions of the Companies Act, 2019 (Act 992). This book focuses on company law in that sense even though there are references to other applicable laws to companies.

However, defining company law as laws that regulate a company goes beyond the strict sense discussed above and touches on all branches of the law. In this sense, the definition will cover criminal law, law of tort, contract law, commercial law, constitutional law, banking law, law of taxation, among others. In other words, numerous laws regulate or affect the operations of companies in Ghana in addition to the Companies Act, 2019 and decided cases as described above. These include sector specific laws and laws of general application. This understanding is particularly relevant to practitioners of company law in advising companies so that the advice is not limited to the understanding of company law in the strict sense stated above. From this perspective, a corpus of law applicable to companies can, in a similar way, be equated to the laws applicable to a person, as a company is a person, albeit an artificial person. In this sense, sources of law can be identified generally as statutes and common law.

1. **Statutes** – these refer to all relevant legislations that affect the companies. These will include the 1992 Constitution, Acts of Parliament, Existing Laws, and Subsidiary Legislations. These

¹⁰ See section 10 of the Interpretation Act, 2009 (Act 792).

laws can generally be classified as laws of general application and sector specific laws applicable to companies. The company, as a recognised legal entity clothed with the character of a person in law, is entitled to act, enjoy rights and saddle with liabilities as provided by relevant applicable provisions under all statutes in Ghana. The company may, however, be exempted from the scope of application of some legislation due to the artificial nature of its personality as distinct from a natural person. The provisions of the statute may either expressly or impliedly exclude the application of the statute or provisions in the statute to companies.

This position is illustrated by the enjoyment of constitutional rights by companies, application of the provisions of the Constitution, 1992 to companies, ascribing criminal and civil liabilities to companies outside the scope of the Companies Act, 2019 (Act 992), the requirement of compliance by companies with other statutes, subsidiary legislations, directives, orders and guidelines, some expressly directed at companies.

Statutes of general application – some statutes apply to companies irrespective of the sector in which the particular company may operate. Examples of some statutes of general application to companies are illustrative on this point. In relation to the 1992 Constitution, it has been held that a company as an artificial person qualifies as a person under the Constitution, 1992 and is entitled to constitutional rights under article 2 of the Constitution, 1992 and can bring an action to enforce and defend the Constitution.

In *New Patriotic Party v. Attorney-General (CIBA Case)*¹¹, the plaintiff, the New Patriotic Party, a political party registered under the laws of Ghana as a body corporate, issued a writ to invoke the original jurisdiction of the Supreme Court under articles 2(1) and 130 of the Constitution, 1992 for a declaration that: “The Council of Indigenous Business Associations Law, 1993 (PNDCL 312) is inconsistent with and a contravention of, the Constitution, and that consequently, to the extent of such inconsistency, the said PNDCL 312 is void.” The Attorney-General raised a preliminary issue to the effect that the New Patriotic Party had no capacity or locus to commence an action under article 2(1) of the Constitution, 1992 on the ground that only a natural person can bring such an action. The Supreme Court had to decide whether “person” used in article 2(1) of the Constitution should be restricted to only natural persons. The Court per Bamford Addo, JSC held that under Article 2(1) of the Constitution, 1992 other than the citizenship requirement, no limitation is placed on the nature of persons who may invoke the original jurisdiction of the Supreme Court. She stated @ pg. 390:

“It is evident from this passage that a very wide effect was intended to enable all persons to resort to judicial review for the enforcement of the Constitution, 1992. Therefore, under article 2(1) of the Constitution, 1992 other than the

¹¹ [1997-98] 1 GLR 378.

citizenship requirement, no limitation is placed on the nature of persons who may invoke the original jurisdiction of the Supreme Court. If this be the case, then it seems to me that there would be no logical reason for restricting the resort to the original jurisdiction of this court to only natural persons. On the contrary, it would be more beneficial and in accordance with the intention of the framers of the Constitution and in the public interest to open the door widely to permit both natural and legal persons, like the plaintiff, access to the court. I would think that corporate bodies by reason of their important place in society are most suited both financially and otherwise to undertake the defence of the constitutional order by resort to judicial review when the constitutional order is being threatened ... since rights and freedoms can be enjoyed by both natural as well as legal persons under the Constitution the duty to defend same through the enforcement procedure under article 2(1) of the Constitution, 1992 should be assured to all classes of persons, natural or legal. That legal persons are within the contemplation of the Constitution, 1992 in certain applicable cases, is evident in article 12 which requires that certain specified persons including "natural and legal persons in Ghana" should respect and uphold the fundamental human rights and freedoms enshrined in chapter 5 of the Constitution, 1992. It follows that proceedings can be taken in court against all such persons for the enforcement of the fundamental rights and freedoms in chapter 5"

Other statutes than the Constitution, 1992 are also statutes of general application to companies. For example, the Income Tax Act, 2015 (Act 896) as amended and other tax legislations, unless otherwise expressly indicated, provide for tax liabilities of all companies irrespective of the sectors of operation. Labour Act, 2003 (Act 651) governs the relationship between companies and employees. The Ghana Investment Promotion Centre Act, 2013 (Act 865) regulate aspects of operations of companies especially those with foreign ownership or shareholding. The Sale of Goods Act, 1962 (Act 137) affect contracts of sale entered into by companies. The purchase of land or buildings by a company is affected by the Land Act, 2020 (Act 1036) on land ownership, acquisition and use. The Environmental Protection Agency Act 1994 (Act 490) regulates the activities of companies that have environmental impact irrespective of the sector of operation of the companies.

Sector specific statutes – these are special legislations enacted to govern the activities and operations of companies engaged in business in specific sectors. Section 1 of the Companies Act, 2019 (Act 992) provides that the Companies Act, 2019 applies to all companies in Ghana. Section 4 of Act 992, however, provides that: *"This Act does not abrogate or affect legislation relating to companies carrying on the business of banking, insurance or any other business*

which is subject to special regulations.” The Companies Act, 2019 does not prevent or affect the application of other specific legislations relating to companies carrying on specific businesses such as banking, insurance, or any other business which are subject to special regulations. Companies are incorporated to undertake a business or pursue an object. Specific sector legislations are enacted to regulate specific activities and hence apply to the companies engaged in the specific activities. Section 4 of the Companies Act, 2019 permits the application of those sector specific laws to the company.

It should be clarified that section 4 of the Companies Act, 2019 does not imply that the Act ceases to be inapplicable to such companies operating in the specific sector. The Companies Act, 2019 and the sector specific legislation both apply to the company. The Companies Act, 2019 will, however, cease to be applicable in two instances.

First, where the sector specific legislation expressly excludes the application of the Companies Act, 2019 (Act 992). For example, the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) expressly provides in section 138 that: *“The provisions of the Companies Act, 1963 (Act 179) [now the Companies Act, 2019 (Act 992)], the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180) [now Corporate Insolvency & Restructuring Act, 2020 (Act 1015)], or any other enactment relating to corporate insolvency or liquidation shall not apply to the winding up and liquidation of an insolvent bank or specialised deposit-taking institution in the country.”* Thus, even though banks and specialised deposit-taking institutions are companies, Act 930 excludes the application of the provisions of the Companies Act, 2019 relating to insolvency and liquidation of companies operating as banks and specialised deposit-taking institutions.

Second, under section 4 of the Companies Act, 2019, where the sector specific legislation is inconsistent with the application of provisions of the Companies Act. In this second instance, the inconsistency will not render the entire Companies Act, 2019 inapplicable. The inapplicability of the Companies Act, 2019 will be limited to provisions of the Act which are inconsistent with the application of the sector specific legislation. Therefore, where the specific sector legislations do not address a specific matter that the Companies Act, 2019 addresses, the Act will continue to be applicable.¹²

Examples of some sectors and sector specific legislation applicable are provided below:

- Banking business – sector specific laws affecting operations of companies in the banking sector include Bank & Specialised Deposit-Taking Institution Act, 2016 (Act 930), Bank of

¹² The position taken by Edusei J. in the case of George Cohen (WA) Ltd, v. Comet Construction Co Ltd; Ghana Commercial Bank (Claimants) [1966] GLR 777 at 779 (HC), is a wrong position in law.

Ghana Act, 2002 (Act 612), Bank of Ghana (Amendment) Act, 2016 (Act 918), Non-Banking Financial Institutions Act, 2008 (Act 774), Finance Lease Law, 1993 (PNDCL 331) and other subsidiary legislations

- Mining business – statutes of specific application to mining companies include Minerals Commission Act, 1993 (Act 450), Minerals and Mining Act, 2006 (Act 703), Minerals and Mining (Amendment) Act, 2010 (Act 794) and subsidiary legislation.
- Petroleum sector – special legislation applicable to upstream oil and gas operations include Petroleum Commission Act, 2011 (Act 821), Petroleum (Exploration and Production) Act, 2016 (Act 919), Ghana National Petroleum Corporation Law, 1983 (P.N.D.C.L. 64), Petroleum Revenue Management Act, 2015 (Act 893) as amended. These are in addition to a number of subsidiary legislations and guidelines issued under these laws.
- Listed Companies – additional laws affect listed companies on the Ghana Stock Exchange, not on the basis of operating in a specific sector but because of the public character it assumes and the trading of their shares on the stock exchange. The laws include Securities Industry Act, 2016 (Act 929), Ghana Stock Exchange Rule Book, Securities Exchange Commission Code on Takeovers & Mergers, 2008, and subsidiary legislation enacted by the Securities and Exchange Commission.

Practitioners advising companies undertaking business in specific sectors must, therefore, not only understand company law in the narrow sense but have a good appreciation of the laws of general and specific application which affect the operations of the company. It should be borne in mind that sector specific laws may and do often modify the provisions of the company law. In view of section 4 of Act 992, such laws take priority over the provisions of Act 992 in the event of a conflict.

2. **Common Law & Doctrine of Equity** – the approach to the enactment of the now repealed Companies Act, 1963 (Act 179) was essentially the codification of three categories of legislations: English laws, borrowed relevant laws from other jurisdictions and proposal on novel adoption fit for the circumstances at that time in Ghana, including economic, social, political and cultural situations.¹³ The critical point to note, however, is that the approach was to codify the laws applicable to a company. In that respect, it restated relevant principles of common law and doctrines of equity. Gower's Report on section 7 states that: *"The enactment attempts to codify case-law and not merely consolidate the statute. Nevertheless, no statute can hope to be completely all embracing and this section is designed to make it clear that the Courts should fill the gaps on the basis of the existing legal doctrines."* This was the basis of the inclusion of section 7 of the Companies Act, 1963 (Act 179) which provides *"the rules of equity and of common law applicable to companies shall continue in force except so far as they are inconsistent with the provision of this Code."* The savings was to permit the use of

¹³ See Gower's Report, pgs. 9 to 33.

case law to fill gaps in the statute and permits the continuous development of principles of company law through case law.

Act 992 restated section 7 of the repealed Companies Act, 1963 (Act 179). Section 5 of Act 992 provides that the rules of equity and of common law applicable to companies continue in force except so far as they are inconsistent with the Act. Case law will, therefore, continue to fill the gaps in Act 992 as well as continue to develop principles of laws applicable to companies.

It should also be emphasised that whilst the Companies Act, 2019 repeals Companies Act, 1963, case law on provisions under the repealed Companies Act, 1963 will continue to have a somewhat binding or persuasive effect in the interpretation and understanding of the provisions of the Act. As can be gleaned from the comparative table in the introductory part of Act 992, the Companies Act, 2019 is a substantial reproduction of the Companies Act, 1963. Cases on provisions of the Companies Act, 1963 will, therefore, provide the foundation and precedent for the interpretation of the Companies Act, 2019. Unless a provision of the Companies Act, 2019 has been modified from the provision in the repealed Companies Act, 1963, cases decided by the Superior Courts will continue to have a somewhat binding effect in accordance with the doctrine of judicial precedent. Even though it is based on a repealed law, there must be a compelling reason for a court, bound by the doctrine of judicial precedent in relation to the decided case, to depart from the ratio of the case.

Another specific mention of application of rules of equity and of common law to companies is provided in section 217 of Act 992 which provides that the rules of common law and equity relating to principal and agent, and master and servant continue to apply to the rights, duties and liabilities of officers and agents of companies unless they are inconsistent with the express provisions of the Act. This provision was previously stated in section 216 of the now repealed Companies Act, 1963 (Act 179). The courts have referred to instances where the rules of equity and common law would be applicable in resolving issues relating to the operations of a company.

*Dupaul Wood Treatment v. Asare*¹⁴ – in a matter in which the respondent alleged oppression under the Companies Act, 1963 and indicated his removal as executive director as one of the grounds to establish oppression, the court per the Ansah J in dismissing the action stated:

“I am of the view that an employee or an office holder in a company who complains that his retirement from office is wrongful, must prove the terms of his employment and then also that his retirement was in breach of the said terms or that it contravened some statutory provision for the time being regulating

¹⁴ [2005-2006] SCGLR 667 @ 669.

employment: see Morgan and ors v Parkinson Howard Ltd. [1961] GLR 68. He may also show that the retirement is against a common law principle. Section 216 of the Companies Code also said that: "The rights and duties and liabilities of officers and agents of companies shall continue to be governed by the rules of the common law and equity relating to principal and agent and master and servant save in so far as such rules are inconsistent with the express provisions of this code." It is not for the respondent to justify the retirement. It is rather for the applicant to show its wrongfulness. The applicant did not produce any evidence on his terms of contract and why he claimed his retirement was wrongful".

*In Re West Coast Dyeing Industries Limited: Adams v. Tanoh*¹⁵ – in an action by the appellant challenging his summary dismissal as a managing director of a company and a director from all the three other sister companies as unlawful, null and void and of no legal effect as these actions were not in accordance with the Companies Act, 1963. The court stated per Abban, JA @ pg. 580 as follows:

"The appellant was an officer of the company. That is he was the managing director of Solid Construction Co. Ltd. and a director of the other three sister companies; and his relationship with those companies continued to be governed by the common law rules of master and servant, irrespective of section 185 whose provisions are not in conflict with the common law rules. There was therefore no obligation whatsoever on the part of the company to resort to the procedure under section 185 of the Code before the appellant could be dismissed from his office as a director or as a managing director. The company may choose either to adopt the procedure under the said section 185 or may proceed in accordance with the principles of common law and equity as provided by section 216, depending on the circumstances of each case..."

1.2 Historical background of the Companies Act

The development of Company law in Ghana has a direct linkage to English Company Law. In the same way, Ghana's legal system has its root from English Law, the enactment of a statute on companies has a direct root from English Company Law. The first legislation on companies introduced in Ghana, then the Gold Coast, was the Gold Cost Companies Ordinance of 1907. The Companies Ordinance of 1907 was a reproduction of the English Companies Act, 1862. The Companies Ordinance of 1907 was introduced as a reaction to the influx of a number of companies from South Africa into the Gold Coast to engage in the mining business. It has been stated that the Companies Ordinance of 1907 was hastily enacted without considering the particular circumstances

¹⁵ [1984-86] 2GLR 561.

of the Gold Coast, which was a colony of the United Kingdom.¹⁶ Due to the haste, the Companies Ordinance of 1907 was a verbatim reproduction of the English Companies Act, 1862 which itself was outdated at the time and was replaced a year later after its reproduction as the Companies Ordinance of 1907 in the Gold Coast.¹⁷

The evolution of company law itself in England dates from the 16th century from the grant of charters by the monarchy to some merchants to engage in specific business activities, thereby outlawing other persons from doing so. It will seem the attempt was to create monopolies in favour of merchants through the grant of charters for specific businesses. Subsequently, given the need for collaboration, where a number of persons must contribute to carrying on specific trades which require huge capital outlay and resources, the joint stock company as a mechanism to undertake business was developed in the 17th century. Members of the joint stock company each contributed to the common business undertaken. In order not to have the common undertaken in the name of a particular merchant, a joint stock company was created and recognised to carry on trade on behalf of the members. Profits made from the joint venture were shared by the members who contributed to the joint stock company in proportion to their contribution.

Specific laws on companies and joint stock companies were enacted in the 19th century. These laws included the following:

- (a) An Act requiring the registration of Deed of Settlement of Joint Stock Companies. This is the Joint Stock Companies Act, 1844
- (b) Joint Stock Companies Winding Up Act, 1848
- (c) Joint Stock Companies Act, 1855
- (d) Joint Stock Companies Arrangement Act, 1870
- (e) Companies Acts of 1862, 1867, 1900, 1907 (Companies (Consolidation) Act 1908), 1929, 1947, 1948, 1967, 1976, 1980, 1981, 1985, and 1989.
- (f) The applicable principal law in England currently is the Companies Act, 2006.

As England colonised the Gold Coast, established business and trading activities, including exploitation of natural resources, there was the need to develop a similar law to govern companies. The Companies Ordinance, 1907 was introduced into the Gold Coast. The Companies Ordinance, 1907, as noted, was a verbatim reproduction of the English Companies Act 1862. The English Companies Act, 1862 itself was repealed and replaced in 1908, a year after its reproduction in Ghana as the Companies Ordinance of 1907, with the Companies (Consolidated) Act, 1908. The Companies Ordinance of 1907 was therefore seen as outmoded at the time of its enactment. In addition, it was seen as defective in that it did not take into account the existing economic, political and cultural

¹⁶ Gower's Report.

¹⁷ Ibid.

conditions of the Gold Coast at the time of its introduction.¹⁸ As noted earlier, its introduction was a response to the influx of companies into the then Gold Coast. Whilst the Companies Ordinance was introduced as a response to the increased foreign business activities in the Gold Coast, it has been stated that the Ordinance failed to take into account growth in indigenous business.¹⁹

The defects in the introduction of the Companies Ordinance of 1907 coupled with subsequent political development after the introduction of the Companies Ordinance of 1907 necessitated the need for the passage of a new companies' act. Significant political development that necessitated this included the consolidation of the administrative territories of the Gold Coast, the evolution of the Gold Coast into an independent country in 1957, and the republican state in 1960. The need for a new companies' act led to the enactment of the Commission of Enquiry Ordinance of 1958 (Cap 249). In addition to this, there was a continued increase in indigenous business, which the Ordinance did not cater for.

Pursuant to Cap 249, the Governor-General on 25th August, 1958 appointed a sole-member commission in the person of Professor L.C.B. Gower to develop a new Companies Bill to be passed into law for Ghana. The terms of reference of the Commissioner provided for the mandate as *"To enquire into the working and administration of the present Company Law in Ghana and in the light of such enquiry to make recommendations for the amendment and alteration of Company Ordinance and of such other laws of Ghana as the Commissioner may consider necessary in regard to his conclusions concerning the said Companies Ordinance."*²⁰ In undertaking the task, the Commissioner is charged to *"take into account and examine the laws of such other African States as he may consider appropriate and he shall be entitled to recommend that any existing or proposed law in relation to companies enacted by any African State may be adopted in whole or in part for use in Ghana"*.²¹ Further, the Commissioner was mandated in framing his recommendations to take cognisance of the need to encourage African enterprise in Ghana as well as the encouragement of foreign investment into Ghana.²² This mandate required having legislation that catered for both local business and foreign investments in Ghana.

Three approaches were opened to the Commissioner. The Commissioner could either recommend the adoption of company law enacted or proposed to be enacted by another African State with a similar level of development as Ghana, or recommend the adoption of English Companies Act, 1948 with modification, or recommend a new approach which is a new law drafted taking into account the particular circumstances of Ghana. The latter approach was adopted in the drafting of the

¹⁸ Gower's Report.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

Companies Code as was submitted by the Commissioner. This approach led to the codification of company laws which are based on the principles of English law, ideas borrowed from other jurisdictions though streamlined and pruned to suit Ghana and novel suggestions all of which aimed at having a Company Code that is suited for the requirements of Ghana and better than that prevailing in other jurisdictions.²³ The result of the work of the Commissioner was the passage of the Companies Act, 1963 (Act 179). The Companies Act, 1963 (Act 179) was the applicable company law in Ghana for about 56 years with six principal amendments in the Companies (Amendment) Act, 1994 (Act 474), Companies (Amendment) Act, 1997 (Act 531), Companies Code (Amendment) Act, 2001 (Act 609), Companies Code (Amendment) Act, 2002 (Act 627), Companies (Amendment) Act, 2012 (Act 835), and Companies (Amendment) Act, 2016 (Act 920).

With over five decades that the Companies Act, 1963 (Act 179), as amended, was in existence coupled with trends observed in other jurisdictions as well as developments in corporate transactions, there was the need to review the Companies Act, 1963 to suit current operations of businesses in Ghana. The effort to review the Companies Act, 1963 commenced with work done by the Statute Law Review Commission in 2003, which was built on by the Attorney-General Departments assisted by a committee of experts. The effort led to the draft Companies Bill which was first introduced in 2013 and later in 2018 and subsequently passed in 2019 as the Companies Act, 2019 (Act 992). The Companies Act, 2019 (Act 992), which repealed the Companies Act, 1963 (Act 179) and its amendments, is now the applicable company statute in Ghana. The memorandum to the Companies Bill, 2018 (which was enacted as the Companies Act, 2019), states the purpose as *“the Bill is to amend, consolidate and revise the law relating to companies and reproduce substantially with amendments the Companies Act, 1963 (Act 179).”* The Companies Act, 2019 is thus a substantial reproduction of the Companies Code as drafted by Professor L.C.B. Gower and passed as the Companies Code, 1963 (Act 179) which was renamed as the Companies Act, 1963 (Act 179) and amended in few respects. However, the Companies Act, 2019 (Act 992) also introduced some novel concepts in company law aimed at conforming to new trends in business practice. The general purpose of the new Companies Act, 2019 (Act 992) is to enhance the legal and regulatory framework for doing business in Ghana through the use of companies.

As noted earlier, in the drafting of the Companies Act, 1963 (Act 179), Professor L.C.B. Gower submitted a final report which contained detailed explanations for each of the provisions in the Companies Act, 1963 (Act 179). The final report is referred to as the Final Report of the Commission of Enquiry into the Working and Administration of present Company Law of Ghana, 1961 (shortly referred to as the “Gower’s Report”). The Gower’s Report serves as a useful tool in the interpretation of the provisions of the Companies Act, 1963 (Act 179). The draft Companies Bill attached to the Gower’s Report (which Bill was passed into the Companies Act, 1963 (Act 179) contained provisions that mandated the court to refer to the Gower’s Report in the interpretation of the provisions of the

²³ Gower’s Report.

Companies Act, 1963 (Act 179) in the event of ambiguity. This would have given a binding effect to the Gower's Report as a tool of interpretation of the Companies Act, 1963 (Act 179). However, the proposed provision was rejected and removed during the passage of the Companies Act, 1963 (Act 179). The Gower's Report, therefore, has no binding effect. However, it continues to be a persuasive tool of interpretation because of section 10 of the Interpretation Act, 2009 (Act 792). Section 10 of the Interpretation Act, 2009 (Act 792) provides that in the ascertainment of the meaning of an enactment, the court may consider a report of a Commission, committee or any other body appointed by the Government or authorised by Parliament, which has been presented to the Government or laid before Parliament as well as Government Paper, or a textbook, any other work of reference, a report or memorandum published by authority about the enactment, and papers laid before Parliament in reference to the enactment. Gower's Report falls into this category. It may therefore be considered by courts in the interpretation of the provisions of the Companies Act, 1963 (Act 179).

The Companies Act, 2019 (Act 992) which repealed the Companies Act, 1963 (Act 179) does not have a similar detailed explanatory memorandum as the Gower's Report. However, the provisions of Act 992 are a substantial reproduction of the provisions of Act 179. As noted earlier, decided cases are one of the main sources of company law in two ways. Firstly, case law fills in the gaps that may be left in the statute and, secondly, provide an authoritative binding interpretation of the provisions of the statute. Decided cases on provisions of the Companies Act, 1963 (Act 179) will therefore offer a strong persuasive, if not binding, authority on the interpretation of the provisions of Act 179 reproduced in Act 992. It is suggested that interpretation of similar provisions under Act 179 and Act 992 under the doctrine of judicial precedent should be binding to the extent that strong justification must be provided for a court to depart from the interpretation given by a higher court or court of similar jurisdiction. A court should not be free to depart from such case law simply based on the repeal of Act 179 even though the same provisions in Act 992 are in issue in a matter. Even if conceded that such cases will not operate strictly as a binding precedent under the doctrine of stare decisis as an interpretation of a repealed statute by a court (higher or of similar jurisdiction) notwithstanding the reproduction of the provision in a new statute, justification for departing from case law must be more than the repeal of Act 179. In any case, the point remains that case law on the interpretation of Act 179 provides a very strong persuasive authority which a court cannot depart from unless strong justification exists which in particular must relate to the interpretation of the new statute as a whole.

The above may have been envisaged by the drafters of the Companies Act, 2019. In relation to other aids of interpretation, particularly the Gower's Report, the Memorandum to the Companies Bill, 2018 (which was enacted into Act 992) itself provides that: *"the present re-enactment [that is the Companies Act, 2019] maintains as much as possible the language of the 1963 legislation so that the Final Report of the Commission of Enquiry into the working and administration of the Company Law of Ghana would still be of assistance when problems of interpretation arise bearing in mind*

section 10 of the Interpretation Act, 2009 (Act 792).” In view of this, no further argument needs to be made for the continuous use of the Gower’s Report as a tool of interpretation for the Companies Act, 2019 (Act 992). Further, it is suggested that case law on Act 179, under the doctrine of judicial precedent, if not binding should at least provide a strong persuasive authority on similar provisions under Act 992.

1.3 Sources of Company Law

Understanding of the scope of company law will not be complete without reminding students and practitioners of the general sources of law in Ghana so that the impression is not created from reading this chapter that the scope of sources of law that applies to companies in Ghana is limited. It should, therefore, be borne in mind that when seeking to answer questions or address issues relating to company law or affecting companies in Ghana, one must consider the general sources of law. The general sources of law in Ghana are stated in article 11 of the Constitution. Article 11 of the 1992 Constitution provides:

“(1) The laws of Ghana shall comprise –

- (a) this Constitution;*
 - (b) enactment made by or under the authority of the Parliament established by this Constitution;*
 - (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;*
 - (d) the existing law; and*
 - (e) the common law.*
- (2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.*
- (3) For the purposes of this article, “customary law” means the rules of law which by custom are applicable to particular communities in Ghana.*
- (4) The existing law shall, except as otherwise provided in clause (1) of this article comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution, and any Act, Decree, Law or statutory instrument issued or made before that date, which is to come into force on or after that date.*
- (5) Subject to the provisions of this Constitution, the existing law shall not be affected by the coming into force of this Constitution.*
- (6) The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution.*

- (7) Any Order, Rule or Regulations made by a person or authority under a power conferred by this Constitution or any other law shall –
- (a) be laid before Parliament;
 - (b) be published in the Gazette on the day it is laid before Parliament; and
 - (c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two thirds of all the members of Parliament.”

Any legal issues relating to companies must be resolved having regard to the general sources of law as stated above. The reference to company law in the specific sense as described above and a broader sense as the laws applicable to companies must relate to the above sources. Illustration in relation to sources will be helpful here.

The Constitution – as indicated above, it has been held in the case of *New Patriotic Party v. Attorney-General (CIBA Case)*²⁴ that a company incorporated under the Companies Act qualifies as a person and is subject to the provisions of the Constitution, 1992. In that respect, the activities and operations of companies in Ghana must conform to the Constitution, 1992 which is the most fundamental law of the land. The case of *Attorney General v. Balkan Energy Ghana Ltd, Balkan Energy LL.C, and Philip David Elders*²⁵ also illustrates the application of the Constitution, 1992 to the operations of a company. In that case, Article 181 of the Constitution, 1992 was in issue in relation to a contract entered into by the company with the Government of Ghana as to whether it amounts to an international business transaction for which parliamentary approval is required for the contract to be valid.

Acts of Parliament – the Companies Act, 2019 (Act 992) is a statute enacted by Parliament and is a direct example of the application of this source of law. In addition, other laws of general application and applicable sector specific laws as explained above also come from this source of law.

Subsidiary Legislation – the Companies Act, 2019 (Act 992) provides for the Minister of Justice to enact legislative instruments to govern various aspect of the implementation of the Companies Act, 2019.²⁶ Subsidiary legislations provide details for the implementation of the Act. The Companies Act, 2019 also saved the application of previous legislative instruments passed under the Companies Act, 1963 (Act 179) as amended. Subsection (2) of section 384 of Act 992 provides that notwithstanding the repeal of the Companies Act, 1973 (Act 179) and its amendments, Regulations passed pursuant

²⁴ [1997-98] 1 GLR 378.

²⁵ Supreme Court, Ghana No. J6/1/2012.

²⁶ Section 380 and 381 of Act 992.

to the repealed enactments and in force at the commencement of the Companies Act, 2019 (Act 992) shall be considered to have been made or done under Act 992 and shall continue to be in force.

In addition, other subsidiary legislations not necessarily passed pursuant to the Companies Act, 2019 may be relevant as laws of general application or sector specific regulations when advising companies or dealing with issues affecting companies. In sum, subsidiary legislations remain a source of company law.

Existing Laws – one of the sources of law as provided under the Constitution, 1992 is laws in existence before the coming into force of the Constitution, 1992 but which are not inconsistent with the Constitution. Prior to the passage of the Companies Act 2019 (Act 992), the Companies Act, 1963 (Act 179) was part of the existing law. In addition, subsidiary legislations passed pursuant to the Companies Act, 1963 (Act 179) before the coming into force of the Constitution, 1992 also fall under this source of law. As noted above, section 384 which repealed the Companies Act, 1963 (Act 179) and its amendments under subsection (1) provides in subsection (2) that the Regulations passed pursuant to powers conferred under the repealed enactments and in force at the commencement of Act 992 shall be considered to be enacted pursuant to Act 992 and shall continue in force. The section may also be interpreted as providing continuity for Regulations and such Regulations may be deemed to have been passed under the Companies Act 2019 (Act 992). However, it may still be considered as an existing law given the definition provided under article 11 of the Constitution, 1992. Laws applicable as laws of general application or sector specific legislations to companies may also predate the Constitution and come under this source.

Common law – common law has been defined under Article 11(2) of the Constitution, 1992 to comprise rules generally known as the common law, rules generally known as the doctrines of equity and rules of customary law including those determined by the Superior Court of Judicature.²⁷ As previously noted, the approach to drafting the Companies Act, 1963 was to codify laws, including common law and rules of equity. The Companies Act, 1963 (Act 179) therefore restated the common law concepts relating to company law. In addition, the Companies Act, 1963 provides in section 7 of the Act for the continuous application of the rules of equity and common law in so far as they are not inconsistent with the provisions of the Companies Act, 1963 (Act 179). This is to enable gaps in the law to be filled by the case law, as well as the development of the principles in the Act through cases on the interpretation of the provisions.

The Companies Act, 2019 (Act 992) is a substantial restatement of the provisions of the Companies Act, 1963 (Act 179) as amended. It is, therefore, based on the same codification approach used in the drafting of the Companies Act, 1963 (Act 179). One can therefore safely state that Act 992 seeks to codify the common law relating to company law. In addition, Act 992 restated section 7 of the

²⁷ Article 11(2) of the 1992 Constitution.

Companies Act, 1963 (Act 179) in section 5 where it permits the application of the rules of equity and common law provided they are not inconsistent with the provisions of Act 992. Customary law also finds application in issues relating to companies. Issues as to who qualifies as legal personal representative to hold shares of a deceased person may be resolved pursuant to applicable customary law.²⁸ It is, therefore, critical to note that a source of company law in Ghana is common law as provided under Article 11(1) and defined by clause (2) of Article 11 of the Constitution, 1992. In other words, the common law as defined under Article 11(2) of the Constitution, 1992 continues to be a critical source of company law.

²⁸ See section 102 of Act 992.

2.0 UNINCORPORATED AND INCORPORATED ENTITIES

2.1 Introduction

The title of this book and the preceding chapter indicate that its content relates to company law. Although the focus of the book is companies, this should not be misconstrued to mean a company is the only means of undertaking a business or pursuing an object. There are other mechanisms through which activities – business and object – can be undertaken. In this respect, this chapter seeks to draw attention to such other mechanisms. It is, therefore, important that one is familiar with these other means to avoid confusion by attempting to apply company law to other entities, who in most respects perform analogous activities as that of companies. In addition, practitioners should not restrict advice on the mechanism by which a business or object may be undertaken to incorporation or registration of companies. This chapter, therefore, looks at other entities – incorporated or unincorporated – through which business and other objects can be pursued. These entities include companies, sole proprietorship, partnership, statutory corporations, cooperative societies and incorporated trusts. These entities can broadly be classified as incorporated and unincorporated entities. These entities are used to pursue business activities for profit or objects that are not profit oriented. Both incorporated and unincorporated entities have advantages and disadvantages dependent on varying factors. In the first part, factors that distinguish an incorporated entity from an unincorporated one are discussed. The second part explains the legal framework affecting a number of these entities.

2.2 Distinction between Unincorporated and Incorporated Entities

(a) Separate legal personality

The most fundamental attribute that separates an incorporated entity from an unincorporated entity is the concept of separate legal personality. The concept of the separate legal entity only applies to an entity when expressly conferred by the applicable law on the entity. Per applicable laws in Ghana, incorporated entities include partnership, statutory corporations, companies, incorporated trust and cooperative societies. The instruments under which each of these entities is incorporated expressly provide that it becomes a body corporate thereby conferring on the entity separate legal personality from owners, members and managers of the entities.

The concept of separate legal personality means the recognition in law that an entity has a separate, distinct and independent legal status from that of its owners and managers. That is the entity exists in its own right and separate from the owners or managers of the entity. The law, therefore, recognises the entity as having a legal capacity of its own and the entity on its own can undertake recognised acts, enjoy rights and incur liabilities on its own which is not dependent on the capacity

of the owners or managers of the entity. Part of that recognition requires that acts done by the incorporated entity must be done in its own name and not the name of the owners or managers of the incorporated entity. The incorporated entity as a legal person on its own has legal rights and obligations attributable to it. The incorporated entity can therefore act as an independent legal person in its own name the same way that a natural person can do. This characteristic is fundamental to all incorporated entities and all other attributes of an incorporated entity flow directly from the concept of separate legal personality.

As already indicated the separate legal personality must be conferred by legislation that created the entity. Under the Companies Act, 2019, section 14(1) provides that *"From the date of incorporation, the company becomes a body corporate by the name contained in the application for incorporation and ... is capable of performing the functions of an incorporated company"*. The Statutory Corporation Act, 1964 (Act 232) provides an analogous provision in section 3 as follows:

"Every corporation established under this Act —

(a) shall have perpetual succession and a common seal;

(b) may sue and be sued in its own name;

(c) subject to the provisions of the instrument by which it was established shall have power, for any purpose which, in the opinion of its governing body, is necessary or expedient for or in connection with the proper exercise of the functions of the corporation, to acquire and hold any movable or immovable property, to sell, lease, mortgage or otherwise alienate or dispose of any such property, and to enter into any other transaction."

In addition to the above, every Act of Parliament that establishes a statutory corporation states that it is a body corporate. This indicates the separate legal personality of the entity as generally distinct from that of the State or the owners and managers. That distinction is further illustrated by the fact that the entity has the capacity to sue and be sued in its own name, has the capacity to acquire and own property in its own name, and having perpetual succession. All these are attributes of the separate legal personality concept.

The Incorporated Private Partnership Act, 1962 (Act 152) provides in relation to a partnership under section 12(1) that:

"From the date of registration mentioned in the certificate of registration issued in accordance with section 6 of this Act, the firm shall be a body corporate under the firm name, distinct from the partners of whom it is composed, and capable forthwith of exercising all the powers of a natural person of full capacity in so far as such powers can be exercised by a body corporate."

As indicated, the concept of separate legal personality is the fundamental attribute of an incorporated entity. The concept distinguishes an incorporated entity from an unincorporated entity. In comparison to an unincorporated entity, the law does not confer legal personality on an unincorporated entity. Even though there may be requirements for the registration of an unincorporated entity, the law regards the entity or association and the owner or members as one and the same. Notwithstanding that the entity or association may have a name, there is no recognition in law that the entity or association can act in such a name. The entity or association is, therefore, not separate from the owner or members of the entity or association. The act of the entity or association is the automatic act of the owner or members. Therefore, any right or liability resulting from the act of the entity or association is the right or liability of the owner or members. Since there is no recognition in law of the legal personality of the entity or association, the entity or association has no capacity pursuant to which it can act, enjoy rights or incur liabilities.

Not only does the concept of separate legal personality distinguishes an incorporated entity from an unincorporated entity but it provides the basis for all other attributes of an incorporated entity as further discussed below. The concept of separate legal personality has been characterized as the cardinal principle that underpins company law in all common law jurisdictions.²⁹ There is a plethora of cases that illustrate the application of the separate legal personality. These include:

*Salomon v. Salomon & Co. Ltd*³⁰ is the most authoritative case on the principle of separate legal personality. In this case, Mr. Aron Salomon previously carried on a leather and boot manufacturing business as a sole proprietorship. A company was incorporated and one of the objects of the company which was implemented was the acquisition by the company of the business then carried on by Mr. Salomon. The business had been a prosperous one and was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons. The wife and children of Mr. Salomon each subscribing for one share. Mr. Salomon afterwards had 20,000 shares allotted to him. The company afterwards became insolvent and went into liquidation. In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. The learned judge thought the liquidator was entitled to the relief asked for, and made the order complained of. He was of the opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him,

²⁹ Per Sophia Akuffo, JSC in the case of *Morkor v. Kuma* (East Coast Fisheries Case) [1998-99] SCGLR 620 @ 632.

³⁰ [1895-9] AII ER 33; [1897] AC 22.

and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal, the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company ... was a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." On the issue of whether the company is the agent of the subscribers or trustees of the company thus formed, the House of Lords held that the company after incorporation attained a separate legal personality distinct from its members.

Lord Mcnaghten stated @ pg. 52:

"When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."

Lord Davey concurred @ pg. 56 by stating:

"Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust. The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company

became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity"

The above position has been applied in a number of subsequent cases including *Lee v. Lee's Air Farming Ltd*³¹; *Prest v. Petrodel Resources Ltd*³² and *Foss v. Harbottle*³³ which are discussed subsequently in this book.

The position has been reflected in the company law of Ghana and stated as a foundation on which our Companies Act is based.

*Morkor v. Kuma (East Coast Fisheries Case)*³⁴ – In a sale agreement between the parties for some metric tons of fish to the first defendant which was a company, the chief executive and shareholder of this company entered into the sale agreement on behalf of the company and when the company defaulted in payment of the remaining amount, it was sued together with the chief executive. The trial court held that the chief executive of the company was liable. On appeal, the issue for determination was whether the appellant was a proper party to the suit. It was held that the proper defendant in an action on a contract is the person (or persons) who made the promise, the breach of which created the cause of action. Since the first appellant had been sued jointly' with the first defendant, she would be a proper party to the suit only if specific personal liability were established against her, or the veil of incorporation could be lifted to make her acts synonymous with those of the company, or vice versa. Akuffo JSC stated @ pgs. 631 and 632:

"It is clear on the face of exhibit A, the sale agreement that the transaction was between the respondent and the company. Furthermore, the claim against the appellant was grounded solely in this sale agreement. It is also patently clear from the statement of claim that the only reason the appellant was sued was because she was the chief executive, a director and the main shareholder of the first defendant company. The statement of claim made no averments against the appellant that would, prima facie, attach any personal liability to her, or render her jointly liable with the first defendant, under the agreement. The fundamental question, therefore, is "were there any circumstances that justified the lifting of the veil of incorporation?"... Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its

³¹ [1960] 3 All ER 420.

³² [2013] UKSC 34.

³³ (1843) 2 Hare 461.

³⁴ [1998-99] SCGLR 620.

authorised business. In this capacity a company is a corporate being, which, within the bounds of the Companies Code, 1963 (Act 179) and the regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it. From the time the House of Lords clarified this cardinal principle, more than a century ago, in the celebrated case of *Salomon v Salomon & Co* [1897] AC 22, HL it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Act 179 is grounded ... For the purposes of taxation, there are numerous statutory provisions which in effect require the corporate veil to be pierced; and the courts have in recent years shown an increasing tendency for such purposes to look at the economic consequences of transactions rather than their strict format, thus in effect bypassing the question of corporate identity. ... Turning to the instant case, it is clear from the record that the proceedings, in which the allegations of fraudulent trading were made, were *ex parte*. It is also clear that in none of the affidavits filed by the respondent in the subsequent proceedings on notice did the respondent repeat these allegations of fraudulent trading. Therefore, it was erroneous for the majority of the Court of Appeal to base their finding that the circumstances justified the lifting of the veil of incorporation, upon these allegations. Neither the appellant nor the defendant was ever in a position or had the opportunity to respond to the same ... The fact that the appellant was at all material times a shareholder, director and manager of the first defendant is not in dispute, although as to whether she was the majority shareholder, we have no proper evidence and it is, in any event, quite irrelevant. As has already been noted, it is also clear on the face of the agreement that the same was between the first defendant company per se, and the respondent as agent for his principals. There is no evidence that the appellant negotiated the agreement on her own behalf or for her immediate personal purposes. Rather, what is quite clear is that she negotiated the agreement in the normal course of the first defendant's business. As the chief executive officer of the first defendant, it would be part of the normal functions of the appellant to negotiate agreements on behalf of the company. Although the appellant co-executed the agreement, she did so with another director of the company, as is the common practice with corporate bodies. The signature of a single director is not usually acceptable in such circumstances. Furthermore, since a company is non-human the only means by which it may execute an agreement is for its directors, or some other authorised person, to sign on its behalf. When an officer of a company, in the normal course of her duties, so negotiates or signs an agreement entered into by the company, no personal liability

is thereby created, in the absence of other clear indications to the contrary. We see no such indications in this case."

*Owusu v. R.N Thorne Ltd*³⁵ - the plaintiff-applicant sued the first defendant, a limited liability company and the second defendant, who was a shareholder and director, as its agent. By an ex parte application, he obtained an absconding warrant against one R.N. Thorne who, together with his wife, also a director of the first defendant company, on the grounds that they had closed the company offices and sold their property and that R.N. Thorne was going on leave and was not likely to return to Ghana. He, therefore, prayed for an order that R.N. Thorne be ordered to furnish personal bail for appearance under the rules of court. The court held that the company existed apart from the directors and members. That R.N. Thorne was not sued personally and was therefore not a defendant within the meaning of rules of court for the court to go into the question of security. Per Boison J. stated @ pg. 92:

"What the court has to determine in this motion is whether R. N. Thorne personally or the company is the first defendant in this case. The theory of legal personality of corporations has its own practical problems but it is clear that a limited company or corporation has legal existence apart from the directors and members, and it is in a few recognised exceptions that the law lifts the "corporate veil," as it has been put, and looks to the directors and members personally. On the plaintiff's own pleadings he sued R. N. Thorne Ltd. the first defendant and one other as the second defendant – the first defendant was the master of the second defendant. It may well be and undoubtedly is true that R. N. Thorne and his wife are the only directors of the company but the company exists apart from the directors and the members. To hold that the directors are personally the first defendant in this case will be defeating the doctrine of the separate existence of a limited liability company. The action is not against R. N. Thorne personally. I am not determining the liability of the first defendants as a company. The question here is: Is R. N. Thorne personally sued as the first defendant so that he is a "defendant" within Order 35? The answer is no. As far as the court is aware the company is not in the process of being wound up and even if that were so, it would not make R. N. Thorne personally the first defendant in this case. In the absence of R. N. Thorne from Ghana, another director has been appointed. The company as far as the court can gather is still in existence and R. N. Thorne is not and cannot be personally the first defendant herein so as to go into the question of his security."

*Quartson v. Quartson*³⁶ – the petitioner in an action against the respondent for divorce seeks from the respondent payment of her director's fees and allowances as a director of Pious Trading and

³⁵ [1966] GLR 90.

³⁶ [2012] 2 SCGLR 1077.

Construction Company Limited of which the respondent has coveted as “his” company. The Supreme Court in dismissing an appeal on this claim stated per Ansah JSC @ pg. 1080:

“The appellant seeks a declaration from this court that she is entitled to directors’ fees and dividends from Pious Trading and Construction Company Limited. The law on the separate legal personality of companies vis-à-vis the personality of the directors and shareholders, is trite. This court would follow the reasoning of a long line of cases beginning with Salomon v. Salomon [1897] A.C. 22, H.L. that a company has separate legal personality and unless certain exceptions can be shown, the court is reluctant to lift that veil of incorporation, see Morkor v. Kuma (East Coast Fisheries Case) [1998-99] SCGLR 620. The appellant here has not shown that this case can be brought under any of the allowed exceptions that warrant the lifting of the corporate veil. The proper person for an action for directors’ fees and dividends would be the company, Pious Trading and Construction Company Ltd and not Pious Pope Quartson himself.”

*Soon Boon Seo v. Gateway Worship Center*³⁷ – the defendant promised to raise funds for the second plaintiff whilst on a projected trip to Korea. The defendant on his return from the trip informed the church that he had been able to raise the funds from a benefactor. There was no disclosure of how much was raised, neither did the defendant hand over the funds to the respondent church. The funds were lodged in his bank account and part subsequently used to acquire the disputed land. An action was commenced by the pastor of the church as the first plaintiff and the church, acting by its trustees against the defendant in the Circuit Court for a declaration of title to the land in dispute, recovery of possession, perpetual injunction, an order for accounts and other orders. The Circuit Court granted the relief sought by the respondent except the order to account. On appeal to the Court of Appeal and subsequently to the Supreme Court, the defendant-appellant alleged that taking into account the claim and evidence in the matter, the first plaintiff, the pastor, had no locus standi in the suit and should have been struck out as a party. It was held per Akuffo JSC @ pgs. 291-292:

“In Ground One of the Notice of Appeal, the Defendant challenged the locus standi of the pastor of the Second Plaintiff church to be party in the case. The Court of Appeal reached the conclusion that, on the evidence on record, the beneficial ownership or interest in the property and/or funds in question vested in the Second Plaintiff, and no one else. As is clear from the record, the Second Plaintiff is a company limited by guarantee and incorporated under the Companies Act, 1963 (Act 179) (as revised). As a result, pursuant to Section 24 of the Companies Act, it has all the powers of a natural person of full capacity. As such, it is a fully-fledged legal entity, with a personality separate from the natural persons forming it, and with capacity to sue and be sued in its own name. In law, the members of a company have no direct proprietary rights over its assets, the company being the sole owner

³⁷ [2009] SCGLR 1077.

of its assets (see Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd. [1962] 1 GLR 122). Since it is patent from the record that the subject matter of the action was being claimed as the Church's asset rather than the joint property of the church and the First Plaintiff, there was no reason why the First Plaintiff should have been included as a co-claimant. From the record, Pastor Ben Adjei really has no business in the suit, since he does not make any claim of interest or right in the subject matter of the suit. The Second Plaintiff church is capable of handling its own litigation and the First Plaintiff is an unnecessary party."

*Republic v. High Court, Accra; Ex parte Appiah and others*³⁸ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate filed included house no. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had an interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all sums of money received in respect of the estate of the Deceased, the court on the issue of inclusion of the house in the estate of the deceased stated per Ampiah JSC @ pg. 425 that:

"In the instant case, the orders made seem to involve an incorporated body. By the deceased's presumed 100 percent shareholding, Lims Co Ltd, the second defendant, seems to have been included in the estate of the deceased. The presumption being that since he owned 100 per cent of the shares, he and the company are one and that the company is owned by the deceased as his personal property. That may factually be so, but the legal position is that an incorporated company has a legal personality of its own different from those who form it. It could sue and be sued as a legal entity. There is no dearth of authority on this issue: see Salomon v Salomon Co [1897] AC 22, HL.

Consequently, though the late Kofi Boye Safo could be the owner of the 100 per cent shares in the company, he is not the company so as to make the company his personal property. As a legal entity the company is governed by rules and regulations of the company. Its management is vested in the board of directors whose managing director is directly involved in the day to day activities of the company and who is responsible to the board and the shareholders. Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later

³⁸ [1999-2000] 2 GLR 420.

distribute them to the beneficiaries who then would have their name entered in the register of the company as members."

(b) Limitation of liability

The separate legal personality concept of an incorporated entity mandates that rights and liabilities arising from an act of the incorporated entity are ascribed to the entity rather than the owner, members or any other person associated with the entity. In other words, **the general proposition is that owners of incorporated entities are not liable for the debt and obligations of the incorporated entity.** This position is reflected in the judgement of *Salomon v. Salomon & Co. Ltd*³⁹; *Morkor v. Kuma (East Coast Fisheries Case)*⁴⁰; *Owusu v. R.N. Thorne*⁴¹ and many others. The first use of the concept of limitation of liability generally illustrates the position that an incorporated entity assumes responsibility for its own liabilities resulting from its act. Such liability is not the liability of the owners, members or managers of the incorporated entities.

In the strict sense, however, limitation of liability refers to the ability of owners or members of an incorporated entity or association to limit the extent to which they can be held liable to contribute to the satisfaction of the liabilities of the incorporated entity or association. As such, owners or members of a company can limit their liability for the acts of the incorporated entity to either amount made available to the incorporated entity for use in its activities, or amount that they agree to contribute in the future either at a specified time or upon the occurrence of an event, or as required to be provided by law. The application of the concept varies in relation to the specific incorporated entities and law pursuant to which the separate legal personality is conferred on such an entity. As noted earlier, the concept of legal personality is only applicable if expressly conferred by legislation. As such the legislation can limit the scope of the concept in relation to its application to the liability of the owners for the debt of the incorporated entity either by maintaining the liability of the owner or limiting the extent of the liability.

A partnership, upon its registration under the Incorporated Private Partnership Act, 1962 (Act 152), enjoys separate legal personality pursuant to section 12(1) of the Act. Notwithstanding the express conferment of separate legal personality on the firm, sections 12(3) of the Act provides that each partner remains liable without limitation for the liability of the firm. This position is different from that of the position of the Companies Act, 2019 (Act 992). As the company acquires separate legal personality, the liability of the members to contribute towards the satisfaction of the liability of the company may be limited depending on the type of company incorporated. Liabilities incurred by the company remains that of the company. As such, no action can be directly taken against the

³⁹ [1895-9] AII ER 33; [1897] AC 22.

⁴⁰ [1998-99] SCGLR 620.

⁴¹ [1966] GLR 90.

owners or members of a company based on the liabilities incurred by the company towards third parties. The position, therefore, remains true that the owners or members of the company are not answerable for the liability of the company. This position remains true irrespective of the type of company incorporated in Ghana. There are, however, situations where the owners, members or shareholders may be required to make payments toward the satisfaction of the liabilities of the company or stand to lose the amount due to the liability of the company.

Owners or members of a company may contribute the capitals or invest the money required for the running of the company. Owners stand to lose the amount invested or contributed to the company if the company uses the capital to satisfy liabilities incurred to third parties and cease operation. In that respect, one may loosely say that the owners assumed the liability of the company. Further, in respect to companies with shares, where the shareholders acquire shares, the shareholder is under liability to pay the stated amount for the shares. The shareholder will remain liable to make the full payment for the shares. In the event the company incurs a liability that it does not have the resource to settle, the owner will be forced to pay the balance owed on the shares either to the company to be used to settle the company's liability or make such payment directly to the debtor or person who the company owes the liability. The extent of the payment to be made by the shareholder depends on whether the type of company in which the member acquired the shares has limited or unlimited liability. If the liability is limited, the shareholder's liability will be limited to the amount he owes on the shares. If the liability of the company is unlimited, then the shareholder will be liable to the full extent of the liability of the company. For companies limited by guarantee, which do not have and do not issue shares, the liability of the members is limited to the amount they promised voluntarily to contribute to the company to settle its indebtedness in the event the company is by itself unable to satisfy the liability when the company is winding up.

The most important point to note under this concept in distinguishing an incorporated entity from an unincorporated entity is that, first, the incorporated entity itself is liable for its indebtedness, liabilities and obligations as separate from the owners or members. Owners or members cannot be sued for the liabilities of the incorporated entities unless the law conferring separate legal personality expressly state so. Owners or members may, however, pursuant to law or contract be liable to contribute towards the satisfaction of the liabilities of the incorporated entity. The discharge of their liability to the company may be through the company or directly to settle the liability of the company to third parties.

In comparison to unincorporated entities or associations, the entity has no legal personality and no capacity to act on its own. Lack of legal personality of unincorporated entities means the concept of limitation of liability is not applicable in the sense explained above. An unincorporated entity cannot itself be liable to anyone neither can liability be enforced against it. As such, the owners or members of an unincorporated entity or association do not have or enjoy limitation of liability as explained

above. The purported acts of an unincorporated entity are the acts of the owner or members. The owner or members bear the liability for the debts and obligations arising. Any act or obligation of an unincorporated entity is the act or obligation of the owner or members since the unincorporated entity has no legal personality separate and distinct from the owner. The liabilities are therefore enforceable against the owner personally and to the full extent of the liability subject to any exclusion or limitation of liability in the contract entered with the other party enforcing the liability. This is one of the characteristics of a sole proprietorship entity which is an unincorporated entity. The proprietor is fully liable for the liabilities of the enterprise.

The law may permit instances that the veil of incorporation may be lifted or pierced, and liability of the incorporated entity assigned to the owner or members. The concept of lifting or piercing the veil of incorporation for the purposes of assigning liabilities to the owners and managers of the company is discussed in chapter 9.0 of this book.

The law under which the separate legal personality is conferred on an incorporated entity can also, notwithstanding the legal capacity of the entity, impose liability on the owners for the actions of the incorporated entity. This is seen in the case of partnership incorporated under the Incorporated Partnership Act, 1962 (Act 152). Section 12(1) of Act 152 confer a separate legal identity on the firm. However, section 12(3) of the Act provides that *“(3) Notwithstanding that the firm is a body corporate, each partner therein shall be liable, without limitation, for the debts and obligations of the firm in the manner referred to in section 16 of this Act; but shall be entitled to an indemnity from the firm and to contribution from his co-partners in accordance with his rights under the partnership agreement.”* Therefore, even though a partnership or firm has a separate legal personality, the concept of limitation of liability is not applicable to the partners.

(c) Perpetual succession

An attribute of an incorporated entity is the legal recognition that its continued existence is not affected by the demise of the owners or officers, or in the event, the owners or officers cease to be associated with the entity in any other manner. That is, an incorporated entity enjoys perpetual succession or continuity of legal existence. The incorporated entity may continue to exist notwithstanding that the owner or officers die, or the owner retires, transfers his interest to another person or the officers resign or the engagements or appointments of the officers are terminated. In contrast to an unincorporated entity, sole proprietorship, the demise of the owner will lead to the demise of the entity. The business of a sole proprietorship will come to an end upon the death of the proprietor and his assets including those used for the business will devolve according to the applicable laws of devolution. Where the unincorporated entity in question is an unincorporated association, all the members cease to undertake the common purpose, the unincorporated entity ceases to exist. The existence of an incorporated entity on the other hand is not affected by the demise

of the incorporators or those who control the affairs of the incorporated entity. A company will therefore continue to exist notwithstanding that the members or shareholders or directors cease to exist or be associated with the company. The company, therefore, enjoys perpetual succession as it is deemed in law to continue in existence until deliberate actions and steps are taken in accordance with the law of incorporation to bring its life to an end. That deliberate action to bring the life of an incorporated entity to an end is liquidation which may entail winding up followed by the dissolution of the entity or just dissolution of the entity. For a statutory corporation, which is set-up by law, the entity will cease to exist based on the repeal of the law or in the manner provided by the law through liquidation and resolution.

A similar position is taken under the Incorporated Private Partnership Act, 1962 (Act 152) in relation to a partnership that is clothed with separate legal personality upon registration under the Act. Section 12(2) of Act 152 provides that notwithstanding any change in the constitution of the partnership, the firm shall continue to exist as a body corporate until dissolved in accordance with the Act. Additionally, section 40 of Act 152 provides that where a partner ceases to be a partner of the firm, the firm shall continue in existence as a body corporate. However, if that results in the firm having only one partner, then the partner has six months to admit another partner failing which the existing partner shall commence the process to dissolve the firm in accordance with the Act.

(d) Capacity to enter legal relations

Flowing from the separate legal capacity conferred on incorporated entities, an incorporated entity acquires the legal capacity to enter into legal relations including contracts and transactions in its own name. In view of the artificial legal nature of the incorporated entity, it will ultimately act through natural persons who may be owners or may represent an owner who is also an incorporated entity or may be appointed to manage the affairs of the incorporated entity. Where such persons act on behalf of an incorporated entity, it is deemed to be the act of the incorporated entity. There may be instances where it is required to show authorisation express or implied, or instances where the act will only be the act of the incorporated entity when the entity is estopped from denying the act. However, the general principle remains that an incorporated entity has the capacity to enter into legal relations even though it acts ultimately through natural persons. In relations to companies, section 18 of Act 992 provides that *“(1) Subject to this Act and to any other enactment, a company shall have:*

- (a) full capacity to carry on or undertake any business or activity, to do any act, or enter into any transaction; and*
- (b) full rights, powers and privileges for the purposes of paragraph (a).”*

The Act, therefore, confer the capacity on a company, pursuant to the concept of its legal personality, to enter into legal relations, to undertake any business, activity or transaction. In so doing, the

company has full rights, powers and privileges. This capacity is subject to limitations as provided under the Companies Act, 2019. A similar provision is found in section 12(1) of the Incorporated Partnership Act, 1962 (Act 152) when it provides that: *“(1) From the date of registration mentioned in the certificate of registration issued in accordance with section 6 of this Act, the firm shall be a body corporate under the firm name, distinct from the partners of whom it is composed, and capable forthwith of exercising all the powers of a natural person of full capacity in so far as such powers can be exercised by a body corporate.”*⁴² A partnership upon registration and issuance of the certificate of registration assumes the capacity to enter into legal relations in a similar manner as a natural person of full capacity.

A similar position is stated in relation to statutory corporations and incorporated trust, all of which are incorporated entities. The general position, therefore, is that an incorporated entity can enter into a contract or any transaction with another person including its owners and officers.

A number of cases illustrate the capacity of an incorporated entity to enter into legal relations. These include the cases of *Salomon v. Salomon & Co Ltd*⁴³ and *Morkor v. Kuma (East Coast Fisheries Case)*⁴⁴. In Salomon’s Case, the company, Salomon & Co Ltd had the legal capacity to enter into a contract pursuant to which it acquired the business of Mr. Aron Salomon and further issued secured debentures to Mr. Salomon and unsecured debentures to other debenture holders. In the East Coast Fisheries Case, the company was held to be the party to the contract and not the chief executive who executed the contract together with another director.

*Lee v. Lee’s Air Farming Ltd*⁴⁵ - the appellant’s husband, Mr. Lee, formed the respondent company for the purpose of carrying on the business of aerial top-dressing. Mr. Lee was the controlling shareholder and the governing director of the company. He was also employed as chief pilot of the company and paid himself a salary. In his capacity as governing director and controlling shareholder, he exercised full and unrestricted control over all the operations of the company. Pursuant to the statutory obligations the company had insured itself against liability to pay compensation in the case of accident to him. While piloting an aircraft belonging to the company in the course of aerial top-dressing operations the aircraft crashed and Mr. Lee was killed. On a claim by the appellant against the respondent company for compensation, alleging that at the time of the accident her husband was a “worker” employed by the respondent company within the meaning of the Workers’ Compensation Act, 1922, as amended, the court held that the deceased was a “worker” within the meaning of the Act. His position as the sole governing director did not make it impossible for him to be a servant of the company in the capacity of chief pilot, for he and the company were

⁴² Emphasis mine.

⁴³ [1895-9] All ER 33; [1897] AC 22.

⁴⁴ [1998-99] SCGLC 620.

⁴⁵ [1961] AC 12 (Privy Council).

separate and distinct legal entities which could enter, and had entered, into a valid contractual relationship, which is not invalidated by the circumstances that the deceased was the sole governing director in whom was vested the full government and control of the company and the controlling shareholder. Also, Mr. Lee and the company were separate legal entities so as to enable the company to give orders to the deceased. One person may function in dual capacities and acting in one capacity gives orders to himself in another capacity. The contractual relationship was that of master and servant, and a contract of service was entered into and operated and the deceased was a “worker” within the statutory definition. Lord Morris of Borthy-Gest delivering the judgement stated:

“The substantial question which arises is, as their Lordships think, whether the deceased was a “worker” within the meaning of the Workers’ Compensation Act, 1922, and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged to the company and when he was carrying out the operation of top-dressing farmlands from the air. He was paid wages for so doing. The company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships’ view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If then, it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased ... Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation. The deceased might have made a firm contract to serve the company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his contract

would not have been affected. The circumstance that in his capacity as a shareholder he could control the course of events would not in itself affect the validity of his contractual relationship with the company. When, therefore, it is said that "one of his first acts was to appoint himself the only pilot of the company," it must be recognised that the appointment was made by the company, and that it was none the less a valid appointment because it was the deceased himself who acted as the agent of the company in arranging it. In their Lordships' view it is a logical consequence of the decision in Salomon's case that one person may function in dual capacities. ... the fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the company to give the orders does not alter the fact that the company and the deceased were two separate and distinct legal persons. If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased."

(e) Capacity to sue and be sued

Another attribute directly derived from the separate legal personality conferred on an incorporated entity is the ability of the entity to sue and be sued in its own name. Once recognised that the entity has a legal personality on its own and can therefore act on its own, enjoy rights and suffer liability on its own, the natural offshoot is that the entity must be able to maintain a legal action if its rights have been violated or breached by another person. Similarly, where the incorporated entity incurred liability and failed to discharge that liability, the other person must be able to maintain an action against the incorporated entity to recover debts or liabilities due. The incorporated entity, therefore, has the capacity to sue to enforce its right against a third party or parties. Such rights may arise pursuant to contract or law, be it common law or statute. A company in the same breath can also be sued if it breaches the obligations or infringes on the right of another person arising either in contract or law. The general position is therefore that a person cannot sue owners and officers of an incorporated entity for the act of the entity.⁴⁶ Similarly, the general principle is that the owners and officers cannot sue in their personal names to enforce the rights of the company.⁴⁷ Both general principles are subject to recognised legal exceptions under both common law and statute which are

⁴⁶ Owusu v. R. N. Thorne And Another [1966] GLR 90.

⁴⁷ Foss v. Harbottle (1843) 2 Hare 461; Bank of West Africa v. Appenteng [1972] 1 GLR 153.

discussed subsequently.⁴⁸ As indicated above, this position is reflected in the Companies Act, 2019 (Act 992)⁴⁹, Incorporated Private Partnership Act, 1962 (Act 152)⁵⁰ and the Statutory Corporation Act, 1964 (Act 232)⁵¹. This attribute is essentially a flipside to the attribute of the capacity of incorporated entities to enter into legal relations both of which derived from the separate legal personality conferred on incorporated entities.

Foss v. Harbottle⁵² - Richard Foss and Edward Starkie Turton were two minority shareholders in the company called "Victoria Park Company". The Company had been set up in September 1835 to buy 180 acres (0.73 km²) of land near Manchester (which became Victoria Park, Manchester). The claimants alleged that a number of improper and fraudulent transactions had been entered into and the property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property. That the directors had made a secret profit and breached their fiduciary duties to the Company. The Claimants asked that the guilty parties be held accountable to the company and that a receiver be appointed. The defendants were the five directors of the company – Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, Richard Bealey – and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane); and also H Rotton, E Lloyd, T Peet, J Biggs and S Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupt. The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has the standing to sue. The company is the proper plaintiff to maintain an action when a wrong is committed against the company. Wigram, V-C stated:

"The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of The Attorney-General v Wilson (1840) Cr & Ph 1 (without going further) it may be stated as undoubted law that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in The Attorney-General v Wilson in this – that, instead of the corporation being formally represented as Plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of—the Plaintiffs assuming to themselves the right and power

⁴⁸ See chapter 23.0 on Remedies for Corporate Wrongs.

⁴⁹ Sections 14(1) and 18(1) of Act 992.

⁵⁰ Section 16(1) of Act 152.

⁵¹ Section 3 of Act 232.

⁵² (1843) 2 Hare 461.

in that manner to sue on behalf of and represent the corporation itself.

*It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative..."*

*Owusu v. R.N Thorne Ltd*⁵³ - the plaintiff-applicant sued the first defendant, a limited liability company and the second defendant, who was a shareholder and director, as its agent. By an ex parte application, he obtained an absconding warrant against one R.N. Thorne who, together with his wife, also a director of the first defendant company, on the grounds that they had closed the company offices and sold their property and that R.N. Thorne was going on leave and was not likely to return to Ghana. He, therefore, prayed for an order that R.N. Thorne be ordered to furnish personal bail for appearance under the rules of court. The court held that the company existed apart from the directors and members. That R.N. Thorne was not sued personally and was therefore not a defendant within the meaning of rules of court for the court to go into the question of security. Per Boison J. stated @ pg. 92 that:

"What the court has to determine in this motion is whether R. N. Thorne personally or the company is the first defendant in this case. The theory of legal personality of corporations has its own practical problems but it is clear that a limited company or corporation has legal existence apart from the directors and members, and it is in a few recognised exceptions that the law lifts the "corporate veil," as it has been put, and looks to the directors and members personally. On the plaintiff's own pleadings he sued R. N. Thorne Ltd. the first defendant and one other as the second defendant — the first defendant was the master of the second defendant. It may well be and undoubtedly is true that R. N. Thorne and his wife are the only directors of the company but the company exists apart from the directors and the members. To hold that the directors are personally the first defendant in this case will be defeating the doctrine of the separate existence of a limited liability company. The action is not against R. N. Thorne personally. I am not determining the liability of the first defendants as a company. The question here is: Is R. N. Thorne personally sued as the first defendant so that he is a "defendant" within Order 35? The answer is no. As far as the court is aware the company is not in the process of being wound up and even if that were so, it would not make R. N. Thorne personally the first defendant in this case. In the absence of R. N. Thorne from Ghana, another director

⁵³ [1966] GLR 90.

has been appointed. The company as far as the court can gather is still in existence and R. N. Thorne is not and cannot be personally the first defendant herein so as to go into the question of his security."

Bank of West Africa v. Appenteng⁵⁴ - the case is a consolidation of a number of cases. The facts relevant to the principle under consideration is that the Bank negligently advised Mpotimma Ltd. The alleged negligent advice resulted in Mpotimma Ltd suffering financial loss. A shareholder of Mpotimma Ltd instituted an action against the Bank for the loss which Mpotimma Ltd has suffered as a result of the negligent advice given by the Bank. The shareholder alleged further that he has been directly affected by the negligent advice as it resulted in the inability of Mpotimma Ltd to declare profit from which his dividend could have been paid. The court held the company was a separate legal person. That a shareholder could not sue in respect of a wrong committed against the company. The proper plaintiff to maintain the action was the company itself. That upon incorporation a company acquires the legal capacity to sue in its name. Siriboe JSC stated as follows:

"In that case, which went before Ollennu J. (as he then was), the principle enunciated in Foss v. Harbottle (1843) 2 Hare 461, that, as a general rule, a shareholder cannot sue for wrong done to a company or to recover money as damages due to it, unless the action is taken by the company itself, and the exceptions to that principle were raised as has been done in the present suit. Then as now, it was submitted on behalf of the shareholders, that the shares held in the company are legal rights which, therefore, entitle the shareholders to sue for an invasion thereof... It cannot be disputed that the purpose for which a shareholder invests money or, to be exact, buys shares in a company, is the hope that the company will be a going concern and, thereby, be able to declare profits and pay dividends. If that should so happily happen, then as Ollennu J. (as he then was) put it in the case of Appenteng v. Bank of West Africa Ltd. [1961] G.L.R. at p. 203, "good luck to him [the shareholder]." But if the opposite should be the case, that is, where a loss is declared and no dividends are payable, Ollennu J. (as he then was) continued at the same page, "then that's just too bad, he cannot sue anyone to compel profits to be declared where none has been made." The reason Ollennu J. gave at p. 203 for this which seems logical, is that "a shareholder has no legal right that a company should always be a going concern." That seems to be the basis for holding against the plaintiffs in suit 2/61: Appenteng v. Bank of West Africa Ltd. [1961] G.L.R. 196 at p. 203; "that loss of business interests and yearly profits and dividend do not constitute an invasion of any legal rights of the plaintiffs, shareholders of Mpotimma Ltd. ... This position was made clear in the recent judgment by Lassey J.A. delivered on 8 June 1970, in appeal No. 106/67, namely, Kwabena Appenteng v. Bank of West Africa Ltd., unreported. It is significant to

⁵⁴ [1972] 1 GLR 153.

note that in his judgment, the trial judge in the present case appeared to have misconceived the basis of Ollennu J.'s decision which he partly accepted but partly rejected, as if it was an appeal before him. For while he agreed with the decision that a shareholder cannot sue for wrong done to the company, he however, disagreed with the view expressed concerning the absence of a cause of action in the plaintiff to sue for loss of profits and dividends resulting from the liquidation of the company."

Grant v. Tikobo⁵⁵ – in this case, a company owed a debt to the plaintiff company. The shareholders and directors of the debtor company sold the business of the debtor company to another company. The plaintiff company instituted an action for recovery of the debt and brought an application to prevent the managing director of the debtor company from travelling outside the jurisdiction. The plaintiff company also requested that to permit the managing director to travel, the managing director must provide security to the court for the claim against the company to recover the debt. The court, per Archer J. (as he then was) dismissed the claim. Relying on the case of **Salomon v. Salomon & Co Ltd**, the court stated that the plaintiff company was distinct and separate from its managing director. The managing director could not be prevented from travelling outside the jurisdiction based on a debt owed by the company to which he was the managing director.

An unincorporated entity on the other hand does not have the capacity to sue or be sued in its own name as it does not have the legal personality to engage in any act, enjoy legal rights or assume the legal obligation in its own name. The legal right to sue is the right of the owner or members of the unincorporated entity or association. Any legal action must be taken by or against the owner or the members of the unincorporated entity or association in the personal name of the owners or members. The sole proprietorship cannot sue another person using the registered trade name of the enterprise. The action must be in the name of the proprietor or owner of the enterprise. However, in order to show the linkage of the action to the enterprise, the owner may institute the suit in his personal name but add "trading under the name ... [inserting the name of the registered business name]".⁵⁶ That is to show the linkage of the action to the enterprise. It does not connote that the action is by the enterprise. The same approach is adopted if the action is taken against the sole proprietor. The name of the proprietor must be used with the addition as stated. However, Order 6, rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) permits suits against an owner in the business name. It has been stated that the action is not against the sole proprietorship, which is a non-existent entity,

⁵⁵ (1968) C.C. 28.

⁵⁶ Order 6, rule 8 of High Court (Civil Procedure) Rules, 2004 (C.I. 47), *Ghana Ports and Harbours Authority v. Issoufou* [1993-94] 1 GLR 20.

but the owner.⁵⁷ The process to be followed under the rules of court relates to dealing with the owner and not the enterprise as an entity with a legal personality.⁵⁸

*Barclays Bank Ghana Limited v. Lartey & Others*⁵⁹ - in this case, Lartey, during his lifetime, registered the name of his business under the Registration of Business Names Act, 1962 (Act 151), as "Scarts". For the purposes of his business, he took a loan from the plaintiffs to whom he mortgaged, inter alia, his landed property with buildings thereon as security for the loan. On his death, his administrators, the defendants incorporated a limited liability company called "Scarts Ltd." which took over the assets and liabilities of the business. The plaintiffs wrote to the defendants demanding repayment of the loan. When they failed to repay, the plaintiffs sued the administrators for an order for judicial sale of the mortgaged property. Counsel for the defendants argued that the defendants could not be sued since the business registered as Scarts became on registration an artificial legal entity with perpetual succession and a distinct personality from that of Lartey and that it was wrong for the plaintiffs to hold the defendants, who were only liable for the personal debts of Lartey, liable for the indebtedness of Scarts. Counsel further argued that it was incompetent for the plaintiffs to sue Scarts since it no longer existed with the incorporation of Scarts Ltd. which had taken over the assets and liabilities of Scarts. It was held that a business name registered under the Registration of Business Names Act, 1962 (Act 151), did not by the act of registration acquire any legal personality distinct from the person registering it. Registration of a business name merely protected the exclusive use and the right of the person registering the name. Consequently, the registered name Scarts did not acquire any legal personality distinct from Lartey, who carried on business under that name. It followed that Lartey was the mortgagor of the mortgaged property in question and the defendants being the administrators of Lartey's estate were the proper persons to be sued. Edward Wiredu J. @ pgs. 288 to 299 as follows:

"Unlike Act 179, the Registration of Business Names Act, 1962 (Act 151), was not intended to confer any distinct legal personality on any business name registered under it. The provisions of the Act are a clear pointer to this. Whilst the provisions of Act 179 refer to the company, those of Act 151 refer to the individuals registering their business names. The fact that registration under Act 151 does not confer perpetual succession on business names registered under it is borne out by section 10(1) of the Act. Act 151 protects the exclusive use and right of the person registering the business name. It is also clear from the provisions of Act 151 that the registrar deals solely with the person registering the business name, and this is understandable because it is only the "business name" which is registered, and someone must be responsible for such registration. I therefore hold in my ruling that Scarts as registered under Act 151 did not acquire any legal personality distinct

⁵⁷ S. A. Turqui v. Dahabieh [1988-89] 2 GLR 486 @ 500.

⁵⁸ The position is explained further under the characteristics of a sole proprietorship at sub-chapter 2.3.1 of this book.

⁵⁹ [1978] GLR 282.

from the person of Emmanuel Kotoku Lartey who carried on business under that name. I also reject as untenable the submission that Scarts enjoyed a perpetual succession under Act 151.

It follows from the above observations that whether Scarts or the deceased is the mortgagor under the instrument in question the defendants as administrators of the late Emmanuel Kotoku Lartey who registered the name Scarts, are answerable under the instrument and therefore the proper persons to be sued under it."

*Soon Boon Seo v. Gateway Worship Center*⁶⁰ – the defendant promised to raise funds for the second plaintiff whilst on a projected trip to Korea. The defendant on his return from the trip informed the church that he had been able to raise the funds from a benefactor. There was no disclosure of how much was raised, neither did the defendant hand over the funds to the respondent church. The funds were lodged in his bank account and part subsequently used to acquire the disputed land. An action was commenced by the pastor of the church as the first plaintiff and the church, acting by its trustees against the defendant in the Circuit Court for a declaration of title to the land in dispute, recovery of possession, perpetual injunction, an order for accounts and other orders. The Circuit Court granted the relief sought by the respondent except the order to account. On appeal to the Court of Appeal and subsequently, to the Supreme Court, the defendant-appellant alleged that taking into account the claim and evidence in the matter, the first plaintiff, the pastor, had no locus standi in the suit and should have been struck out as a party. It was held per Akuffo JSC @ pgs. 291-292 that:

*"In Ground One of the Notice of Appeal, the Defendant challenged the locus standi of the pastor of the Second Plaintiff church to be party in the case. The Court of Appeal reached the conclusion that, on the evidence on record, the beneficial ownership or interest in the property and/or funds in question vested in the Second Plaintiff, and no one else. As is clear from the record, the Second Plaintiff is a company limited by guarantee and incorporated under the Companies Act, 1963 (Act 179) (as revised). As a result, pursuant to Section 24 of the Companies Act, it has all the powers of a natural person of full capacity. As such, it is a fully-fledged legal entity, with a personality separate from the natural persons forming it, and with capacity to sue and be sued in its own name. In law, the members of a company have no direct proprietary rights over its assets, the company being the sole owner of its assets (see *Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd.* [1962] 1 GLR 122). Since it is patent from the record that the subject matter of the action was being claimed as the Church's asset rather than the joint property of the church and the First Plaintiff, there was no reason why the First Plaintiff should have been included as a co-claimant. From the record, Pastor Ben Adjei really has no business in the suit, since he does not make any claim of interest or right in the subject matter*

⁶⁰ [2009] SCGLR 1077.

of the suit. The Second Plaintiff church is capable of handling its own litigation and the First Plaintiff is an unnecessary party."

(f) Property

Another consequence flowing from the separate legal personality concept is the incorporated entity acquires the legal capacity to acquire and own property in its name. Such property is a corporate property that belongs to the incorporated entity and forms part of the corporate assets of the incorporated entity which must be used to carry on its business activities or pursue the object for which the entity was incorporated. The corporate assets are separate from the personal assets of the owners and officer of the incorporated entity. The distinction between corporate assets and personal assets of owners and officers, therefore, prevent the owners and officers of the incorporated entity from the use of the corporate assets for personal benefit. It also prevents situations where the personal assets of the owners and officers are attached by judgment creditors to satisfy the liabilities of the incorporated entity. This means owners and officers have no direct claim to the corporate assets. Ownership of shares in a company or being a partner in the firm does not confer a direct interest in the assets of the company or firm respectively.

*Majdoub & Company Ltd v. Bartholomew & Co Ltd*⁶¹ - in this case, the defendants instituted an action against a partnership called Fattal & Majdoub & Co. for an amount being a balance of accounts. While the action was pending, the partnership was dissolved. A limited liability company (the plaintiffs) was formed to take over the business assets and liabilities of the partnership. The plaintiffs agreed to pay all the liabilities incurred by the partnership, but they refused and the defendants obtained a judgment against the firm for the amount claimed. In execution of the judgment, the defendants attached the store which formerly belonged to the firm and now belonged to the plaintiffs. The plaintiffs thus instituted an action for damages for unlawful attachment. It was held by the court per Djabonor J. that:

"A limited liability company is an artificially created body by statute and I think the law is entitled to recognise that artificial existence. In any case it seems to me that by that date there was no partnership for the assets to remain in. Lord Halsbury L.C. in the Privy Council case of Salomon v. Salomon & Co. Ltd.² said, "....it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." For my part as soon as I accept the evidence that Majdoub & Company Ltd. bought the assets of the old Fattal & Majdoub, which I do, I must necessarily hold that the defendants cannot attach their property in

⁶¹ [1962] GLR 122.

execution of a judgment-debt of Fattal & Majdoub because the two firms are quite separate, different, and distinct legal persons."

In contrast, an unincorporated entity has no legal personality and capacity and cannot, therefore, acquire or own property in its name. Property used to undertake the business or pursue objects in the event of associations remain the property of the owner or members of the unincorporated entity or association. In the event of an unincorporated association with two or more members, those assets will belong to the members as joint members in accordance with their agreement or the applicable rule of the association. The rules may be agreed on by the members, implied from the conduct of the members or derived from applicable law or practice.

*Macaura v. Northern Assurance Co. Ltd*⁶² - in this case, the owner of a timber estate sold the whole of the timber on the estate to a timber company in consideration of fully paid-up shares in the company. The owner was the sole shareholder of the timber company and subsequently the creditor of the company. The owner subsequently took out insurance to cover the timber against fire. The insurance was, however, taken in the name of the owner and not the company. Subsequently, a fire outbreak destroyed the greater part of the timber. A claim put in by the owner to recover the amounts under the insurance policies was rejected by the insurance company. The owner, therefore, sued the insurance companies to recover the loss. The actions were stayed and the matter was referred to arbitration in pursuance of the terms of the insurance policies. The arbitrator held that the claimant owner had no insurable interest in the timber insured and disallowed the claim: The court held that the claimant owner had not, either as shareholder or creditor any insurable interest in the goods because the goods belonged to the company. Lord Buckmaster reasoned @ pg. 626 as follows:

"... It must, in my opinion, be admitted that at first sight the facts suggest that there really was no person other than the plaintiff who was interested in the preservation of the timber. It is true that the timber was owned by the company, but practically the whole interest in the company was owned by the appellant. He would receive the benefit of any profit and on him would fall the burden of any loss. But the principles on which the decision of this case rests must be independent of the extent of the interest held. The appellant could only insure either as a creditor or as a shareholder in the company. And if he was not entitled in virtue of either of these rights he can acquire no better position by reason of the fact that he held both characters. As a creditor his position appears to me quite incapable of supporting the claim. If his contention were right it would follow that any person would be at liberty to insure the furniture of his debtor, and no such claim has ever been recognised by the Courts... Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding

⁶² [1925] AC 619.

all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset - a calculation almost impossible to make..."

Lord Sumner concurring stated:

"My Lords, this appeal relates to an insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmills, Ltd., of Skibbereen, co. Cork. He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no "legal or equitable relation to" the timber at all. He had no "concern in" the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire. No authority has been produced for the proposition that the appellant had any insurable interest in the timber in any capacity, and the books are full of decisions and dicta that he had none."

Lord Wrenbury further stated:

"My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation. Further, I have read and concur in the judgment delivered by my noble and learned friend, Lord Sumner. I think the appeal should be dismissed."

*R v. Arnaud and Powell*⁶³ - in this case, the facts of which are stated in the judgement, the issue for determination was, whether a corporation aggregate, of which some of the members are foreigners, can claim to be registered in its corporate character. Per Lord Denman C.J. holding that the

⁶³ (1846) QB 115.

Registering authority registers the ship on the basis that the British Company was the ship's owner rather than the members of the company reasoned as follows:

"The object of the present mandamus is to compel the Custom House officers to register a vessel, the property of the Pacific Steam Navigation Company. The company is a corporation, by charter of Her present Majesty, for the purpose of providing vessels and employing them in the Pacific Ocean. It is admitted by the defendants that the company, as a British corporation might be owners of British built vessels, and primâ facie would be, as such corporation entitled to register them under the provisions of stat. 8 & 9 Vict. c. 89, applicable to the registry of vessels by corporations. But it is said that some of the members of the corporation are not British subjects, but foreigners, and, consequently, that the vessel does not wholly belong to Her Majesty's subjects, as required by the fifth section of the Act, and is within the prohibition, contained in the twelfth section of the Act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered. Now it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the fifth section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. The individual members of the corporation, no doubt, are interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction: but in no legal sense are the individual members the owners. If all the individuals of the corporation were duly qualified British subjects, they could not register the vessel in their individual names as owners, but must register it as belonging wholly to the corporation as owner."

*Gramophone & Typewriter Ltd v. Stanley*⁶⁴ - the facts stated in the judgement of the Master of Rolls as follows:

"This is an appeal from the Judgment of Mr. Justice Walton, who held that the Plaintiff Company, whom I shall call the English Company, are not liable to pay Income Tax in respect of £15,000, part of the profits of a German Company, not distributed in the way of dividend or transmitted to England, but written off by the German Company in Germany to meet the depreciation of patents. The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that

⁶⁴ [1908-10] All ER 833 CA.

*certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use words found in one of the authorities, 'stated the Appellants out of Court.' I may add that the arguments before Mr. Justice Walton proceeded upon this footing. The German Company was established in Germany in 1900 in accordance with German law. It was undoubtedly a Company with several-shareholders who brought in considerable capital. One of those shareholders was an English Company, whose undertaking was subsequently acquired by the present English Company. At some date which is not stated, the English Company acquired all the shares of the German Company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a Company may give him the control of the Company in the sense that it may enable him, by exercising his voting powers, to turn out the Directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the Directors, or make the property or assets of the Company his as distinct from the Corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole of the shares. The business of the Company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more."*⁶⁵

*Short v. Treasury Commissioners*⁶⁶ - Short Brothers (Rochester and Bedford) Ltd was nationalised and all the shares transferred to a nominee of the Minister of Aircraft Production. Each shareholder was entitled to compensation, measured at the market value of his shareholding. The shareholders argued that, since the entire share capital was transferred into state ownership, the compensation paid to each shareholder should be a proportionate part of the value of the company's assets at that date. At the Court of Appeal, it was held per Evershed LJ drawing distinction between holding shares and assets of the company as follows:

"Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the shareholdings. The claimants recognised this difficulty, and in this court their main argument was, we think, addressed to an alternative statement of their case, that is, that the value of their shares must be calculated on the basis of an apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred. This alternative is not in terms set out in the award; but,

⁶⁵ Emphasis mine.

⁶⁶ [1948] SCV 177; [1948] KB 116.

as we have already indicated, the real issues between the parties are, in our judgement, sufficiently raised by the award.

It is said on the one hand that it is of the essence of the matter that the Crown is, as it is bound to do, acquiring all the shares of the company. That is true; but, on the other hand, it is also the fact that the Crown is acquiring shares from a number of individual shareholders. "Prima facie" as it seems to us, and apart from any special words in the regulation, each shareholder is entitled to get, and to get only, the value of what he possesses; for that is all that he has to sell or transfer. If an individual shareholder in a company owns such a number of shares in that company as gives him effective control of the company's affairs, it may well be that the value to be attributed to that holding, on a sale of it as a separate transaction, is a figure greater than the sum arrived at by multiplying the number of his shares by the "market" value for the time being of a single share. In such a case the shareholder in question, it may be said, has and is able to sell something more than a mere parcel of shares, each having the rights as to dividend and otherwise conferred upon it by the company's regulations."

In adopting this decision, the House of Lord per Lord Porter reiterated the position by stating @ pgs. 177 to 179:

"As to the alternative argument that the value of the business as a going concern should first be ascertained and then that global sum should be divided in due proportions between the different classes of shareholders, no doubt, if the regulation had stated that the shareholders were to receive the value of their shares calculated on their value on the sale of their business as a going concern, ... the appellants' claim would be correct, but, to my mind, the regulation makes quite a different stipulation. It is true that under the order all the shares are to be transferred, but though all are transferred to the nominees of the Treasury, all are not transferred from one person, and it is the value of the willing seller of his holding which has to be ascertained, not a potentiality of control which he does not possess. The paragraph speaks of the price of "any shares" which naturally refers to those embraced in any individual parcel and it is those shares, not the shares as a whole, the value of which is to be ascertained as between a willing buyer and a willing seller, a phrase which, in my mind, means a willing buyer and a willing seller of those shares. If it were not so, there would be great difficulty, if not impossibility, in distributing the total sum obtained as the price of the undertaking among the various classes of beneficiaries in cases where there were a number of different classes of shares, and even in the present case where the preference shareholders are only entitled to the nominal value of their shares on a winding-up the question

might arise as to their value when they were being paid off, but the company was not being wound up."

*Republic v. High Court, Accra; Ex parte Appiah and others*⁶⁷ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate included house no. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had an interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all sums of money received in respect of the estate of the Deceased, the court on the issue of inclusion of the house in the estate of the deceased stated per Ampiah JSC @ pg. 425:

"In the instant case, the orders made seem to involve an incorporated body. By the deceased's presumed 100 percent shareholding, Lims Co Ltd, the second defendant, seems to have been included in the estate of the deceased. The presumption being that since he owned 100 per cent of the shares, he and the company are one and that the company is owned by the deceased as his personal property. That may factually be so, but the legal position is that an incorporated company has a legal personality of its own different from those who form it. It could sue and be sued as a legal entity. There is no dearth of authority on this issue: see Salomon v Salomon Co [1897] AC 22, HL.

Consequently, though the late Kofi Boye Safo could be the owner of the 100 per cent shares in the company, he is not the company so as to make the company his personal property. As a legal entity the company is governed by rules and regulations of the company. Its management is vested in the board of directors whose managing director is directly involved in the day to day activities of the company and who is responsible to the board and the shareholders. Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later distribute them to the beneficiaries who then would have their name entered in the register of the company as members."

(g) Capacity to borrow and create charges over assets

As indicated above, an incorporated entity as a separate legal person has its own legal capacity which legal capacity permits the entity to enter into a contract that includes a contract to borrow

⁶⁷ [1999-2000] 2 GLR 420.

money in its name. This characteristic enables incorporated entities to raise capital to carry out their business activities or objects without requiring all contributions to come from their members or “owners”. Unlike a natural person who from birth until attaining the age of majority, subject to some exceptions, or an unincorporated entity, an incorporated entity from the day of incorporation has the legal capacity to exercise borrowing powers. Through the exercise of its borrowing powers, an incorporated entity can source for funds in its own name to pursue the object or business for which it is incorporated. The incorporated entity can raise capital from owners or borrow from third parties or owners to fund its activities.

However, third parties do not lend money to an incorporated entity simply on the basis that it has the capacity to borrow. The incorporated entity must be creditworthy. The incorporated entity may demonstrate such creditworthiness by its ability to have adequate receivables to service the loan or provide security by creating a charge over its assets to give comfort to the lenders. The ability of the incorporated entity to own assets and the separation of such corporate assets from personal assets of the owners and managers enables the incorporated entity to provide credible security for the payment of the loan. The incorporated entity provides security by creating a charge over its assets in favour of the lenders, which entitles the lenders to take possession or realise the corporate asset for the satisfaction of the debt.

The Companies Act, 2019 in section 83 permits companies to borrow in the form of debenture or series of debentures or debenture stocks. A debenture is defined in the First Schedule of the Companies Act, 2019 as “*a written acknowledgement of indebtedness issued by a company in respect of a loan made to it...*”. Section 89(1) of the Companies Act, 2019 further provides that “*Debentures may either be secured by a charge over the property of the company or may be unsecured by a charge.*” A company as an incorporated entity can therefore borrow and create a charge over corporate assets to secure the repayment obligations in favour of the lender or debenture holder. In respect to statutory corporations, the Public Finance Management Act, 2016 (Act 921) permits public corporations and state-owned enterprises to borrow in their names subject to obtaining requisite approvals from the Minister responsible for Finance.⁶⁸ Legislations establishing statutory corporations provide for such powers. A partnership under section 10 of the Incorporated Private Partnership Act, 1962 becomes an incorporated entity separate from the partners and can exercise borrowing powers. The Incorporated Private Partnership Act, 1962 permits the firm under section 21 to create a charge over the assets of the firm.

An unincorporated entity does not have a separate legal personality. As such they do not have the capacity to borrow. In addition, since they have no personality, they are unable to own assets and therefore cannot create a charge over assets in favour of lenders.

⁶⁸ Sections 73 and 74 of the Public Finance Management Act, 2016 (Act 921) as amended.

Barclays Bank Ghana Limited v. Lartey & Others⁶⁹ - Edward Wiredu J. (as he then was) examines the capacity of "Scarts" the registered name of a sole proprietorship of Kotoku Lartey to hold the asset and create a charge as a mortgage. The Justice stated @ pgs. 288-9 that:

"Unlike Act 179, the Registration of Business Names Act, 1962 (Act 151), was not intended to confer any distinct legal personality on any business name registered under it. The provisions of the Act are a clear pointer to this. Whilst the provisions of Act 179 refer to the company, those of Act 151 refer to the individuals registering their business names. The fact that registration under Act 151 does not confer perpetual succession on business names registered under it is borne out by section 10 (1) of the Act. Act 151 protects the exclusive use and right of the person registering the business name. It is also clear from the provisions of Act 151 that the registrar deals solely with the person registering the business name, and this is understandable because it is only the "business name" which is registered, and someone must be responsible for such registration. I therefore hold in my ruling that Scarts as registered under Act 151 did not acquire any legal personality distinct from the person of Emmanuel Kotoku Lartey who carried on business under that name. I also reject as untenable the submission that Scarts enjoyed a perpetual succession under Act 151. ...

A careful examination of the instrument itself reveals that the mortgagor is Emmanuel "Kotoku Lartey of Scarts". Some attempt was made to capitalise on the term "of Scarts" by learned counsel for the defendants but I find in my ruling that Mr. Puplampu's view that the term is merely descriptive of the deceased is to be preferred to Mr. Hansen's view which appeared to suggest that the term was an indication of the fact that the deceased was merely acting for Scarts."

(h) Taxable entity

An incorporated entity is a legal person whose existence is separate and distinct from its owners and managers. Therefore, as a legal person, it is liable to pay tax as a natural person. The Income Tax Act, 2015 (Act 896) in section 1 imposes income tax on a person who has chargeable income or a person who receives a final withholding tax. The tax is imposed on a person. An incorporated entity is a person separate and distinct from its owners and officers. The incorporated entity, therefore, is liable to pay income tax on its chargeable income. An incorporated entity is therefore a taxable unit on its own, separate and distinct from the owners and managers of the incorporated entity. Separate income taxes are payable by the owners, managers and the incorporated entity. For example, on the incorporation of a company, the chargeable income of the company is subject to tax separate from the income tax payable by the shareholder on dividend received from the company and separate from income tax payable by the manager on income received from the company.

⁶⁹ [1978] GLR 282.

2.3 Incorporated and Unincorporated Entities

The preceding sub-chapter provides the distinctive characteristics of an incorporated entity and an unincorporated entity. This sub-chapter discusses entities, other than companies, through which business and objects may be undertaken. Such entities may be either incorporated or unincorporated entities. The legal framework within which the entity may be set up and operate is also discussed. The entities to be discussed are sole proprietorship, which is an unincorporated entity, partnership, statutory corporations, incorporated trust, cooperative societies, building societies and companies that are incorporated entities.

2.3.1 SOLE PROPRIETORSHIP

Nature and characteristics

A sole proprietorship is the most common form through which business is carried in Ghana. Information obtained from the Registrar-General's Department suggests the registration of sole proprietorship business accounts for more than half of registered entities through which business or other activities are undertaken.⁷⁰ This may account for the large number of businesses operating in what has been termed as the informal sector.

A sole proprietorship refers to a business owned and controlled by a single or sole person. A sole proprietorship is also known as a "one man business", a sole trader, an enterprise or proprietorship. By definition, it is the type of business entity that is owned and run by one natural person. A sole proprietorship is an unincorporated entity. As such, there is no legal distinction between the owner of the business and the business as an entity. The lack of this separation makes the owner and the business unit one and the same. The owner is in direct control of all the elements and is legally accountable for the finances and liabilities of the business. The owner receives all the profits and has unlimited liability. Every asset of the business is owned by the proprietor and all the liabilities of the business are borne by the proprietor.

Whilst sole proprietorship may mostly be seen as small business such as neighbourhood provision shops, food vendors including waakye sellers, "chopbars", hawkers, and others trading in consumable and non-consumable products, service providers such as hairdressers, barbers, plumbers, carpenters, mechanics, masons, a sole proprietorship can be large scale businesses with a large number of employees and high annual turnovers. The size of a business cannot, therefore, be used as the yardstick to classify a business as a sole proprietorship or otherwise. A company may

⁷⁰ The information showed that between December 5, 2011 to September 2, 2019, a total of 321,259 sole proprietorships have been registered, as against 127,641 companies limited by shares, 38,307 companies limited by guarantee, 3,603 subsidiary business names, 1,542 partnerships and 933 external companies.

have a business model that puts employees on the street to hawk on its behalf just in the same way as a sole proprietor may do.

A sole proprietorship has a number of characteristics that distinguishes it from other business entities. These characteristics flow from the fact that a sole proprietorship does not have a legal personality that is distinct and separate from the owner. The characteristics include:

(a) Legal Status

Legal status or personality in this context refers to the legal capacity of an entity to act or undertake activities recognised in law in its own name. That is, the recognition in law that an entity has the legal capacity to undertake specific activities recognised in law which may give rise to legal consequences or obligation. The general position is that for artificial entities which are created or recognised as a person by law, the law must expressly confer legal status or capacity on the entity and define the scope of that legal status or capacity. Short of the law conferring legal status on that entity by recognising the entity as a legal person, the entity is not a person and will not have legal status. A contrary position applies to natural persons where the law assumes legal capacity unless the law restricts such capacity.

Under Ghanaian law, no legal status or personality is conferred on a sole proprietorship that is distinct from the status of the proprietor, who is the owner of the business. The enterprise or proprietorship does not have a legal existence separate and distinct from its owner or proprietor who controls and manages the enterprise. The proprietorship cannot, therefore, exercise legal rights and be subject to legal obligations in its own right separate and distinct from that of the proprietor. Consequently, sole proprietorship, even when given a name, has no legal existence under that name as separate from the owner. The sole proprietorship cannot sue and be sued in its name; it cannot enter into legal relations in its name; it cannot acquire and own property in its name and does not enjoy perpetual succession. Its legal existence is linked to the existence of its owner. There is no separation of business assets from the personal assets of the owner. The business assets of the owner are treated as the personal assets of the owner.

*Barclays Bank Ghana Limited v. Lartey & Others*⁷¹ - Lartey, during his lifetime, registered the name of his business under the Registration of Business Names Act, 1962 (Act 151), as "Scarts". For the purposes of his business, he took a loan from the plaintiffs to whom he mortgaged, inter alia, his landed property with buildings thereon as security for the loan. On his death, his administrators, the defendants incorporated a limited liability company called "Scarts Ltd." which took over the assets and liabilities of the business. The plaintiffs wrote to the defendants demanding repayment of the loan. When they failed to repay, the plaintiffs sued the administrators for an order for judicial

⁷¹ [1978] GLR 282.

sale of the mortgaged property. Counsel for the defendants argued that the defendants could not be sued since the business registered as Scarts became on registration an artificial legal entity with perpetual succession and a distinct personality from that of Lartey and that it was wrong for the plaintiffs to hold the defendants, who were only liable for the personal debts of Lartey, liable for the indebtedness of Scarts. Counsel further argued that it was incompetent for the plaintiffs to sue Scarts since it no longer existed with the incorporation of Scarts Ltd. which had taken over the assets and liabilities of Scarts. The court held that a business name registered under the Registration of Business Names Act, 1962 (Act 151), did not by the act of registration acquire any legal personality distinct from the person registering it. Registration of business name merely protected the exclusive use and the right of the person registering the name. Consequently, the registered name Scarts did not acquire any legal personality distinct from Lartey, who carried on business under that name. It followed that Lartey was the mortgagor of the mortgaged property in question and the defendants being the administrators of Lartey's estate were the proper persons to be sued. Edward Wiredu J. @ pg. 288 as follows:

“Unlike Act 179, the Registration of Business Names Act, 1962 (Act 151), was not intended to confer any distinct legal personality on any business name registered under it. The provisions of the Act are a clear pointer to this. Whilst the provisions of Act 179 refer to the company, those of Act 151 refer to the individuals registering their business names. The fact that registration under Act 151 does not confer perpetual succession on business names registered under it is borne out by section 10(1) of the Act. Act 151 protects the exclusive use and right of the person registering the business name. It is also clear from the provisions of Act 151 that the registrar deals solely with the person registering the business name, and this is understandable because it is only the “business name” which is registered, and someone must be responsible for such registration. I therefore hold in my ruling that Scarts as registered under Act 151 did not acquire any legal personality distinct from the person of Emmanuel Kotoku Lartey who carried on business under that name. I also reject as untenable the submission that Scarts enjoyed a perpetual succession under Act 151.”

S. A. Turki v. Dahabieh⁷² - the respondent rented the premises of the appellant from where he runs his trading business under the name of Technical Trading Co. (TTC). The appellant gave the respondent six months to vacate the premises but the respondent informed the appellant that because of expenses incurred in renovating the premises, he could not comply with the notice. Shortly after, he travelled out of the country. The applicant applied *ex parte* for and obtained an order for substituted service. The supporting affidavit indicated, inter alia, that the applicant had unsuccessfully made several attempts to serve TTC but on each occasion found the stores locked and since they believed the “defendants” were evading the service the surest way to serve “them” was

⁷² [1987-88] 2 GLR 486.

by substitution. Upon the grant of the applicant, the applicant removed the respondent's goods being from the premise. Upon the respondent's return he, as the first plaintiff and TTC as the second plaintiff appealed the decision. On the issue whether the order obtained *ex parte* and subsequent judgment on such order are valid, the High Court set aside the order and judgement on the ground, inter alia, that *"The essence of the registration of a business name ... is not for giving it a corporate personality but to enable it to be known at any eventuality the personality of the one who runs that business. In suing the Technical Trading Co., the plaintiff in that suit sued no one, and therefore the institution of that suit No. 104/75 was a nullity on that ground, because there were plaintiffs therein but no defendant."* The Court of Appeal on the issue indicated that the judgment was per incuriam in view of Order 48A, r. 11 of L.N. 140A which provides that "11. Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."⁷³ However, since the appellant did not follow the procedure for service of process on a firm, the *ex parte* order and subsequent process based on the order are null and void.

Note: The proposition is true that registration of a business name does not confer legal personality on the entity. A person cannot, therefore, sue and be sued in a business name. However, a legislation such as Order 6, rule 8 of C.I. 47, which has replaced the repealed Order 48A, rule 11 of L.N. 140A, permits action against a proprietor by the use of the business name. As Taylor J.S.C. stated in the above case:

*"It must be appreciated however, from its very wording that under Order 48A, r. 11, it is in fact the proprietor or owner of the business name who is being sued and not the dehumanised concept in the abstraction that is represented by the business name. That name is used merely as a strategy to reach the person operating under that name. Consequently, it is the proprietor or the person owning the business name or the person with the control and management of the business who must be served with the writ and all other processes".*⁷⁴

*Baidoo v. Sam*⁷⁵ - the plaintiff claimed he was a joint owner with one Mr. Arzumah of a business whose name was registered in accordance with Act 151 as "Unity Salt Industries" for production of salt. The name on the registration form was that of the plaintiff. Mr. A indicated that being a police officer at the time, he instructed the plaintiff to register the business and act as his "frontman". The plaintiff claimed he had acquired the land on which the salt was produced with Mr. A. Evidence was provided to the contrary that Mr. A had acquired the land alone and had in fact employed the plaintiff to act as a "frontman" for the registration and management of the business. Mr. A sold the

⁷³ Now Order 6 rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

⁷⁴ S.A. Turqui v. Dahabieh [1987-88] 2 GLR 489 @ 500.

⁷⁵ [1987-88] 2 GLR 666.

business to the defendant without the plaintiff's knowledge or inclusion in the transaction but had given him a portion of the deposit paid by the defendant to cover costs of loans the plaintiff had taken in the name of the business per Mr. A's authorisation. The plaintiff was seeking a declaration that the transaction between the defendant and Mr. A should be set aside. It was held that there was no agreement of a partnership between the Plaintiff and Mr. A. Moreover, if there was any such agreement, there was no evidence of registration of partnership agreement in accordance with Act 152. Consequently, the plaintiff could not benefit from an illegal contract and could not call upon the court to set aside a transaction of which he had no part or benefit. Taylor JSC in delivering the judgement of the Court of Appeal stated @ pgs. 671 to 672:

"A few comments on the legal propriety of the claims indorsed on the writ of summons will demonstrate the slovenly character and nebulous nature of the claims. Claim (a) for instance is for a declaration that the sale of Unity Salt Industry is "null and void and of no effect." But by the law governing corporated and unincorporated associations or companies the "Unity Salt Industry" is nothing but the name under which the registered proprietor, a single individual, chooses to trade. How on earth such registered business name can be sold is difficult to understand, having regard to the provisions of the Registration of Business Names Act, 1962 (Act 151). A business name under Act 151 is surely not a chose in action like a copyright or a patent for it does not satisfy Channell J's classic definition of a chose in action in Torkington v. Magee [1902] 2 K.B. 427 at 430, where he said:

"Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession." (The emphasis is mine.) I am unable to understand what personal right of property anyone has in a mere name so as to sell or purchase it. Claim (b) is equally an untidy and vacuous claim. A letter written by one man to another concerning their mutual transaction and copied to three institutions is to be set aside by a court of law on the application of a stranger to the transaction. I confess I do not appreciate what possible purpose such a court order can be reasonably expected to accomplish nor do I think claim (c) should be dignified by any comment and I will ignore it completely."

(b) Ownership

As the name indicates, a sole proprietorship is legally owned by a single person. The business is legally incapable of dual or multiple ownership. That is, it cannot be owned by two or more persons. Its net profit is taken by the single person, who also bears all the losses made by the business. The proprietor is therefore solely responsible for the losses and consequences of the failure of the

business. In practice, there are instances where a husband and wife purport to set up a sole proprietorship. For example, a husband called “Simon” together with a wife called “Elizabeth” set up a shop in front of the couple’s residence which has been named as “Lizmon Store” run by the wife whilst the husband was employed and worked in another establishment. It may, in the event of death or separation, be argued that the business is owned by two persons. However, once it is determined that the business is registered as a sole proprietorship business, it cannot legally be held to be owned by the husband and wife. **The sole owner must be determined based on who the ownership and control of the business is vested in.** Whilst the registration document at the Registrar-General’s Department or the Office of the Registrar may provide prima facie evidence, contrary evidence may be provided to rebut such prima facie evidence. Such evidence must show ownership of the business assets and control of the business. The interest of the other party may be in relation to any investment or services rendered to the owner of the business. **It should also be noted that such a business will not be held as a partnership unless it is registered under the Incorporated Private Partnership Act, 1962 (Act 152).** Any agreement, verbal or written, purported to be entered into making the parties partners will not be enforceable if the partnership is not registered as provided under Act 152.

The above principle was stated in **Baidoo v. Sam**⁷⁶ per Taylor JSC @ pgs. 672 to 673 when he indicated that:

“Now to the statement of claim: paragraph 2 avers the business name Unity Salt Industry was registered by the plaintiff Ellion Baidoo and one Arzumah. If the draftsman of this pleading had with professional diligence looked at the certificate of registration, it would have been very obvious to him that the registration was made under the provisions of Act 151 and under that law two persons, it would seem, cannot be so registered and no two persons were, in fact, registered under the said Act. It is here necessary to observe that the certificate of registration which was issued by the registrar of business names on 29 January 1973 apart from stating that Unity Salt Industry as a business name had been registered with registration No. 34532 contained no other name indicating who the proprietor of the business name is. To find this out, any person dealing with the Unity Salt Industry must contact the Registrar of Business Names in order to peruse the particulars supplied on the statutory Form A filled by the applicant in accordance with the relevant provision of Act 151...

With regard to paragraphs (4) and (5) of the statement of claim, it appears that the plaintiff is pleading that he was in partnership with the said John Arzumah, they had jointly carried on the salt business at least from 29 January 1973 until sometime in June 1980. It is amazing and regrettable that learned counsel could see fit to plead such illegal business transaction in contravention of sections 1 and 4(1) of the

⁷⁶ Ibid.

Incorporated Private Partnerships Act, 1962 (Act 152) which provide that it shall not be lawful for a partnership to carry on business as from 1 April 1963, unless the partnership is registered under the Act. John K. Arzumah in his evidence on oath alleged that he instructed the plaintiff, Ellion Baidoo, to register Unity Salt Industry for him. I cannot help feeling that there must be some element of truth in this allegation having regard to the plaintiff's pleading that he owned the business name "Unity Salt Industries" with the said Arzumah. The particulars supplied to the Registrar of Business Names however show that legally Unity Salt Industry is the trade name of Ellion Baidoo alone and it had nothing to do with John K. Arzumah. It would seem however that this indisputable legal position is not how the parties and those who came in contact with them understood the status of the Unity Salt Industry. John K Arzumah in his letter, exhibit 2, written ante litem motam, addressed himself as "The Proprietor, Unity Salt Industry." Furthermore, the letter which the Edina Traditional Council sent to John K. Arzumah, exhibit 1 speaks for itself".

(c) **Formation**

A sole proprietorship does not require formal registration or incorporation to commence business. An individual may wake up and choose to sell on a table in front of his or her residence without any registration requirement or may opt to hawk in traffic without any formality of registration. In essence, there is no law that imposes punishment on an individual intending to commence business as a sole trader to register the proprietorship prior to engaging in business. This will not be the case for specific business activities that require licences for one to engage in such business. Unlike a partnership or a company that requires a formal registration or incorporation process prior to commencement of business as a firm or a company, a sole proprietorship does not require any such formal process.

However, for sole proprietorship business, the Registration of Business Names Act, 1962 (Act 151) provides for the registration of the names of sole proprietorships in some instances.⁷⁷ It should be noted that registration of a name of a sole proprietorship is not required in all instances.⁷⁸ In all instances, the registration does not relate to the formation of the sole proprietorship but to the registration of the name of the business without conferring any legal status on the proprietorship. The legal effect of the registration is to confer the right of exclusive use of the registered business name on the business owner. It does not incorporate the business in terms of conferring a legal status or personality on the business that is distinct and separate from its owner.

⁷⁷ Section 1 of Act 151.

⁷⁸ Ibid.

Edward Wiredu J. stated In *Barclays Bank Ghana Limited v. Lartey & Others*⁷⁹ that:

“Unlike Act 179, the Registration of Business Names Act, 1962 (Act 151), was not intended to confer any distinct legal personality on any business name registered under it. The provisions of the Act are a clear pointer to this. Whilst the provisions of Act 179 refer to the company, those of Act 151 refer to the individuals registering their business names. The fact that registration under Act 151 does not confer perpetual succession on business names registered under it is borne out by section 10(1) of the Act. Act 151 protects the exclusive use and right of the person registering the business name. It is also clear from the provisions of Act 151 that the registrar deals solely with the person registering the business name, and this is understandable because it is only the “business name” which is registered, and someone must be responsible for such registration.

In addition, the dissolution of the business does not require any formal procedure. A sole proprietor selling on the street can decide to, at any time, stop undertaking such business. There is no requirement of giving any notice or following any procedure under any prescribed law for the proprietor to bring to an end the proprietorship business.

(d) Management

A sole proprietorship is owned by one individual. The individual is solely responsible for the management and control of a sole proprietorship. That is, management and control of the sole proprietorship are vested in the proprietor. Two critical legal principles are revealed by this position. First, ownership of the business is not divorced from the control or management of the business. Secondly, and related to the first, the person who qualifies as the proprietor is the one who owns the business as well as controls the business. There is no legal separation of ownership from management. Thus, the owner is at the same time the manager of the business.

These principles do not prevent the proprietor from delegating responsibility to some other individual or individuals to manage some aspects of the business. Even in such instances of delegation by the proprietor to other individuals, overall and ultimate control remains with the proprietor. The delegates remain accountable to the proprietor.

In *Baidoo v. Sam*⁸⁰, it was shown that the plaintiff did in fact carry on the business together with Arzumah. However, the Court of Appeal indicated that this was based on the instruction from Arzumah and created a principal-agent relationship and not a partnership. Taylor JSC stated @ pgs. 675 to 676 as follows:

⁷⁹ [1978] GLR 282 @ 288.

⁸⁰ [1987-88] 2 GLR 666 @ 675-6.

“Leaving aside the element of registration in the new Ghana concept, I have no doubt that the evidence of the plaintiff if accepted will quite clearly satisfy this definition of partnership pending registration. The evidence of John K. Arzumah however which was given for the defendant if accepted will only make the plaintiff an agent for, but not a partner of, the said Arzumah in all transactions which he undertook on behalf of the salt industry. The relevant characteristic of the relationship of Ellion Baidoo the plaintiff with John Arzumah, will then be the well-known status of a principal and his agent.

In this case, in his dealings with some officials, the identity of John K. Arzumah was not disclosed; his reasons for non-disclosure or having his identity suppressed being that as a policeman he was not permitted by the government to do work outside the police service. We are therefore faced with the common law principle of the undisclosed principal which in contemporary Ghana conditions is often referred to in no complimentary terms in local parlance as “front man.” Where the principal is not a public officer and there is no statutory provision in respect of his status I apprehend his position is in no way complicated at all and it is very clearly that of an undisclosed principal simpliciter and the consequences of the relationship are traditionally acceptable to the common law. In the instant case the judge after hearing all the witnesses accepted the stand of the defendant as against the plaintiff that the business belongs to Arzumah and made firm findings consistent with this view which I am not disposed to disturb. This is because he had sufficient and quite overwhelming evidence to persuade him to come to the conclusion he came ...

I do not doubt that as a front man, Ellion Baidoo, the plaintiff, did some work for John K. Arzumah. I do not feel called upon however to decide whether as a front man as distinct from a partner after John K. Arzumah had sold out the subject matter of their common concern the plaintiff, Ellion Baidoo, would be entitled to remuneration on the basis of quantum meruit on the principle ...”

(e) Liability for debts

As a sole proprietorship has no legal existence, the proprietorship is incapable of entering into a legal relationship and thereby assumes legal obligations and liability. Any debt incurred in relation to the business is the personal liability of the proprietor. The proprietor, therefore, is liable for the debts of the business. Any agreement to be entered into to impose rights and liabilities relating to the business must be entered into by the proprietor or any right or obligation imposed by law must be imposed on the proprietor. This is because the business has no legal existence of its own and is, therefore, incapable of possessing legal obligations including incurring debts and liabilities. Debts incurred by the business are considered as the personal debts of the proprietor. It is the proprietor that is solely responsible for the payment of the debts. An offshoot of this principle is that the sole

proprietor does not enjoy limited liability. The proprietor is liable for the full debt and liability incurred in relation to the business and must fully satisfy the liabilities. In the event of the death of the proprietor, such liability must be satisfied from his estate by his personal legal representatives.

*Barclays Bank Ghana Limited v. Lartey & Others*⁸¹ - Lartey, during his lifetime, registered the name of his business under the Registration of Business Names Act, 1962 (Act 151), as "Scarts". For the purposes of his business, he took a loan from the plaintiffs to whom he mortgaged, inter alia, his landed property with buildings thereon as security for the loan. On his death, his administrators, the defendants incorporated a limited liability company called "Scarts Ltd." which took over the assets and liabilities of the business. The plaintiffs wrote to the defendants demanding repayment of the loan. When they failed to repay, the plaintiffs sued the administrators for an order for judicial sale of the mortgaged property. Counsel for the defendants argued that the defendants could not be sued since the business registered as Scarts became on registration an artificial legal entity with perpetual succession and a distinct personality from that of Lartey and that it was wrong for the plaintiffs to hold the defendants, who were only liable for the personal debts of Lartey, liable for the indebtedness of Scarts. which had taken over the assets and liabilities of Scarts. It was held by the court that a business name registered under the Registration of Business Names Act, 1962 (Act 151), did not by the act of registration acquire any legal personality distinct from the person registering it. Registration of business name merely protected the exclusive use and the right of the person registering the name. Consequently, the registered name Scarts did not acquire any legal personality distinct from Lartey, who carried on business under that name. It followed that Lartey was the mortgagor of the mortgaged property in question and the defendants being the administrators of Lartey's estate were the proper persons to be sued because Lartey was personally liable for the debt.

(f) Capacity to sue and be sued

A sole proprietorship has no legal capacity separate, independent and distinct from its owner. Legally, therefore, it cannot sue or be sued. However, where a sole proprietorship is registered under a name separate from the name or initials of the proprietor, the Registration of Business Names Act, 1962 (Act 151) requires registration of the business name. Whilst the registration of the business name does not confer legal capacity on the sole proprietorship, the rules of court permit the proprietor to be sued via the business name. The suit, even though instituted against a business name, is against the owner of the business, and not against the proprietorship which has no legal capacity. Order 6 Rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) provides that "*An individual carrying on business within the jurisdiction in a name or style other than in that individual's own name, may be sued in that name or style as if it were the name of a firm, and rules*

⁸¹ [1978] GLR 282.

2⁸² to 7⁸³ shall, as far as applicable, apply as if the individual were a partner and the name in which he or she carries on business were the name of his or her firm." The rule thus permits an owner of a sole proprietorship to be sued via a business name.

In *S. A. Turqui v. Dahabieh*⁸⁴ where a business name, Technical Trading Co. (TTC) was part of the suit on appeal as the second plaintiff-respondent, where an order for substituted services was obtained and subsequent judgment entered, the High Court ruled setting aside the judgment on the ground, inter alia, that "*The essence of the registration of a business name ... is not for giving it a corporate personality but to enable it to be known at any eventuality the personality of the one who runs that business. In suing the Technical Trading Co., the plaintiff in that suit sued no one, and therefore the institution of that suit No. 104/75 was a nullity on that ground, because there were plaintiffs therein but no defendant.*" On appeal, the Court of Appeal on the issue indicated that the judgment was per incuriam in view of Order 48A, r. 11 of L.N. 140A which provided that "11. Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."⁸⁵ However, since the appellant did not follow the procedure for service of process on a firm, the *ex parte* order and subsequent process based on the order are null and void. Taylor J.S.C. explained the import of the rules of court @ pg. 497-8 as follows:

*"It must be appreciated however, from its very wording that under Order 48A, r. 11, it is in fact the proprietor or owner of the business name who is being sued and not the dehumanised concept in the abstraction that is represented by the business name. That name is used merely as a strategy to reach the person operating under that name. Consequently, it is the proprietor or the person owning the business name or the person with the control and management of the business who must be served with the writ and all other processes"*⁸⁶

Since the rule provides expressly that an owner of a business "*may be sued in that name or style as if it were the name of a firm*" without indicating if the owner can sue in the name or style of the business, a strict interpretation will mean whilst the business name can be stated as a defendant, it cannot be a plaintiff. However, the courts have taken a contrary position by indicating that a sole proprietorship cannot sue in the registered business name. The case of *Ghana Ports and Harbours Authority v. Issoufou*⁸⁷ review the authorities on the subject and the relevant part of the judgment is stated below.

⁸² The provision on disclosure of partner's names.

⁸³ The provision on attachment of debts owned by a firm.

⁸⁴ [1987-88] 2 GLR 486.

⁸⁵ Now Order 6 rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

⁸⁶ *S.A. Turqui v. Dahabieh* [1987-88] 2 GLR 489 @ 500.

⁸⁷ [1993] 1 GLR 24.

In the case of *Ghana Ports and Harbours Authority v. ETS Issoufou*⁸⁸ which was decided on by the Supreme Court, one of the issues was whether an amendment of the title of the suit at the Court of Appeal on the application of the counsel to read "Kabore Issoufou, doing business under the name and style of ETS Kabore Issoufou v. Ghana Ports and Harbours Authority" was valid. The court per Aikins JSC @ pgs. 33 to 37 stated:

"I must say that the argument of learned counsel for the defendants that the amendment was improperly applied for and granted by the Court of Appeal does not impress me as sound in law. In my view, the courts have a duty to ensure that justice is done in cases before them, and should not let this duty be circumvented by mere technicalities. Since the power to make such amendments rests in the inherent jurisdiction of the courts, the courts can, when the issue is raised either in the trial court any time after judgment is delivered, or in the appellate court on the application of a party to the suit (orally or otherwise), grant such amendments as are necessary to meet the justice of the case; see Mercer Alloys Corporation v Rolls Royce Ltd [1972] 1 All ER 211 at 214, CA per Davies LJ. See also Gbogbolulu (Chief) v Hodo v (Chief) (1941) 7 WACA 164 at 165 where the court stated as follows:

"It is the duty of Courts to aim at doing substantial justice between the parties and not to let that aim be turned aside by technicalities.

.. As soon as any question arose as to the capacities of the respective parties it was, in our view, the duty of the Court to make any formal amendment in the claim which would make clear the capacity in which the plaintiff sued and the defendant was sued and the real point of controversy between them, provided that that could be done without any hardship to either party."

Counsel for the defendants, Nana Akufo-Addo, further contended that the Court of Appeal was bound to follow its decisions in *Ghana Industrial Holding Corporation v Vincenta Publications*⁸⁹. It is pertinent to note that in the *Vinenta* case the business name in which the plaintiff, the sole proprietor, sued was *Vinenta Publication*. The plaintiff's actual name was "*Vinenta Alisa Onuku*" which was completely different from the firm name. The Court of Appeal held that though a single person cannot sue in a firm name either under rule 1 or rule 11 of Order 48A of the High Court (Civil Procedure) Rules, 1954 (LN 140A), Order 16, r 2 of LN 140A gives the court power to add or substitute a plaintiff where the action has been taken in the name of the wrong person. However, the application to amend the name of the respondent to read "*Vinenta Alisa Onuku trading under firm name and style of Vinenta Publications*" was refused because the respondent's application was to

⁸⁸ Ibid.

⁸⁹ [1971] 2 GLR 24, CA.

substitute and existing person for a business name that was not a person. Perhaps the Court of Appeal would have been of a different view if the respondent had sued in the firm name of Vincenta Alisa Onuku Publications or VA Onuku Publications. Two English decisions were considered in the Vincenta case. The first was Noble Lowndes and Partners (A Firm) v Hadfields Ltd [1939] 1 Ch 569. There, one Mr N F Lowndes entered into a contract with the defendants in the name of Noble Lowndes and Partners under the mistaken impression that there was a partnership between himself and five other persons. When Lowndes sued the defendants later, he described the plaintiffs as "Noble Lowndes and Partners (A Firm)." Mr Lowndes applied to amend the title substituting his own name for that of the plaintiffs when the defendants discovered that there was no such firm and also applied to strike out the action. The court allowed the amendment by striking out "and Partners (A Firm)", i.e. all the plaintiffs except one and left that one, "Noble Lowndes" as the sole plaintiff.

The second case, W Hill & Son v Tannerhill [1944] KB 472, CA which followed the decision in the Lowndes case is a case where one Walter Hill carried on business alone and without partners under the name of "W Hill & Son." Mr Hill's car was damaged and he took action against the driver of the vehicle. The solicitor's clerk inadvertently stated "W Hill and Son" in the writ to be the plaintiffs. Later Mr Hill applied for an order substituting as plaintiff in the action "Walter Hill trading as W Hill & Son." The application was granted and affirmed on appeal. It was held that as W Hill was an actually existing person and the person in the action, he was entitled to the order. Scott LJ reasoned as follows at 474-475:

"When the writ was issued in the name of 'W. Hill & Son' there was an individual person in fact interested in the claim. His description as 'W. Hill & Son' was a mistake by a clerk. The question is whether that mistake is more than a mistake in form. In my opinion, it is not. Under Or. 48A, r 1, one person, even if he is carrying on business in a firm name, cannot issue a writ in the firm name, but if a real person does issue the writ in his own name, say, of W. Hill, the fact that he adds the two additional words 'and Son' does not prevent his still being the real plaintiff in the action. The application under the order for directions that his name should be written in full as 'Walter Hill' instead of 'W Hill' obviously by itself would have been unobjectionable. The addition asked for, 'trading as W. Hill and Son,' as if he were a firm, is merely useless and inappropriate surplusage, but it does not prevent the fact that it was Walter Hill himself who was still going to be the plaintiff just as he had originally in the writ been the plaintiff. For these reasons I think the master and judge were right in allowing the amendment."

Concurring with this view, Du Parcq LJ added at 475:

"It is clear that a single person trading under a firm name is not entitled to issue a writ in a firm name, but it is wrong to say that when this writ was issued in the name of 'W. Hill & Son,' it was issued in the name of a non-existent person... If the writ had been issued in the name of 'W. Hill & Son Ld.' the case would have been very different, because 'W. Hill & Son Ld.' indicates a legal entity and a person. I do not say what we should have done or what the learned judge would have been in a position to do if there had been no 'W. Hill' of the address given and the owner of the lorry had been someone of a different name trading in the name of 'W. Hill & Son.' A question may arise about that some day, but in this case there is a 'W. Hill,' and all that need be said that 'and Son' ought not to have been added."

In the circumstance, it seems to me that the Court of Appeal was right to distinguish the Vincenta case (supra) from the instant case, and it would be wrong to argue that when the writ was issued in the name of "ETS Kabore Issoufou" it was issued in the name of a non-existent person.

It is my view also that the Court of Appeal rightly applied the decision in Mussey v Darko. In that case the basis of the suit was a deed of agreement expressly made between Okofoh Enterprises of Takoradi per its manager Rexford Ayeh Darko and Mr Anthony Arthur Mussey (MTB), a timber contractor of the Western Region of Ghana and dated June 1969 bearing the registry of deeds No AC2583/70, in which it was agreed that the buyer, Okofoh Enterprises, would advance various sums of money to the contractor for the payment of timber to be supplied at a later date. The case for the respondent was that after some advances had been made the appellant failed to carry out his obligation under the contract, resulting in a balance of €4,492.86 due to Okofoh Enterprises which the appellant refused to refund. A writ was therefore issued at the instance of the respondent in the name of the firm, the ostensible party to the agreement. This mistake was due to the inadvertence of the solicitor's clerk when transmitting the names of the parties from the said deed of agreement to the writ of summons, where he completely omitted the name of R. A Darko.

Though the appellant disputed the respondent's capacity to maintain the action, for some unknown reason this lack of capacity was not pursued though made an issue. When judgment was entered for the respondent he applied for amendment of the title substituting the name of the respondent on the ground that there was a bona fide mistake by counsel because though the deed of agreement between the parties expressly named R A Darko as its manager, the name was omitted when the particulars of the agreement were being transferred onto the writ. The bona fides of

the respondent was accepted by the learned trial judge and he granted the application to amend. The appeal by the appellant was dismissed by the Court of Appeal which held that where the sole proprietor of a business mistakenly sued in the firm's name, and later gave reasonable explanation for his mistake, the court could treat the mistake as a mere misnomer and grant an application to have the title to the writ amended.

The Vincenta case was distinguished because in that case neither the appellant nor his counsel disclosed the proprietor or proprietors of the firm. Secondly, counsel was not even sure whether the firm was registered under the Registration of Business Names Act, 1962 (Act 151). The inability or reluctance of the firm (ie Vincenta Publications) to put all their cards on the table for the benefit of the court astounded the learned judges.

In the present case, the name of the sole proprietor has been disclosed, and the reason for the mistake was accepted by the Court of Appeal which granted the amendment. In my judgment, the action taken by the Court of Appeal was right in law. Here too there was enough evidence to show that Kabore Issoufou is the sole proprietor of the business, that it was he who imported the quantity of rice from Pakistan, and that ETS Kabore Issoufou is a business name which had been registered since 1965 and not a corporate body. Furthermore, the business name is almost the same as that of the sole proprietor of the business. The Court of Appeal was therefore right in amending the title of the suit to read: "Kabore Issoufou, doing business under the name and style of ETS Kabore Issoufou v Ghana Ports and Harbours Authority."

From the above, the courts are willing to substitute the name of an owner of a sole proprietorship who sued in the business name in the interest of justice. In addition, the courts have accepted the practice where the owner sues in his name but indicates that the owner is trading under a stated business name.

(g) No distinction between business and personal assets

A sole proprietorship has no legal status and personality, and therefore, the proprietorship has no legal existence that permits ownership of assets separate from the capacity of the owner to own assets. The assets or properties used to carry on the business are the assets of the proprietor. The stock-in-trade is an asset of the proprietor. Therefore, there is no legal separation of the business assets from the personal assets of the proprietor. This is because an entity cannot own assets unless so recognised by law as having the legal capacity to own and hold assets in its own name. A sole proprietorship has no such legal recognition. It cannot, therefore, own property in its name. The business and the assets used to carry out the business are all assets of the proprietor and are

considered personal assets, not business asset in terms of being owned by the business as separate from the proprietor.

(h) Lack of power to borrow

Since a sole proprietorship has no separate legal personality, it has no capacity to enter into a contract and, cannot therefore borrow. Borrowing must necessarily be done through a contract. A sole proprietorship is not a person and has no legal capacity on its own. The sole proprietorship, therefore, lacks the legal capacity to borrow or incur liability in its name. Borrowing to finance the business is done by the proprietor in his name. The contract pursuant to which a debt is secured must be entered into in the name of the proprietor, not the proprietorship. Reference may be made to the fact that the loan is for the purpose of a stated business engaged in by the proprietor. However, the party to the contract cannot and should not be the name of the sole proprietorship, even if a name is registered under the Registration of Business Names Act, 1962 (Act 151). The proprietor will, therefore, be personally liable for the amount borrowed and must repay the loan from his resources which may be income he obtained from the business.

(i) Taxation

Taxes are imposed on persons with chargeable income. Section 1 of the Income Tax, 2015 (Act 896) as amended provides that:

“(1) Income tax is payable for each year of assessment by

(a) a person who has chargeable income for the year; and

(b) a person who receives a final withholding payment during the year.”⁹⁰

Tax is payable by a person. A sole proprietorship is not recognised as a person since no law confers legal personality on the proprietorship. It, therefore, cannot have a chargeable income which will attract income tax. A sole proprietorship is, therefore, not a taxable entity. The tax liability is imposed on the income of the proprietor from the business. Section 5 of Act 896 imposes tax on income of a person from business. The proprietor's income tax is therefore charged on his chargeable income from business, employment and investment. There is no separate tax imposed on the sole proprietorship different from the income tax imposed on the income of the proprietor from the business.

(j) Perpetual Succession

A sole proprietorship does not enjoy perpetual succession. The life of the business is tied to the life of the owner. No formal legal process is required to set up a sole proprietorship or for the sole

⁹⁰ Emphasis mine.

proprietorship to cease operation. The death of the owner signifies the end of the business. The assets and undertakings of the business are treated as the personal assets of the deceased individual and the liabilities arising as liabilities that are personal to the deceased individuals attached to his estate. The assets and undertaking will, therefore, be distributed in accordance with his will (if he dies testate) or in accordance with the applicable intestate succession law (if he dies intestate) after the liabilities are settled. It may happen that the assets and undertakings are bequeathed to another individual who may continue to use them to carry on business as a sole proprietor. However, that would not amount to the separate existence of the business as an entity. It is merely the inheritance of assets and undertaking by another individual who has commenced business as a sole proprietor in his own right.

In *Barclays Bank Ghana Limited v. Lartey & Others*⁹¹, where the court had to state the status of “Scarts”, a business name registered under Act 151, Edward Wiredu J. stated @ pg. 288 as follows:

“I therefore hold in my ruling that Scarts as registered under Act 151 did not acquire any legal personality distinct from the person of Emmanuel Kotoku Lartey who carried on business under that name. I also reject as untenable the submission that Scarts enjoyed a perpetual succession under Act 151.”

2.3.1.1 Registration of business name

Since a sole proprietor may trade under a business name, it is important to discuss at this stage, the requirements of registration of business names. However, as indicated above, the registration of a business name has nothing to do with the formation of the business and more importantly, does not confer any legal status on the sole proprietorship. The sole proprietor is required to register the business names under the Registration of Business Names Act, 1962 (Act 151). Not all sole proprietors are required to register their business names under the Act. The Act requires registration of two (2) categories of business names⁹²:

- (a) An individual having a place of business in Ghana who carries on business under a name which is different from the true personal names of that individual or the surname or initials; or
- (b) A company that carries on business in Ghana under a business name that does not consist of its corporate name.

The registration of a business name is not a condition for the commencement of business by the sole proprietor. Section 4 of Act 151 provides that: *“The particulars referred to in section 2 of this Act shall be furnished within fourteen days after such person commences the business in respect of which registration is required.”* It is, therefore, not illegal for a proprietor to commence business prior to

⁹¹ [1978] GLR 282.

⁹² Section 1 of Act 151.

registration even if the proprietor chooses a name that is required to be registered under section 1 of Act 151. The registration can be done within fourteen (14) days of commencement of business. Secondly, a proprietor may choose to carry on business under his name or initials, which requires no registration under section 1 of Act 151. Further, the registration of business names does not only relate to sole proprietorships, but also to instances where a corporate entity engages in a business under a business name different from its corporate name.⁹³

Particulars of Registration

The registration requires that the following particulars are furnished to the Registrar⁹⁴:

- (a) Business name
- (b) General nature of the business
- (c) Principal place of business
- (d) All other places at which business is carried on
- (e) Where the registration is by an individual:
 - (i) The present first name and surname of the individual
 - (ii) The nationality of the individual or if not the national of origin, then the national of origin
 - (iii) The usual residence and other business occupation of the individual, and
 - (iv) Whether the individual is under the age of 21 years at the date of furnishing the statement and if so, the date of birth of the individual
- (f) Where the registration is related to a company, its corporate name and registered office
- (g) The date of commencement of business

The statement containing the above must be signed by the individual, and in relation to a company, by the director or secretary of the company. The registration is subject to renewal every year⁹⁵ and where there is a change in the particulars⁹⁶ submitted.

⁹³ Section 1(1)(b) of Act 151.

⁹⁴ Section 2 of Act 151. It should be noted that section 353 of the Companies Act, 2019 (Act 992) makes the Registrar of companies the person responsible for registration of business names under Act 151. This is, therefore, no longer the function of the Registrar General as provided under Act 151.

⁹⁵ Section 5A of Act 151.

⁹⁶ Section 6 of Act 151.

Refusal to register a business name

The Registrar has the power to refuse to register the name of a business for any of the following reasons.⁹⁷ The grounds for refusal are that:⁹⁸

- (a) the business to be carried out is unlawful,
- (b) the name is misleading or undesirable, or
- (c) the name creates a misleading understanding of the general nature of the business carried on.

Where a person fails to register or renew the registration or fails to furnish changes in the particulars, the person is liable for a fine of one hundred penalty units for every day during which the default continues⁹⁹ Where the person furnishes a false statement, the person commits an offence and upon conviction is liable to a fine of two hundred and fifty penalty units or to a term of imprisonment not exceeding six months¹⁰⁰.

Certificate of Registration

Upon registration, the Registrar will issue a Certificate of Registration, which must be exhibited in a conspicuous position at the principal place of business.¹⁰¹ Section 9 of Act 151 provides that:

- “(1) Every statement furnished under this Act shall be filed by the Registrar who shall deliver a certificate of the registration thereof to the person registering.*
- (2) The certificate or a certified copy thereof shall be kept exhibited in a conspicuous position at the principal place of business of that person, and if not so kept exhibited, that person, and in the case of a company, every director thereof, shall be liable to a fine not exceeding one hundred and fifty penalty units.”*

The Act also requires the display of the certificate at the place of registration as evidence of registration of the business name.

Disability for Failure to Register

Failure to register a business name that comes under section 1 of Act 151 attracts some liabilities provided for under section 15 of Act 151. Defaulters are unable to enforce contracts entered into whilst the default continues unless relief is granted by the court. Whilst the contract may be a valid

⁹⁷ Section 5 of Act 151.

⁹⁸ Ibid.

⁹⁹ Section 7 of Act 151.

¹⁰⁰ Section 8 of Act 151.

¹⁰¹ Section 9 of Act 151.

contract, the sole proprietor trading under a business name that requires registration, but which has not been registered, cannot institute an action in court to enforce the contract. Notwithstanding this disability, the Act provides for exceptions where the defaulter may be able to enforce the contract. The defaulter may do or suffer any of the following¹⁰²:

- (a) The defaulter may apply to the High Court for relief against the disability. That is, application to the court for permission to institute the action for the breach of contract. Whilst ordinarily, no permission is required to bring an action to enforce a claim for breach of contract, the defaulter, due to the default, is required to seek permission and it is only when the permission is granted that the defaulter can bring an action for the breach of contract.
- (b) The defaulter can be sued by third parties. The disability does not prejudice the rights of other parties against the defaulters. Even though the defaulter is under the disability to bring an action to enforce a contract, the failure to register the business name cannot be raised as a defence to an action from counterparties to enforce claims against the defaulting proprietor. In other words, whilst the defaulting proprietor cannot be a plaintiff, the defaulting proprietor can be a defendant.
- (c) The defaulter can apply to enforce his rights by way of counterclaim or set-off if the defaulting proprietor is sued and becomes a defendant. The Act permits the defendant to make a counterclaim or ask for a set-off against the plaintiffs.

2.3.2 PARTNERSHIP

Another entity through which business can be conducted in Ghana is a partnership, generally referred to as a firm. Partnership as a business entity in Ghana is regulated and governed by the Incorporated Private Partnership Act, 1962 (Act 152). The Act also provides that the rules of equity and common law continue to be applicable to a partnership registered in Ghana unless such rules are inconsistent with the Act. Section 58 of Act 152 provides that *"The rules of equity and common law applicable to partnership shall continue in force in so far as they inconsistent with the express provisions of this Act."*

Section 3 of Act 152 provides that *"Partnership means the association of two or more individuals carrying on business for the purpose of making profits"*. Further, the Act defines business to include every trade or profession.¹⁰³ The partnership must exist for the purpose of carrying on business for profit. In addition, the Act provides in section 4(2) that no partnership consisting of more than 20 persons or of which a body corporate is a member shall be registered as a firm. In effect, a partnership

¹⁰² Section 15 of Act 151.

¹⁰³ Section 2 of Act 152.

is an association of two but not more than 20 individuals carrying on any trade or profession for the purpose of making profit.

In the case of *Baidoo v. Sam*¹⁰⁴, Taylor JSC @ pg. 675 stated the definition of partnership in Ghana as:

“In the law of Ghana the subsisting general definition with a few exceptions not relevant to this case is that a partnership means the coming together of at least two but not more than twenty individuals with no body corporate as a member, in an association constituted and statutorily registered on or after 1 April 1963 for carrying on business jointly for the purpose of making profit.”

An association carrying on charitable activities or not-for-profit activities is not a partnership under the Act. Even though, the Act prohibits a not-for-profit association from being registered as a firm, the use of income from business of a firm to undertake a charitable venture will not bring the activities of the firm within the prohibited scope.

In the case of *Mensah & Others v. Adu & Others*¹⁰⁵, the Nkwanta State Council upon being advised that it had no authority to enter into the timber business, decided to encourage any well-organised body that could engage in such business on its behalf. Pursuant to this decision, the state council encouraged five persons, namely, the first two plaintiffs, the two defendants and one Kwaku Banin to form the Nkwanta Industrial Corporation which entered the timber business. There was an understanding between the firm and the state council that from its profits the firm would give the state council financial assistance and also promote the general welfare of the Nkwanta State by acts such as the award of scholarships to deserving young persons in the state. The initial capital of the firm consisted of a loan made to it by the state council. Upon the death of a partner and on admission of a new partner, a dispute arose. In an action before the court, one of the issues for determination was whether the use of the income from the business as stated means the association is not a partnership. It was held that a firm is a partnership notwithstanding an agreement that part of the profit of the company was to be used for the charitable purposes – promotion of the welfare of Nkwanta State through the award of scholarships to deserving young people in the state. Ollennu JSC stated @ pgs. 205-6 as follows:

“Counsel for the defendants and co-defendant ... contended that ... there was no proof that the five persons who carried on the business of the firm agreed to share profits from the business, and therefore the association is not a partnership. He supported his submission with the definition of partnership as contained in section 1 of the Partnership Act, 1890 which is as follows: “the relation which subsists between persons carrying on a business in common with a view of profit.”

¹⁰⁴ [1987-88] 2 GLR 666.

¹⁰⁵ [1965] GLR 198.

Though the Act is subsequent to 1874, yet this definition is applicable to Ghana ..., for as Farewell J. points out in British Homes Assurance Corporation, Ltd. v. Paterson, (1902) Ch. 404 at p. 410 it is merely declaratory, and states the common law position of partnership, ... This definition does not mean that a combination of persons doing business together for profit cannot be a partnership in law unless they were to share the profits for their individual personal benefit. The learned authors of Lindley on Partnership (12th ed.), p.14, commenting on the definition with respect to profits said:

"It is apprehended that even before the Act of 1890 persons who carried on a business in all other respects as partners, but with the object of applying the profits towards some charitable purpose, instead of dividing them among themselves would have been partners,"

... In the present case there is clear evidence that the original five persons came together to carry on business, and that after the death of Kwaku Banin the plaintiffs and the defendants came together to do business and albeit their coming together in each case was initially upon nomination or appointment by the Nkwanta State Council, it is also clear that they agreed to do the business together with a view of profit which they would employ for the welfare of the state; there is the further evidence that they made themselves liable for losses which occurred or may occur from the said business; and no good reason has been shown either in law or fact why they should be liable for losses arising out of the business but not to be entitled to profits. That first association of the five persons up to 1958, the date of the death of Kwaku Banin, and the subsequent association of four of the former five and the third plaintiff which began in 1958 answer the legal definition of a partnership, and the partners thereof are bound by all the legal implications of a partnership. The awards of scholarships made to members of the state, the acquisition of a building for the use of the Omanhene, i.e. the state, and financial grants made to the state from the profits of the business appear to be in accord with the objects of the partnership and the moral obligation undertaken by the partners, and the expenditure in that regard can be properly met from accounts in the transaction of the business.

Having misdirected himself as to the status of the state vis-a-vis the business, the learned judge failed to consider the legal position of the association of the five persons and their relationship inter se with respect to their said association and the business carried on by them. Consequently, he erred in holding that the plaintiffs failed to establish the existence of any partnership, and consequently he erred in concluding that the plaintiffs are not entitled to any of the reliefs they claim."

For an entity to be considered a partnership, it must therefore satisfy the definition. That is, it must have at least two individuals but not more than twenty and must be carrying on a business with the purpose of making profit. In addition to satisfying the definition, the entity must not be excluded by the Act from consideration as a partnership. Under the Act¹⁰⁶, the following shall not be regarded as a partnership:

- (a) An association of individuals that is registered under the Companies Act.
- (b) A company, body corporate or unincorporated association formed under any other enactment.
- (c) A body corporate formed in accordance with the law of a foreign country, whether or not carrying on business in Ghana.
- (d) A joint venture without a firm name for one or more specific operation.
- (e) Family ownership or co-ownership of property whether or not the family or co-owners share any profits made by the use of that property.

Other than the first three associations, the last two may be converted to a partnership by satisfying the requirement for formation and actually registering under the Act provided the association satisfies the definition of partnership under the Act. The Act provides for a pointer to guide such determination. Section 3(3) of Act 152 provides that:

“(3) Subject as aforesaid, the sharing of the net profits of a business shall, prima facie, be evidence of a partnership, but,

- (a) the remuneration of a servant or agent of a person engaged in business by a share of profits of the business shall not of itself make the servant or agent a partner; and***
- (b) a person shall not be deemed to be a partner if it is shown that he did not participate in the carrying on of the business and was not authorised so to do.”***

Sharing of net profit of a business is thus *prima facie* evidence of a partnership relationship. However, where a person engages a servant or agent on the basis of remunerating such servant or agent by a share of profits from the business, the servant or agent is not a partner of such a person. In addition, a person is not a partner if the person does not participate in carrying on the business and was not authorised to do so. The concept of dormant partner, it seems, is not known in Ghana.

Formation of Partnership

Unlike a sole proprietorship, the law requires the formation of a partnership in accordance with Act 152 prior to commencement of business. Section 4(1) of the Act provides ***“(1) ... it shall not be lawful for a partnership to carry on business unless the firm shall have been duly registered in accordance***

¹⁰⁶ Section 3(2) and (3) of Act 152.

with section 5 of this Act ...". Under the Act, the partners are required to prepare the relevant documents for the registration and submit same to the Registrar¹⁰⁷ for registration. Two documents are required to be delivered for the registration. These are the partnership agreement and the statement. Section 5(1) of the Act provides that:

"(1) Registration under this Act shall be effected in the manner following, that is to say, there shall be sent or delivered to the Registrar for registration a copy of the partnership agreement and a statement in the prescribed form signed by all the partners".

Every association starts with an agreement between or among the members of the association. A partnership as an association also starts with an agreement between or among the intended partners. A partnership agreement formalises the association between or among the individuals coming together for the purpose of carrying on a business. Section 5(1) of Act 152 requires that the partnership agreement or contract must be delivered to the Registrar as part of the registration process. The partnership agreement must be valid and enforceable. This partnership agreement must, therefore, be a valid contract.

The process of registration under Act 152 requires that a statement in the prescribed form, in which the partners are to provide specified particulars under the Act must be submitted to the Registrar. The Act requires the Statement to provide the following particulars¹⁰⁸:

- (a) the firm name of the partnership,
- (b) the general nature of the business of the partnership,
- (c) the residential address and post office box of the principal place of business of the partnership and any other place where the partnership business is carried,
- (d) the names and any former names, residential addresses and business occupation of the partners,
- (e) the date of commencement of the partnership, and
- (f) particulars of any charges or mortgages requiring registration under the Act

Even though the above particulars are mandatory per the Act, the Act expressly indicates the submission of the Statement shall not be construed as providing constructive knowledge of the particulars stated except charges registered under the Act. Section 11 of the Act provides that: *"Except as provided by section 31 of this Act, a person shall not be deemed to have knowledge of any particulars by reason only that such particulars are stated or referred to in any statement or notice registered in accordance with this Act."* There is therefore no constructive notice of information disclosed in the Statement except the charges registered in accordance with the Act.

¹⁰⁷ Section 353 of the Companies Act, 2019 (Act 992) makes the Registrar of companies the person responsible for registration of partnership under Act 152.

¹⁰⁸ Section 5(1) of Act 152.

In respect of the partnership agreement, the Act has not provided what must be in the agreement. The determination of the terms of the partnership agreement is left to the partners. The principle of freedom of contract will not support a prescription of the terms of a partnership agreement. Partnership agreements, therefore, vary in terms of the terms and conditions as it depends on what the partners choose to include in their agreement. Partnership agreements may vary in terms of a number of pages from a one-page agreement to an agreement of a hundred or more pages. However, a partnership agreement must generally provide, among others, for:

- (a) the parties to the agreement
- (b) representations based on which the agreement is to be entered
- (c) the name of the firm
- (d) the type of business to be undertaken
- (e) the rights and obligations of the partners
- (f) the duration of the partnership
- (g) requirements for being a partner and admission process for a new partner
- (h) grounds and consequences for termination of partners from the partnership
- (i) distribution of profits and losses
- (j) contribution of capital
- (k) manner of decision-making of the partnership
- (l) power of each partner
- (m) duties and liabilities of each partner
- (n) dispute settlement mechanism
- (o) government and applicable law

The partners are required to sign both the Partnership Agreement and Statement¹⁰⁹. The signed documents are submitted to the Registrar and payment of the prescribed fees made for the registration of the partnership.¹¹⁰ The Registrar is mandated to examine the document to ensure that it complies with the requirement of the Act. The Act empowers the Registrar to refuse to register the partnership on any of the following grounds:¹¹¹

- (a) the partnership cannot be registered under the Act;
- (b) any of the business to be carried on by the firm is unlawful or illegal;
- (c) the name of the firm is misleading or undesirable;
- (d) any of the partners have no capacity to contract. That is, the person is a minor or of unsound mind;
- (e) any of the partners have been guilty of fraud or dishonesty within the preceding five years, whether convicted or not, in relation to trade or business;
- (f) a partner is an undischarged bankrupt; and

¹⁰⁹ Section 5(1) of Act 152.

¹¹⁰ *Ibid.*

¹¹¹ Section 5(2) of Act 152.

(g) the Statement is incomplete, illegible, inaccurate, irregular or on paper insufficiently durable.

Act 152 provides in section 5(3) that: *“(3) For the purposes of forming an opinion in accordance with the immediately preceding subsection [that is on the above grounds], the Registrar may call upon any partner or former partner to supply such information as he shall think fit; and may require the books and accounts of the partnership to be produced for his inspection.”* The decision of the Registrar on refusal to register a partnership under the grounds stated in paragraph (a), (b) or (d) above may be appealed by partner or person claiming to be a partner to the High Court.¹¹² By implication, the decision of the Registrar to refuse registration on grounds stated in paragraph (c), (e) and (f) cannot be challenged. Such decisions will be final unless established that the Registrar as a public officer acted contrary to Article 296 of the 1992 Constitution.¹¹³

If the Registrar is satisfied that the documents submitted for registration comply with the Act, the Act mandates the Registrar to register the partnership. Upon registration, the Registrar General must issue a Certificate of Registration¹¹⁴ under his official seal and to state in the certificate that the partnership has been registered and incorporated. The Registrar must also state the names of the partners and that their “Liability is Unlimited”. The Act also requires the Registrar to insert a copy of the certificate in the Gazette and to state in the Gazette the issue of the certificate and the terms of the certificate.

Section 6 of Act 152 provides:

- “(1) Upon registration the Registrar shall certify under his seal that the firm has been registered and is incorporated and such certificate shall state the names of the partners and that their liability is unlimited.*
- (2) The Registrar shall insert a notice in the Gazette stating the issue of the certificate and the terms thereof.*
- (3) The certificate, or a copy thereof, certified as correct under the hand of the Registrar, or the Gazette containing the notice referred to in the immediately preceding subsection, shall be conclusive evidence that the firm has been duly incorporated under this Act.”*

¹¹² Section 5(4) of Act 152.

¹¹³ Article 296 of the 1992 Constitution provides:

“Where in this Constitution or in any other law discretionary power is vested in any person or authority –

- (a) that discretionary power shall be deemed to imply a duty to be fair and candid;*
- (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and*
- (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument, statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.”*

¹¹⁴ Section 6 of Act 152.

Effect of Registration

From the date mentioned in the certificate, the partnership becomes an incorporated entity capable of exercising legal capacity in its name. It continues to exist as a legal person until it is formally wound up in accordance with the provisions of the Act. Section 12(1) of Act 152 provides that *“(1) From the date of registration mentioned in the certificate of registration issued in accordance with section 6, the firm is a body corporate under the firm name, distinct from the partners of whom it is composed, and capable of exercising the powers of a natural person of full capacity in so far as those powers can be exercised by a body corporate.”* Therefore, on completion of registration under the Act, the partnership becomes an incorporated entity identified by its own name as indicated on the certificate of registration. The registration confers a legal personality on the partnership that is separate and distinct from that of its partners from the date of registration indicated on the certificate. The legal personality of the firm continues notwithstanding any change in the particulars stated in the Statement or amendment of the partnership until the firm is dissolved in accordance with the Act.¹¹⁵

The Act, however, requires annual renewal of the registration by delivery of the prescribed Statement¹¹⁶ to the Registrar. In addition, any change in the particulars required for registration must be notified to the Registrar.¹¹⁷ Failure to renew the registration does not affect the legal personality of the firm. Section 9 of the Act, however, prescribes penalties that are imposed on the firm and the partners for the default to renew the registration. Section 9(1) of Act 152 provides:

“In the event of default in complying with sections 4, 5, 7 or 8 of this Act,
(a) every partner shall be liable to a fine not exceeding twenty-five
penalty units for each day during which the default continues;
(b) the rights of the firm concerned and of the partners therein arising out
of any contract made during such time as the default continues shall
not be enforceable by action or other legal proceedings.”

Publication of firm name and partners' name

The registered name of the firm is required to be painted or affixed outside of every office or place in which its business is carried on.¹¹⁸ In addition, the firm must have the registered firm name and the names of all the partners in the firm accurately mentioned in legible characters at the head of all trade circulars and business letters of the firm. The certificate of registration must also be exhibited

¹¹⁵ Section 12(2) of Act 152.

¹¹⁶ Section 8 of Act 152.

¹¹⁷ Ibid.

¹¹⁸ Section 13 of Act 152.

in a conspicuous position at the principal place of business of the firm.¹¹⁹ Default of any of the above attracts a fine under the Act.¹²⁰

Failure to register prior to commencement of business

The Act provides that it is unlawful for any firm to carry on business as a partnership unless registered under the Act and further provides sanction for the breach. Section 9(1) of the Act provides that in the event a partnership carries on business without registration:

- “(a) every partner shall be liable to a fine not exceeding twenty-five penalty units for each day during which the default continues;*
- (b) the rights of the firm concerned and of the partners therein arising out of any contract made during such time as the default continues shall not be enforceable by action or other legal proceedings.”*

In effect, to carry on a business as a partnership without registration, the Act imposes the following liabilities¹²¹:

- (a) A fine is imposed on every partner for each day of the default.
- (b) The firm cannot take legal action against third parties to enforce a contract entered into at the time of the default. Third parties can however sue the firm to enforce the contract.
- (c) Partners cannot sue each other on the partnership agreement

The law recognises there may be instances where injustice may be occasioned by strictly enforcing the disability provisions which prevent the firm from bringing legal action to enforce contracts against third parties. For example, a party to a contract with the firm, who has taken delivery of goods may be unjustly enriched if he refuses to pay for the goods under the contract and the firm is disabled from bringing an action to recover the price. The Act, therefore, provides for two instances where an unregistered firm can enforce its right under contracts entered into at the time of the default. These are:

- (a) The firm may apply to the Court for a relief against the disability imposed by the law. The Court may grant the relief if it is just and equitable to do so.
- (b) Even though the firm and the partner cannot sue third parties until it gets the relief from the Court, when sued first by the third party, either the firm or the partners can file a counterclaim or ask for set-off or for any other right that may have accrued under the contract against the third party.

¹¹⁹ Ibid.

¹²⁰ Section 13(2) of Act 152.

¹²¹ Section 9 of Act 152.

Re Sasu Twum (decd); Sasu-Twum v. Twum¹²² - A widow, whose husband had died intestate, sued for a declaration that she was engaged in a partnership with her deceased husband in carrying on the business. Therefore, she was entitled to half of the business based on that partnership. The partnership was not registered as required by the Incorporated Private Partnership Act, 1962 (Act 152), Section 4(1). It was held by the court that although the contract to engage in partnership business was ostensibly a valid contract, the illegality of not registering the agreement as was required by Act 152 rendered it unenforceable such that neither of the partners could enforce any right arising out of the said agreement. In effect, the plaintiff could not rely on the partnership agreement to claim her half share of the business. Abban J. stated @ pgs. 29 to 31 as follows:

"I should remark that the plaintiff is an educated person and she was aware of the existence of the Incorporated Private Partnerships Act, 1962 (Act 152), and must be taken to have been aware of its provisions. The plaintiff and the deceased, in fact, referred to some of the provisions of the said Act in the partnership agreement. So that the plaintiff and the deceased knew all the time that it was unlawful, under Act 152, to carry on business in the name of S. S. Twum & Sons without first registering it; and it is clear to me that because they did not want to take any risk, they never intended, and never attempted, to put into operation any of the terms of the partnership agreement until the partnership itself was duly registered. If that was not the case, then why is it that they did not, after executing the agreement, change the sign board on the shop from S. S. Twum & Sons Ltd. to S. S. Twum & Sons but allowed the old sign board of S. S. Twum & Sons Ltd. to remain on the shop up to the time of the death of the husband and even up to today? Or why did they not, for the time being, open partnership account in the name of S. S. Twum & Sons or share the profits accruing from the business as specified in clauses (2) and (3) of the agreement, while waiting for the registration to go through?

In my opinion, this conduct on the part of the plaintiff and the deceased is a clear proof that they never intended the said partnership agreement to be operative until and unless the name, S. S. Twum & Sons, was duly and properly registered as a partnership under Act 152. Since the partnership was never in fact registered, the terms of the partnership agreement never also came into operation. Consequently, the rights and the obligations of any of the parties thereto could not and cannot be enforced.

If, on the other hand, the partnership agreement really took effect from 17 September 1970, the date of its execution, and its terms were put into operation by the plaintiff and the deceased by carrying on business in the name of S. S. Twum & Sons, despite their failure to register S. S. Twum & Sons as a partnership, then I am afraid, the plaintiff and the deceased wilfully conducted themselves in direct breach of the provisions of section 4 of Act 152; and in that case, I agree with learned counsel for

¹²² [1976] 1 GLR 23.

the defendant that this court should not lend its aid to the plaintiff. Section 4(1) of the Incorporated Private Partnerships Act, 1962 (Act 152), provides that:

"After the expiration of three months from the commencement of this Act, it shall not be lawful for a partnership to carry on business unless the firm shall have been duly registered in accordance with section 5 of this Act and not struck off the register under section 51, 52 or 53 of this Act."

A contract to engage in a partnership business, like exhibit A, is ostensibly a valid contract. But an illegality may defeat such a contract. The illegality may arise by statute or by virtue of the principles of common law.

In the present case, the illegality which exhibit A faced arose from the contravention of the provisions of section 4(1) of Act 152 as stated above. The plaintiff and the deceased failed to register the partnership and the plaintiff's story, if accepted, meant that they carried out the terms of the agreement when they knew they had not registered the partnership. On the true construction of the provisions of Act 152, partnership business is statutorily forbidden unless the partnership is registered in accordance with the provisions of the said Act. That is to say, the plaintiff and the deceased were statutorily forbidden to carry out the terms of the agreement and generally perform the agreement, exhibit A, without first complying with the provisions and the conditions as regards registration.

*Thus, as I have already said, if the plaintiff's evidence is true then, on her own showing, she and the deceased committed an illegal act. They contravened the provisions of Act 152; and, in my view, the contravention concerned an act essential to the contemplated execution of the agreement. In other words, their failure to comply with the requirements of Act 152 made the performance of the agreement illegal, and the illegality affected the very core of the agreement. The agreement was therefore unenforceable: see the statement of Scrutton L.J. in *Anderson Ltd. v. Daniel* [1924] 1 K.B. 138 at p. 149, C.A. In any case, the consequences of contravening the provisions of Act 152 have been spelt out in section 9 of the said Act which states as follows:*

"9. (1) In the event of default in complying with section 4, 5, 7 or 8 of this Act,

- (a) every partner shall be liable to a fine not exceeding five pounds [ten cedis] for each day during which the default continues;*
- (b) the rights of the firm concerned and of the partners therein arising out of any contract made during such time as the default continues shall not be enforceable by action or other legal proceedings."*

The proviso to section 9(1) of Act 152 does not apply to the present case. The implications of the above provisions are clear. If the plaintiff and the deceased did carry on business in partnership under the name S. S. Twum & Sons as stipulated in clause (1) of the agreement, exhibit A, then they were in breach of section 4(1) of the said Act and were therefore subject to the penalties and the disabilities prescribed by section 9(1) of Act 152; and also neither the plaintiff nor her husband could enforce his or her rights arising out of the said agreement, so long as the name of the partnership, S. S. Twum & Sons, continued to be unregistered. In the circumstances, I hold that the plaintiff cannot rely on the partnership agreement to claim a half share of the goods in the shop."

*Baidoo v. Sam*¹²³ - the plaintiff claimed he was a joint owner with one Mr. Arzumah (A) of a business whose name was registered in accordance with Act 151 as "Unity Salt Industries" for production of salt. The name on the registration form was that of the plaintiff. Mr. A indicated that being a police officer at the time, he instructed the plaintiff to register the business and act as his "front man". The plaintiff claimed he had acquired the land on which the salt was produced with Mr. A. Evidence was provided to the contrary that Mr. A had acquired the land alone and had in fact employed the plaintiff to act as a "front man" for the registration and management of the business. Mr. A sold the business to the defendant without the plaintiff's knowledge or inclusion in the transaction but had given him a portion of the deposit paid by the defendant to cover costs of loans the plaintiff had taken in the name of the business per Mr. A's authorisation. The plaintiff was seeking a declaration that the transaction between the defendant and Mr. A should be set aside. It was held that there was no agreement of a partnership between the Plaintiff and Mr. A. Moreover, if there was any such agreement, there was no evidence of registration of partnership agreement as in accordance with Act 152. Consequently, the plaintiff could not benefit from an illegal contract and could not call upon the court to set aside a transaction of which he had no part or benefit. Taylor JSC in delivering the judgement of the Court of Appeal stated @ pgs. 679 to 680:

"For plurality of persons not exceeding twenty registration must be under Act 152 not Act 151. By section 1 of its provisions Act 152 came into force on 1 January 1963, so this date must be taken to be its commencement date. Now under section 4(1) of Act 152 it is provided as follows:

"After the expiration of three months from the commencement of this Act, it shall not be lawful for a partnership to carry on business unless the firm shall have been duly registered in accordance with section 5 of this Act and not struck off the register ... under this Act."

The plaintiff, therefore, since his alleged partnership was not registered, is in effect claiming that he was engaged in illegal business with one John K. Arzumah and wants the aid of this court to help him assert his rights under the said business. I

¹²³ [1987-88] 2 GLR 666.

do not think it is proper for this court to lend its support to a party in the position of the plaintiff who by his own pleadings has alleged that the foundation of his claim is tainted with illegality. The rule is ex turpi causa non oritur actio. Lindley L.J. in Scott v. Brown, Doering McNab & Co. [1892] 2 Q.B. 724 at 728 stated the principle in this resounding language which would seem to cover the facts of this case with commendable prophetic perspicacity when he said:

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality."

It should be noted that the prohibition does not apply where a partnership entity registered in another jurisdiction sues in Ghana to enforce a contractual right.

*Levandowsky v. Attorney-General*¹²⁴ - The plaintiffs were a foreign firm of partnership who never carried on business in Ghana since all the work was done abroad, nor were they resident in Ghana. In 1962, the plaintiffs sued the government successfully with respect to a debt that arose out of an agreement dated 13th March, 1962. On August 11th, 1970 when the plaintiffs asked for leave to go into execution, the defendant raised preliminary objections submitting that the plaintiffs not having registered as a company under the Companies Code, 1963 (Act 179) or not having been registered as a firm of partnership under the Incorporated Private Partnership Act, 1962 (Act 152) were hindered from instituting any legal proceedings for the purpose of enforcing any rights which the plaintiffs may have had under the said agreement. The defendant also submitted that because the plaintiff instituted the action in the High Court of Ghana and obtained judgment, they must be taken to have carried on business in Ghana with reference to Order 48A, r. 1 of the Supreme [High] Court (Civil Procedure) Rules (L.N, 140A/54). The objection was overruled. The court held that the plaintiffs have never "carried on business" in Ghana within the meaning of section 4 of Act 152, therefore it was not necessary for them to have their partnership firm registered in compliance with the said section in order to be entitled to take legal proceedings to recover their professional fees. They are also not caught by the provisions of section 9(1)(b) of Act 152, thus their rights arising out of the said agreement are enforceable by action or by any other legal proceedings. Abban J. (as he then was stated) @ pgs. 40-1 stated:

"The question now to be considered is whether the plaintiffs, a foreign firm of partnership, ever carried on business in this country so as to make section 4 of Act 152 applicable to them. Section 4 of Act 152 which came into operation on 1 January 1963 reads as follows:

¹²⁴ [1971] 1 GLR 38.

"4. (1) After the expiration of three months from the commencement of this Act, it shall not be lawful for a partnership to carry on business unless the firm shall have been duly registered in accordance with section 5 of this Act and not struck off the register under section 51, 52 or 53 of this Act."

(The emphasis is mine.)

Section 5 of this Act lays down the procedure for registration. Section 7 provides for what should be done by the registered firm of partnership, if changes are made or otherwise occur in the particulars already registered with the Registrar-General; and section 8 mainly deals with the annual renewal of the registration. As a result the disabilities and the sanctions spelt out in section 9(1) of Act 152 for breach of sections 4, 7 or 8 of Act 152 will apply only to partnership firms which are in fact carrying on business in this country. Foreign partnership firms which are not or have not been carrying on business in Ghana are not affected in any way by section 9(1) of Act 152."

Separate legal personality of the firm and relationship with partners

As noted above, upon registration of the firm under Act 152, the firm becomes a separate legal person which is distinct from the partners.¹²⁵ The firm can, therefore, act in its name. The firm and the partners thus become separate, distinct and independent persons. As a separate legal person, the law defines what relationship exists between the firm on the one hand and the partners on the other hand. Act 152 provides for two types of relationships that exist between the partners on the one hand and the firm on the other hand.

Section 14(1) of Act 152 provides that ***"(1) ... every partner shall be an agent of the firm for the purpose of the business of the firm..."***. Further, section 34(1) of Act 152 states ***"(1) ... partners shall stand in a fiduciary relationship towards the firm ..."***. Two types of relationship are imposed between partners and the firm – an agency relationship and a fiduciary relationship. Under the agency relationship, every partner of the firm is an agent and the firm is the principal for the purpose of the conduct of the business of the firm. As such all principles of agency are deemed applicable when the partner conducts the business of the firm.¹²⁶ In addition to the agency relationship, the Act provides each partner stands in a fiduciary relationship with the firm. Fiduciary relationship requires the partners as fiduciary to act in the interest of the firm, which is the beneficiary, in all instances. It must be noted that an agency relationship implies fiduciary obligations on the part of the agent. However, a fiduciary relationship arises even where there is no appointment and a person elects to act in the interest of another person. The imposition of the fiduciary relationship implies the

¹²⁵ Section 12 of Act 152.

¹²⁶ Section 58 of Act 152.

partners must at all times act in the interest of the firm whether the partners are so expressly or impliedly authorised by the firm, or where the partners simply elect to so act on behalf of the firm even where there is no appointment.

Power of a partner to bind the firm

In view of the relationship imposed by law as between the partners on the one hand and the firm on the other, especially as agents of the firm, the Act permits the partner to bind the firm to a contract. Section 14(2) and (3) of Act 152 provides:

- “(2) The acts of every partner shall bind the firm if,*
- (a) such acts were authorised, expressly or impliedly, by his other partners or were subsequently ratified by them;*
 - (b) such acts were done for carrying on in the usual way business of the kind carried on by the firm, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing knows that he has no authority.*
- (3) Where the acts of a partner are for a purpose apparently not connected with the firm’s ordinary course of business, the firm shall not be bound unless he is in fact authorised by his other partners or his act is subsequently ratified by them.”*

A partner thus can bind a firm when:

- (a) the act of the partner is authorised, expressly or impliedly, by the other partners;
- (b) the act of the partner is not authorised but is subsequently ratified by the other partners;
- (c) the act of the partner is done for carrying on in the usual way the business of the kind conducted by the firm is done. However, where the act is done for carrying on the business of the firm was not authorised, it would not bind the firm if the third party knew that the act was not authorised; or
- (d) the act of the partner done is not for purposes apparently unconnected with the business of the firm, but it was authorised or later ratified by the other partners.

The power of a partner to bind the firm can be restricted by agreement. Section 14(4) of Act 152 provides *“(4) If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement shall be binding on the firm with respect to persons having notice of the agreement: Provided that an agreement purporting to limit the extent of the liability of the firm or the partners in respect of any act binding the firm shall not be effective except as between the actual parties to the agreement.”*

It should be noted that any restriction on the powers of a partner to bind the firm will not operate against a third party who entered into an agreement with the firm where the partner in entering the agreement breached the restriction unless the third party has actual knowledge of the restriction.

Relationship among partners

As between or among the partners themselves, there are two types of relationship recognised by law. That is a contractual relationship and a statutory fiduciary relationship. The association of two or more individuals for the purpose of carrying on business for profit originates from a contract entered into by the partners, which is the partnership agreement. Their first relationship is therefore contractual in nature. The Act requires the partnership agreement to be delivered for registration of the firm. Based on the principle of freedom to contract, the partners are free to determine the terms of the partnership agreement. In the absence of stated terms, Act 152 implies a number of terms into the partnership agreement as provided below. In essence, there is a contractual relationship among the partners. The partners are, therefore, bound contractually to the terms as stated in the partnership agreement. This agreement is enforceable among the partners once the firm is registered under the Act.

In addition to the contractual relationship among the partners, fiduciary relationship is created by law among the partners. The Act provides in section 34 that *“partners stand in a fiduciary relationship towards the firm and their co-partners”*. The fiduciary relationship is, therefore, not only towards the firm but also to each of the other partners. In expanding on the extent of the fiduciary relationship, section 34(2) of Act 152 provides:

- “(2) Without prejudice to the generality of subsection (1) of this section,*
- (a) every partner shall be bound to render to every other partner full information of all things affecting the firm;*
 - (b) every partner shall account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the firm or from any use by him of the firm’s property, name or business connection;*
 - (c) if a partner, without the consent of the other partners, directly or indirectly carries on any business of the same nature as, and competing with, that of the firm, he shall account for, and pay over to the firm, all profits made by him in that business.”*

In addition to the general principles of common law applicable to fiduciary obligations, the Act provides for three statutory duties to be observed among the partners in relation to each other. The partners are required to render full information of all matters affecting the firm to the other partners. A partner must disclose all information that come into his possession that affect the firm to his other

partners. Secondly, a partner has a duty to account to his other partner for any benefit the partner receives from any transaction concerning the firm, or the use of the firm's name, property or business connection. It should be noted that such benefit can be kept by the partner only upon obtaining the consent of the firm to do so. Lastly, a partner has a duty not to, directly or indirectly, compete with the firm by carrying on a similar business as the one being carried on by the firm except where he obtains the consent of the partners. A breach of this duty requires the partner to account for and pay to the firm, all profits derived from the competing business.

These duties imposed on the partners are mandatory in nature and cannot be derogated from. The partners cannot, therefore, per the partnership agreement elect not to be under a duty to render full information, or to account to the other partners, or to retain benefits from competing business without the consent of the other partners. The rationale is that these duties are essential for the survival of any partnership and must be strictly adhered to by the partners in their dealing with each other.

Partnership Agreement and default applicable rules

A critical document for the formation of a partnership is a partnership agreement. As noted earlier, the association of the individuals must be based on an agreement. A partnership agreement is required under Act 152 to be in writing and signed by all the partners.¹²⁷ In addition, the partnership agreement and statement must be submitted, and the firm registered for the partnership agreement to be enforceable in law. Failure to register the firm will render the partnership agreement unenforceable.

Taylor JSC stated in *Baidoo v. Sam*¹²⁸ in relation to a partnership agreement that has not been registered as follows:

"Thus, as I have already said, if the plaintiff's evidence is true then, on her own showing, she and the deceased committed an illegal act. They contravened the provisions of Act 152; and, in my view, the contravention concerned an act essential to the contemplated execution of the agreement. In other words, their failure to comply with the requirements of Act 152 made the performance of the agreement illegal, and the illegality affected the very core of the agreement. The agreement was therefore unenforceable".

The Act does not provide for the terms of the partnership agreement. This is due to the doctrine of freedom to contract where parties to a contract retain the freedom to determine the terms to which they must be bound. However, the Act recognises the need for stated terms for a partnership to be

¹²⁷ Section 5(1) of Act 152.

¹²⁸ [1987-88] 2 GLR 666.

operative. In view of that, the Act provides in section 35, a number of default rules applicable to the partners unless contrary terms are expressly stated in the partnership agreement or implied from the dealings of the partners. Unlike the provisions of section 34 of Act 152, the provisions of section 35 apply only in the absence of stated or implied terms in the partnership agreement relating to the matters regulated by the rules. Section 35 of Act 152 provides as follows:

“(1) Subject to the provisions of this Act the mutual rights and duties of the partners whether ascertained by agreement or by the provisions of this section may be varied by the consent of all the partners and such consent may be either express or inferred from a course of dealing.

(2) Subject to any agreement, express or implied, the following rules shall apply, that is to say,

- (a) all the partners shall be entitled to share equally in the capital and profits of the firm and shall contribute equally towards the losses sustained by the firm;*
- (b) the firm shall indemnify every partner in respect of payments made and personal liabilities incurred by him,*
 - (i) in the ordinary and proper conduct of the business of the firm; or*
 - (ii) in or about anything necessarily done for the preservation of the business or property of the firm;*
- (b) a partner, making, for the purpose of the firm, any actual payment or advance beyond the amount of capital which he has agreed to subscribe shall be entitled to interest at the rate of five per centum per annum from the date of payment or advance;*
- (c) notwithstanding that the partnership agreement provides for payment of interest on the capital subscribed by any partner, a partner shall not be entitled to payment of such interest before the ascertainment of the profits of the firm;*
- (d) every partner may take part in the management of the business of the firm;*
- (e) no partner shall be entitled to remuneration for acting in the firm's business;*
- (f) no person may be introduced as a partner without his consent and the consent of all the existing partners;*
- (g) any difference arising as to ordinary matters connected with the firm's business may be decided by a majority of the partners, but no change may be made in the nature of the firm's business without the consent of all the existing partners;*

(h) the partnership books and accounts shall be kept at the place of business of the firm or the principal place of business if there is more than one."

The above are applicable default rules in the absence of contrary express terms in the partnership agreement, or contrary position implied from the conduct of the parties. As indicated, the parties are free to modify the above rules by providing contrary terms in the partnership agreement.

A partnership may be for a fixed term. Upon expiration of the fixed term, the partnership may be wound up. However, under section 36 of Act 152, where the partners expressly or impliedly agree to continue as partners in the firm after the fixed term, the rights and duties of the partners who so agree, in the absence of any agreement to the contrary, shall remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will.

Liability of the firm and partners

Section 12(1) of Act 152 provides that the firm upon completion of registration becomes a separate legal person able to act in its own name. Further, the Act provides that the partners are agents of the firm for the purpose of the business of the firm.¹²⁹ The general principle under common law is that the agent is not liable for the contract entered into on behalf of the principal. Therefore, the firm is deemed to be liable for obligations assumed under contracts entered into by the firm in its own name or by the partner on behalf of the firm. Notwithstanding this position, the Act makes partners liable in addition to the firm, for the obligation assumed by the firm under contract and law. Section 12(3) of Act 152 provides that:

"Notwithstanding that the firm is a body corporate, each partner therein shall be liable, without limitation, for the debts and obligations of the firm in the manner referred to in section 16 of this Act; but shall be entitled to an indemnity from the firm and to contribution from his co-partners in accordance with his rights under the partnership agreement."

The general position under the Act is, therefore, that although the firm is a body corporate, the firm and each partner of the firm is liable without limitation for the debts and obligations of the firm in accordance with section 16. This means that though the firm can be held liable for its debts and obligation, the partners can also be held liable for the debts and obligations of the firm. The liability of the partners is therefore unlimited in relation to the firm.

The manner of liability is provided for in Section 16 of the Act. The section provides that ***"... every partner in a firm is jointly and severally liable with the firm and the other partners for the debts***

¹²⁹ Section 14(1) of Act 152.

and obligations of the firm incurred while that partner remains a partner". This means that a creditor or claimant against the firm can hold all partners together with the firm liable for the obligations or liabilities of the firm. In the alternative, a creditor or claimant can choose any partner to hold liable for the debts or obligations of the firm. The action must be instituted in the name of the firm.¹³⁰ The name of the partners must however be disclosed.¹³¹

The liability is imposed on the partners that are partners at the time the liability was incurred.

Liability of an apparent partner

There are instances where a person who is actually not a partner, as the person is not a party to the partnership agreement, has not signed the statement or has not been admitted to partnership, can be held liable due to the representation made by the person or others that the person is a partner. In other words, the person is an apparent or *de facto* partner. That is, the person either represented himself to be a partner or acquiesced in representation by another person that he is a partner. The representation can either be by words, spoken or written, or implied from conduct. Such a person can be held liable as a partner under section 18 of Act 152 under the concept of liability by holding out. That is, the person is held liable as a party because the person though not a partner either holds himself out or allows himself to be held out as a partner.

Section 18 of Act 152 provides:

"Every person who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm shall be liable as a partner to any other person who has, on the faith of any such representation, allowed the firm to incur debts or obligations to him whether the representation has or has not been made or communicated to such other person by or with the knowledge of the apparent partner making the representation or suffering it to be made:

Provided that where after a partner's death or retirement the firm continues to do business in the same firm name, the continued use of that name or of the former partner's name as part thereof, shall not of itself make his estate or him liable for any debts or obligations of the firm contracted or incurred after his death or retirement."

The liability arises under the general doctrine of estoppel which provides that a person who by his conduct or words, written or spoken, makes a representation of fact which is meant to and is actually relied on by another to his detriment, is prevented from denying his representation which is untrue.

¹³⁰ Order 6 rule 1 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

¹³¹ Order 6 rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

That person will be liable based on the misrepresentation. A partner is, therefore, held liable under the operation of the doctrine of estoppel as provided by the section.

Retiring or deceased partners are not held liable under section 18 of Act 152 simply because the firm continues to carry business in the same firm name or continues to use the name of the former partner as part of the name of the firm. The proviso to section 18 of Act 152 provides that:

“Provided that where after a partner’s death or retirement the firm continues to do business in the same firm name, the continued use of that name or of the former partner’s name as part thereof, shall not of itself make his estate or him liable for any debts or obligations of the firm contracted or incurred after his death or retirement.”

Right to indemnity and contribution

Given the severability of the liability of the firm, a creditor or claimant can select a particular partner or partners to proceed against for the liability of the firm or a partner may elect to settle the liability. Section 12(3) of Act 152 entitles the selected or elected partner to indemnity from the firm and to contribution from his co-partners in accordance with the rights of the partner under the partnership agreement where the partner incurs liability or debt as a partner. Indemnity is the obligation of a person to reimburse another person for making payment which the person making the indemnity is under a legal duty to make.

Restrictions and qualifications on the liability of partners

Notwithstanding sections 12(3) and 16 of the Act, not all partners are liable for debts incurred by the firm. The Act exempts partners who became partners after the liability was incurred. Section 17(1) of the Act provides for the exemption of persons who became partners from anything done before such persons became partners. Section 17(1) of Act 152 provides that:

“(1) A person who is admitted as a partner into an existing firm shall not thereby become liable to the creditors of the firm for anything done before he became a partner.”

On the other hand, a partner who retires from the firm is liable for anything done before his retirement from the firm.¹³² A retired partner, therefore, remains liable for debts and obligations contracted before the retirement of the partner. However, the retired partner can discharge himself from such liability by entering into a valid agreement with the remaining partners and the creditor

¹³² Section 17(2) of Act 152.

that discharges the retired partner from liability.¹³³ The agreement discharging the retired partner must be a valid contract for it to be binding and enforceable.

A retired partner may be held liable for liability incurred after his retirement. The Act provides that a person who deals with a firm after the retirement of a partner who the person knows to be a partner, is entitled to hold that retired partner liable until the person has notice of the retirement of a partner.¹³⁴ Such notice must be an actual notice and not constructive notice.¹³⁵ However, an advertisement in a daily newspaper published and circulated in the district where the principal place of business of the firm is situated shall be deemed to be a notice to a person who has dealings with the firm.¹³⁶ Subject to the foregoing, the estate of a dead partner or a partner against whom an insolvency order has been made, or a retired partner shall not be held liable for liability incurred after retirement.¹³⁷

Section 17 of Act 152 provides:

- “(1) A person who is admitted as a partner into an existing firm shall not thereby become liable to the creditors of the firm for anything done before he became a partner.*
- (2) A partner who retires from a firm shall not thereby cease to be liable for the debts or obligations of the firm incurred before his retirement.*
- (3) A retiring partner may be discharged from any existing liability by an agreement to that effect between himself and the firm and the creditor, and this agreement may be either express or inferred as a fact from the course of dealing between the creditor and the firm as newly constituted.*
- (4) Where a person deals with a firm after the retirement of any partner whom he knew to be a partner in the firm, he shall be entitled to treat the retired partner as still being a partner until he has notice of the retirement and the retired partner shall be liable accordingly.*
- (5) If any such person had dealings with the firm prior to the retirement he shall not be deemed to have notice of the retirement unless he has actual knowledge thereof, but an advertisement in a daily newspaper circulating in the district in which is situated the principal place of business of the firm shall be notice to persons who have not had dealings with the firm prior to the retirement.*
- (6) The estate of a partner who dies or has an insolvency order made against him under the [Insolvency Act, 2006 (Act 708)] or, subject as provided by subsections*

¹³³ Section 17(3) of Act 152.

¹³⁴ Section 17(4) of Act 152.

¹³⁵ Section 17(5) of Act 152.

¹³⁶ Ibid.

¹³⁷ Section 17(6) of Act 152.

(4) and (5) of this section, a partner who retires, shall not be liable for any debts or obligations of the firm contracted or incurred after the date of the death, insolvency order, or retirement respectively."

Liability of the firm for partner's liability

Notwithstanding that the partners are liable, together with the firm, for the debt of the firm, the firm is not liable for the debt of a partner. The Act provides that a writ of execution shall not issue against the property of a firm except on a judgment against the firm.¹³⁸ Therefore, a judgment against a partner cannot be enforced against the firm.

However, the interest of the partner in the firm can be charged against the judgment against the partner.¹³⁹ The Act provides that:

*"Where judgment has been recovered against any partner the Court may, on the application of the judgment creditor, make an order charging the partner's interest in the firm with the payment of the amount of the judgment debt and interest thereon, and may, by the same or a subsequent order appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money that may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been given or directed if the charge had been made in favour of the judgment creditor by the partner or which the circumstances of the case may require."*¹⁴⁰

The interest of the partner in the firm is a personal estate, that is an intangible asset of the partner. Such interest can therefore be attached to satisfy a judgment against the partner. An application must be made to the court for the court to order the attachment by either directing payment due the partner to be paid to the judgment creditor or appointing a receiver to receive amounts due and amounts that will become due in the future to the partner from the firm. Such amount received by the receiver will be used to pay the judgment creditor.

The Act permits the other partners to, at any time, redeem the interest charged or, in the case of a sale being directed, may purchase the same.¹⁴¹

¹³⁸ Section 20(1) of Act 152.

¹³⁹ Section 20(2) of Act 152.

¹⁴⁰ Section 20(2) of Act 152.

¹⁴¹ Section 20(3) of Act 152.

Nature of a partner's interest in the firm

One of the characteristics of an incorporated entity is that it has the capacity to acquire and own assets in its own name. There is, therefore, a distinction between corporate assets and personal assets. In respect of a partnership, once registered, it becomes an incorporated entity and has the capacity to acquire and own assets in the name of the firm. There is therefore a separation of the firm's assets from the personal assets of the partners. The partners do not own the firm's assets. It is, therefore, important to determine what is the nature of the partners' interest in the firm. Section 37 of Act 152 answers that question by providing that:

"The interests of the partners in the firm constitute a personal estate and are not in the nature of real or immovable property".

This means that the nature of a partner's interest is in the rights that the partner is entitled to as a partner in the firm and not an interest in the assets of the firm. The right is treated as a personal estate but it is not in the nature of real or immovable property. It is an intangible species of property. As a personal estate, it has the attribute that it can be assigned to a third party who is not a partner in the firm. Upon a valid transfer or assignment of the partner's interest, the partner will cease to be entitled to the rights which he has transferred or assigned to the extent of the transfer or assignment. The assignment can take the form of a gift, a sale or a mortgage. As assignee or transferee of the interest, the assignment or transfer only entitles the assignee to receive the share of profits to which the assigning or transferring partner would have been entitled, and the assignee or transferee shall accept the account of profits agreed to by the partners¹⁴². The transfer or assignment does not entitle the transferee or assignee to take part in the management of the firm, inspect the books of the partnership or order for accounts of the firm's transaction.

Section 38(1) of Act 152 provides:

"(1) An assignment by any partner of his interest in the firm, either absolute or by way of a charge, shall not, as against the other partners, entitle the assignee to interfere in the management or administration of the firm or to require any accounts of the firm's transactions or to inspect the partnership books, but shall entitle the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee shall accept the account of profits agreed to by the partners."

The right ceases when the assigning partner himself ceases to be a member of the firm.¹⁴³ When this occurs, the assignee will receive the amount, if any, the partner would have been entitled to receive

¹⁴² Section 38 of Act 152.

¹⁴³ Ibid.

upon ceasing to be a partner in the firm to the extent of the assignment or transfer of interest. Section 38(2) of the Act provides that:

“(2) In the event of the assigning partner ceasing to be a partner in the firm the assignee shall be entitled to receive the amount which the assigning partner or his estate would be entitled to receive as between himself and the other partners and, for the purpose of ascertaining that amount, to an account as from the date of his ceasing to be a partner.”

Registration of charges

A charge is simply a security interest created by an agreement or law over assets to secure the performance of an obligation, usually the repayment of debt. The charge may be a fixed charge or floating charge. Section 2 of Act 152 provides *“charges include a mortgage, legal or equitable”*. A firm as a legal entity in its own name has the legal capacity to acquire and own assets. The assets of the firm are separate from the assets of the partners. The firm can, therefore, exercise borrowing powers and create a charge over its assets to secure the repayment obligation. The Act permits the creation of fixed or floating charge on all or any of the assets of the firm. In the event of the creation of a floating charge, the floating charge crystallizes into a fixed charge on the occurrence of stated events.

Section 21 of Act 152 provides:

“(1) A firm may grant a floating charge over the whole or a specified part of its undertaking and assets.

(2) A floating charge shall be an equitable charge on the whole or a specified part of the firm's undertaking and assets both present and future, so however, that the charge shall not preclude the firm from dealing with such assets until,

(a) the security becomes enforceable in accordance with the provisions of the charge and the chargee, pursuant to a power in that behalf in the instrument of charge, appoints a receiver or manager or enters into possession of such assets; or

(b) the Court appoints a receiver or manager of such assets on the application of the chargee; or

(c) the firm goes into liquidation.

(3) On the happening of any such event as is specified in the immediately preceding subsection, the charge shall be deemed to crystallise and to become a fixed equitable charge on such of the firm's assets as are subject to the charge; and if a receiver or manager is withdrawn with the consent of the chargee or the chargee withdraws from possession before the charge has been fully discharged,

the charge shall thereupon cease to be a fixed charge and shall become a floating charge.

- (4) *A fixed charge on any property shall have priority over a floating charge affecting that property unless the terms on which the floating charge was granted prohibited the firm from granting any later charge having priority over the floating charge and the person in whose favour such fixed charge was granted had actual notice of that prohibition at the time when the charge was granted to him.*
- (5) *After a floating charge has been granted over any part of the undertaking and assets of a firm no payment or return shall be made to any partner by the firm out of any assets subject to the charge, except to the extent agreed by the chargee, and if any such payment or return is made without such agreement the security of the chargee shall become immediately enforceable."*

A fixed charge over the asset of the firm takes precedent over a floating charge over the same asset. The only exception where a floating charge will take priority over a fixed charge is when three conditions are satisfied:

- (a) a floating charge is created first;
- (b) the floating charge created expressly prohibits the creation of a charge that takes priority over the floating charge; and
- (c) the person in whose favour the subsequent fixed charge is created has actual notice of the floating charge and the prohibition in the floating charge at the time of creating the fixed charge.

Unless agreed with the person in whose favour the floating charge is created, no payment or return is to be made from the assets over which the floating charge is created to the partners. If payment is made contrary to the term, the charge becomes immediately enforceable.

Act 152 mandates registration of charges created over the assets of the firm. The particulars required to be stated in the Statement for registration of a partnership include particulars of any charge or mortgage.¹⁴⁴ In addition, the Act mandates that any charge created to secure the liability of the firm must be registered in order to be valid.¹⁴⁵ The Act provides that a charge created after the registration of the firm or by a partner to secure debt or obligation of the firm shall be void as security unless the particulars required under the Act are registered within 28 days after its creation.¹⁴⁶

¹⁴⁴ Section 3(1) of Act 152.

¹⁴⁵ Section 22 of Act 152.

¹⁴⁶ Section 22(1) of Act 152.

Even though the Act renders void a charge not registered within the 28 days of creation, the amount purported to be secured by the void charge is deemed to be immediately due for payment.¹⁴⁷

The Act also requires registration of charges on property acquired within 28 days of the acquisition¹⁴⁸ or of existing charges prior to registration of the firm within 28 days of the registration¹⁴⁹. However, the failure to register charges on an acquired property or existing charges does not affect the validity of such charges.¹⁵⁰ The likely reason for not rendering such charges void may be the unfairness in invalidating charges that are valid at the time of creation on the ground of failure to perform an act not required at the time of the creation of the charge.

In the event that the charges are not registered within the 28 days, an application for extension of time may be made to the court and the court upon being satisfied with the reason for the failure to register may grant an extension of time for the registration or correction of the register of registration.¹⁵¹ The grant of the extension of time to register or correct the register must not prejudice the right of any other creditor.¹⁵²

The Act thus requires registration of three (3) types of charges:

- (a) Charges created after the registration of the firm to secure an obligation of the firm.
- (b) Existing charges on assets or property acquired by the firm provided the charges are not discharged at the time of acquisition.
- (c) Existing charges prior to the registration of the firm. That is, assets transferred to the firm which at the time of registration have been charged.

Not all charges are, however, required to be registered. The following charges are not required to be registered under the Act¹⁵³:

- (a) pledge;
- (b) deposit;
- (c) letter of hypothecation or trust receipt;
- (d) bills of lading, dock warrants or other documents of title; and
- (e) bills of exchange, promissory notes or other negotiable securities for money.

¹⁴⁷ Section 22(2) of Act 152.

¹⁴⁸ Section 24(1) of Act 152.

¹⁴⁹ Section 25(1) of Act 152.

¹⁵⁰ Sections 24(2) and 25(2) of Act 152

¹⁵¹ Section 29 of Act 152.

¹⁵² *Ibid.*

¹⁵³ Section 22(3) of Act 152.

Particulars required for the registration

The Act requires the provision of stated particulars and the original or certified copy of the instrument of the charge to be delivered for registration.¹⁵⁴ The particulars required for registration under the Act are:¹⁵⁵

- (a) date of creation of the charge;
- (b) the nature of the charge;
- (c) the amount secured by the charge or the maximum sum deemed to be secured;
- (d) short particulars of the property charged;
- (e) the grantor of the charge;
- (f) the person entitled to the charge; and
- (g) in the case of a floating charge, the nature of any restriction on the power of the firm to grant further charges.

The duty is imposed on the firm to submit the particulars for the registration to the Registrar. Any other person interested in the charge can also submit the particulars for the registration.¹⁵⁶

The Registrar is to effect the registration by entry of the particulars in the register of charges. A certificate of the registration is issued upon registration by the Registrar which provides conclusive evidence of the charge.¹⁵⁷ The Act also requires registration of the entry of satisfaction and discharge of the charge¹⁵⁸, and enforcement of proceedings to realise the charge.¹⁵⁹

Consequence of registration

The registration of a charge by the Registrar constitutes actual notice of the particulars registered, but not of the contents of instrument, to all persons and for all purposes from the date of the registration. Section 31 of Act 152 provides that:

“The registration of any particulars on the register of particulars of charges shall constitute actual notice of such particulars, but not of the contents of any document referred to therein or delivered therewith, to all persons and for all purposes as from the date of registration.”

¹⁵⁴ Section 22(1) of Act 152.

¹⁵⁵ Section 22(4) of Act 152.

¹⁵⁶ Section 26 of Act 152.

¹⁵⁷ Section 27 of Act 152.

¹⁵⁸ Section 28 of Act 152.

¹⁵⁹ Section 30 of Act 152.

Accounts

A firm is required to keep proper accounts with respect to its financial position and changes, and with respect to the control of, and accounting for, all property acquired whether for resale or for use in the firm's business. The account of the firm must show the following:

- (a) all sums of money received and expended by or on behalf of the firm and the matters in respect of which the receipt and expenditure takes place;
- (b) all sales and purchases by the firm of property, goods and services; and
- (c) the assets and liabilities of the firm and the interests of the partners therein.

Section 32 of Act 152 provides:

“(1) Every firm shall cause to be kept proper accounts with respect to its financial position and changes therein, and with respect to the control of, and accounting for, all property acquired whether for resale or for use in the firm's business and in particular with respect to,

- (a) all sums of money received and expended by or on behalf of the firm and the matters in respect of which the receipt and expenditure takes place;*
- (b) all sales and purchases by the firm of property, goods and services;*
- (c) the assets and liabilities of the firm and the interests of the partners therein.*

(2) Every firm shall, at intervals of not more than fifteen months, cause to be prepared,

- (a) a profit and loss account giving a true and fair view of the profit or loss of the firm for the period to which it relates; and*
- (b) a balance sheet giving a true and fair view of the assets and liabilities and state of affairs of the firm and of the value of the interest of each of the partners therein as at the end of the period to which the profit and loss account relates.*
- (3) The Registrar may, by order published in the Gazette, prescribe the form of, or minimum information to be given in, accounts and balance sheets to be kept and prepared in accordance with this section and may require accounts and balance sheets to be audited and may prescribe the qualifications of auditors.*
- (4) If there shall be any default in maintaining or preparing the accounts and balance sheet required by this section each partner shall be liable to a fine not exceeding one hundred pounds.”*

For a period of not more than fifteen months, the firm must prepare: (a) profit and loss account that gives a true and fair view of the profit or loss of the firm for the period to which it relates; and (b) a balance sheet that gives a true and fair view of the assets and liabilities and state of affairs of the firm and of the value of the interest of each of the partners as at the end of the period to which the profit and loss account relates.

The Registrar may, by order published in the Gazette, prescribe the form of or minimum information to be given in accounts and balance sheets to be kept and prepared in accordance with this section. By the same means, the Registrar may require accounts and balance sheets to be audited and may prescribe the qualifications of auditors.

If there is a default in maintaining or preparing the accounts and balance sheet required by this section each partner is liable to a fine.

Partners access to accounts.

Notwithstanding any agreement to the contrary, a partner in the firm has the right of access to the firm's accounts and may inspect and copy any of them and each partner or former partner, and the personal representative of a deceased partner shall be supplied with a copy of the profit and loss account and balance sheet prepared and relating to any period during which he was a partner in the firm. Section 33 of Act 152 provides that:

“Notwithstanding any agreement to the contrary, each partner in the firm shall have a right of access to the firm’s accounts and may inspect and copy any of them and each partner or former partner, and the personal representative of a deceased partner shall be supplied with a copy of the profit and loss account and balance sheet prepared in accordance with the immediately foregoing section and relating to any period during which he was a partner in the firm.”

Termination of membership in a partnership¹⁶⁰

Just like any other relationship, a partner is permitted to terminate his membership in a firm. A person can cease to be a partner in a firm in any of the following circumstances:

- (a) the partner dies;
- (b) the partner becomes an alien enemy during a time of war;
- (c) the partner is declared bankrupt or insolvent under the Insolvency Act, 2006 (Act 708);
- (d) the partner becomes a judgment debtor, his interest in the firm is charged and as a result, he is expelled by the other partners;

¹⁶⁰ Section 39 of Act 152.

- (e) the partner breaches a condition in the partnership agreement that provides for the termination of his membership;
- (f) the partner retires from the firm with due notice; or
- (g) the partner is expelled by a Court order upon the application of a partner on any of the following grounds:
 - (i) the partner is permanently of unsound mind
 - (ii) the partner has become permanently incapable of implementing his part of the partnership agreement
 - (iii) the partner has misconducted himself to the detriment of the firm's business
 - (iv) the partner has breached a serious condition in the partnership agreement
 - (v) it was just and equitable to exclude the partner from the partnership.

There are, therefore, six grounds under the Act pursuant to which a partner ceases to be a partner of a firm. One of the grounds is when there is a court order terminating membership. The court order is made if the applicant establishes any of the grounds stated above. It must be emphasised that the five grounds on which a court can make an order for termination of the membership, will not result in termination of the membership without the court making an order. A person may therefore be permanently insane but without a court, the membership of that person in the firm is not automatically terminated.

Section 39 of Act 152 provides as follows:

- “(1) A partner shall cease to be a partner in the firm in the event of,*
- (a) his death;*
 - (b) his becoming an alien enemy during time of war;*
 - (c) an insolvency order being made against him under the provisions of the [Insolvency Act, 2006 (Act 708)].*
- (2) If the other partners so elect in writing, a partner shall cease to be a partner in the firm if he suffers his interest in the partnership to be charged under section 20 of this Act for his separate debt.*
- (3) A partnership agreement may validly provide that on the occurrence of any of the events therein specified any partner shall cease to be a partner either automatically or at the option of the other partners.*
- (4) On application by a partner the Court may order that any partner shall cease to be a partner in the firm in any of the following cases, that is to say,*
- (a) when such partner is shown to the satisfaction of the Court to have become permanently of unsound mind;*
 - (b) when such partner is shown to the satisfaction of the Court to have become in any other way permanently incapable of performing his part of the partnership agreement;*

- (c) when such partner has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the firm's business, is calculated prejudicially to affect the carrying on of the business;*
- (d) when such partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the firm's business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;*
- (e) whenever circumstances have arisen which, in the opinion of the Court, render it just and equitable that such partner should cease to be a partner in the firm.*
- (5) Application to the Court on any of the grounds specified in paragraphs (a), (b) and (e) of the immediately preceding subsection may be made by any partner.*
- (6) Application on any of the grounds specified in paragraphs (c) and (d) of subsection (4) of this section may not be made by the partner whose conduct is alleged to justify the making of an order that he shall cease to be a partner.*
- (7) Subject to any agreement between the partners, if the partnership is for an undefined term or has become a partnership at will in accordance with section 36 of this Act, a partner may at any time retire from the firm by giving notice in writing to the other partners of his intention to retire, and thereupon such partner shall cease to be a partner in the firm as from the date mentioned in the notice as the date of retirement or, if no date is so mentioned, as from the date of the communication of the notice.*
- (8) A partnership agreement may validly provide that any partner may retire from the partnership in the manner therein specified and on retirement in accordance with such provisions the partner shall cease to be a member of the firm.*
- (9) On any partner ceasing to be a partner he or any other partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence."*

Effect of the termination of membership

The firm as an incorporated entity has a separate legal personality and enjoys perpetual succession. As such, the termination of membership of a partner in the firm does not directly and automatically affect the existence of the firm as a legal person. The firm continues as a legal person notwithstanding termination by a partner of his membership in the firm. Section 40 of Act 152 provides that: *"The fact that a partner has ceased to be a partner in the firm shall not affect the existence of the firm or the mutual rights and duties of the other partners."*

However, the definition of a partnership requires a minimum of two partners. As a result, where the termination of the membership of a partner in a firm results in the number of partners falling below the two minimum partners required, the Act requires the existing partner to take one of two actions within six months of the firm ceasing to have the minimum of two partners. The firm must admit a new partner or partners to meet the minimum number required or must commence a winding up proceeding in accordance with the Act. Section 41 of Act 152 provides:

- “(1) If, on any partner ceasing to be a partner in the firm there is only one surviving or continuing partner of the firm the surviving or continuing partner shall, within six months of the cessation, either,*
- (a) admit another member or members into partnership in the firm; or*
 - (b) commence to wind up the firm in accordance with section 47 or 48 of this Act.*
- (2) Subject to any express agreement relating to the passing or acquisition of the interest in the firm of a partner who ceases to be a partner and the admission in his place of any new partner, the provisions of subsections (3), (4) and (5) of this section shall apply when any partner ceases to be a partner and whether there is one or more than one, surviving or continuing partner of the firm.*
- (3) Within six months after a partner has ceased to be a partner in the firm the surviving or continuing partners shall either,*
- (a) admit into partnership in the firm the person or persons (in this section called the successors) who shall have acquired or agreed to acquire or succeeded to the interest in the firm of such former partner; or*
 - (b) purchase the interest in the firm of the former partner at a price to be determined in default of agreement by a single arbitrator appointed by the parties or, if they cannot agree upon an appointment, nominated by the President for the time being of the Association of Accountants in Ghana; or*
 - (c) commence to wind up the firm in accordance with section 47 or 48 of this Act.*
- (4) If the successors shall be admitted into partnership in the firm in accordance with paragraph (a) of the immediately preceding subsection they shall be deemed to have become partners in the firm in the place of the former partner as from the date when he ceased to be a partner.*
- (5) If the surviving or continuing partners elect to purchase the interest of the former partner or to wind up the firm, the amount payable to the former partner, or his successors, in respect of his interest shall, as between himself and the firm in the absence of agreement to the contrary, be deemed to be a debt due from the firm*

as at the date of his ceasing to be a partner and shall carry interest therefrom at the rate of five per centum per annum."

Winding up

Winding up of a firm generally precedes the dissolution of the firm. Winding up relates to gathering and realising the assets of the firm, using the proceeds to satisfy the liabilities of the firm, and distributing what is left to the partners in accordance with their partnership agreement. Under the Act, winding up may be done in two instances:

- (a) compulsorily under a court order which may result from an insolvency proceeding or based on grounds stated in the Act, or
- (b) voluntarily by agreement of all the partners.

Section 44 of Act 152 provides that:

"The winding-up of a firm may be either,
(a) as a result of insolvency proceedings under the [Insolvency Act, 2006
(Act 708)] against all the partners jointly; or
(b) under an order of the Court; or
(c) by voluntary liquidation by the partners."

During the winding up process, a firm continues to have legal capacity until it is dissolved. However, the firm is required by the Act to cease to carry on business unless the continuation of the business is determined to be beneficial for the winding up proceeding. Section 45 of Act 152 provides that:

"The firm shall, from the commencement of the winding up, cease to carry on its business except so far as may be required for the beneficial winding up thereof but the corporate state and corporate powers of the firm shall continue until it is dissolved."

Insolvency proceedings

Act 152 allows one or more creditors of the firm to present a petition to the Court for an insolvency proceeding against the partners jointly if the firm owes an amount of GHS10,000 or more and has failed to pay within 30 days upon demand notice by the creditors. Section 45 of Act 152 vests the powers and authority of the partners in relation to the firm in the Official Trustee when a protection order is made, who have general powers provided under section 43 of the Insolvency Act, 2006 (Act 708). Section 45 of Act 152 states as follows:

"(1) Unless the firm is being wound up under an order of the Court under section 47 of this Act one or more of the creditors of the firm may institute insolvency proceedings

under the Insolvency Act, 2006 (Act 708) against all the partners jointly if the conditions specified in section 9 of that Act are complied with, and for the purposes of such section anything done by or to a firm shall be deemed to be done by or to all the partners jointly.

- (6) If a protection order is made against all the partners jointly the order shall have the effect of appointing the Official Trustee to be the liquidator of the firm and, pursuant to section 37 of the Insolvency Act, 2006 (Act 708), as from the date of the order all the interests of the partners and all the powers and authority of the partners in relation to the firm shall vest in the Official Trustee.*
- (7) A copy of the protection order shall be delivered by the Official Trustee to the Registrar for registration.*
- (8) If an insolvency order is made against the partners jointly, all the assets of the firm shall be administered by the Official Trustee in accordance with the provisions of the Insolvency Act, 2006 (Act 708) as if they were the joint estate of the partners but the creditors of the firm shall be entitled to prove for such debts as are provable under the provisions of the Insolvency Act, 2006 (Act 708) against both the firm's assets and the separate estate of each partner liable therefor."*

It should be noted that this insolvency proceeding is not a winding up proceeding. In order to proceed with the winding up of the firm, an order from the court for a winding up must be obtained.

Compulsory Winding up by a court order

A firm, whether in voluntary winding up or not, may be wound up by order of the High Court upon application by:¹⁶¹

- (a) a partner of the firm,
- (b) a former partner or the legal representative of the former partner, who has not been paid the amount of money due in respect of the former partner's interest in the firm, or
- (c) the Registrar.

The grounds upon which the court will grant an order winding up a firm are where:¹⁶²

- (a) the firm does not commence business within a year from the registration or suspends its business for a whole year,
- (b) the firm carries on business for more than six months with less than two partners,
- (c) the firm is unable to pay its debts as they fall due, or
- (d) the Court is of the opinion that it is just and equitable that the firm should be wound-up.

¹⁶¹ Section 47(1) of Act 152

¹⁶² Section 47(3) of Act 152

No proceeding can be instituted for an order to wind up a firm after an insolvency proceeding has been commenced under section 47(1) of Act 152 against all the partners.¹⁶³

The court is required under the Act to enquire into the solvency of the firm and unless the court is satisfied that the firm will be able to fully pay its debts and liabilities within six months, the order shall be deemed to be a protection order. Section 47(4) of Act 152 provides that:

“Before making a winding up order the Court shall enquire as to the solvency of the firm; and unless the Court is satisfied that the debts and liabilities of the firm will be paid in full within a period of six months from the commencement of the winding up, if the Court orders the winding up of the firm, the order shall be deemed to be a protection order under the Insolvency Act, 2006 (Act 708) made against all the partners jointly and accordingly subsections (2), (3) and (4) of the immediately preceding section shall apply.”

Other than as provided above, the court in ordering the winding up of the firm will appoint the Registrar or any other person as the Official Trustee¹⁶⁴ who is required by the Act to undertake the winding up in accordance with the Act. In relation to the winding up, subsections (5), (6) and (7) of Section 47 of Act 152 provides for rules applicable to the winding up as follows:

- “(5) Except as provided in subsection (4) of this section when the Court makes a winding up order it shall appoint the Official Trustee, the Registrar or such other person as it thinks fit as liquidator to wind up the affairs of the firm and within forty-eight hours of the drawing up of the winding up order a copy thereof shall be delivered by the liquidator to the Registrar for registration and the Registrar shall cause notice thereof to be published in the Gazette.*
- (6) Where, before the making of the winding up order, the partners have commenced to wind up voluntarily, the winding up shall be deemed to have commenced at the date of the commencement of the voluntary winding up and, unless the Court otherwise directs, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken; and in any other case the winding up shall be deemed to commence at the date of the making of the winding up order.*
- (7) As from the date of the winding up order all the powers and authority of the partners in relation to the firm shall cease and shall vest in the liquidator.”*

A firm being wound up pursuant to a court order must indicate so in all correspondence issued by the firm. Section 49 of Act 152 provides that:

¹⁶³ Section 47(2) of Act 152

¹⁶⁴ The Official Trustee must be qualified as an insolvency practitioner under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015).

“When a firm is being wound up otherwise than voluntarily by the partners, every invoice, order, or business letter issued by or on behalf of the firm, being a document in or on which the name of the firm appears, shall contain a statement that the firm is being wound up and shall state the name or official title of the liquidator.”

Voluntary winding up by agreement of all the partners

The Act permits all the partners to voluntarily agree to wind up the firm. This may be done for firms set up pursuant to a partnership agreement for a fixed term or a decision by the partners to stop carrying on business for any reason. A partnership agreement, however, does not terminate automatically if after the expiration of the terms indicated therein, the partners continue to carry on to the business. Section 36 of Act 152 provides that:

“Where a partnership is expressed to be for a fixed term, and, after the expiration of that term, the partners or some of them expressly or impliedly agree to remain partners in the firm, the rights and duties of such partners, in the absence of agreement to the contrary, shall remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will.”

Section 48 of Act 152 provides for the conditions for voluntary winding up as follows:

- “(1) A firm may be wound up by way of voluntary liquidation by the partners if all the partners therein so agree and send notification thereof in the prescribed form to the Registrar for registration.*
- (2) The winding up shall be deemed to commence at the date of the registration by the Registrar of such notification and notice thereof shall be published by him in the Gazette.*
- (3) The authority of each partner to bind the firm and the other rights and obligations of the partners shall continue, notwithstanding the winding up until the firm is dissolved or a protection order under the [Insolvency Act, 2006 (Act 708)] is made against all the partners jointly or an order is made for the winding up of the firm under an order of the Court, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the commencement of the winding up, but not otherwise.*
- (4) If at any time a partner is of the opinion that the firm shall not be able to pay its debts in full within six months from the commencement of the winding up, he shall forthwith give notice in the prescribed form to the Registrar who shall register such notice and cause a copy thereof to be published in the Gazette.*
- (5) Within twenty-one days from the expiration of six months from the commencement of the winding up, the partners shall send to the Registrar a statement in the prescribed form stating whether or not all the debts of the firm have been paid in full,*

and the Registrar shall register such statement and cause a copy thereof to be published in the Gazette.

- (6) If any partner shall wilfully default in complying with subsection (4) or (5) of this section or shall wilfully make any misstatement in any statement sent thereunder he shall be liable on conviction to a term of imprisonment not exceeding six months."*

The critical condition is that all the partners must agree and undertake the winding up proceeding within the time given for the various proceedings under the Act. Upon agreement, a notice must be given to the Registrar. The winding up is deemed to commence and must be completed within six months of the notice to the Registrar. A second notice must be given to the Registrar indicating the debts of the firm have been fully satisfied, and the Registrar must publish the notice in the Gazette. It should be noted that unlike compulsory winding up, the partners retain the powers and authority relating to the firm during the winding up process.

Application of firm's property

The Act provides for the sharing of losses where the assets are not enough to satisfy the liabilities of the firm in the event of winding up of the firm. Further, it provides for how profits realised after winding up are shared after all liabilities have been settled. Section 50 of Act 152 provides as follows:

- "(1) On the winding up of a firm, every partner, and every former partner, or his legal representative, who has not been paid the amount due in respect of such former partner's interest in the firm, shall be entitled, as against the other partners in the firm and the persons claiming through them in respect of their interests as partners, to have the undertaking and assets of the firm sold (the business being sold as a going concern if practicable) and the proceeds applied in payment of the debts and liabilities of the firm and the surplus applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm.*
- (2) In settling accounts between the partners the following rules shall, subject to any agreement, be observed, that is to say,*
- (a) losses, other than deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;*
 - (b) deficiencies of capital shall not be made up but shall be borne by the partners in the proportion in which they were entitled to capital;*
 - (c) the assets of the firm shall be applied in the following manner and order, that is to say,*

- (i) *in paying the debts and liabilities of the firm to persons who are not partners therein;*
 - (ii) *in paying to each partner rateably what is due from the firm to him for advances as opposed to his agreed share of capital;*
 - (iii) *in paying to each partner rateably what is due from the firm to him in respect of capital;*
 - (iv) *the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.*
- (3) *If, in a voluntary winding up by the partners, the debts and liabilities of the firm are not paid in full, and an insolvency order under the [Insolvency Act, 2006 (Act 708)] is made against all the partners jointly as a result of insolvency proceedings commenced within one year after the commencement of the voluntary winding up, any sum paid in the voluntary winding up to a creditor which would not have been paid had the debts been paid in the order prescribed by section 47 of the [Insolvency Act, 2006 (Act 708)] in accordance with section 54 of that Act, the creditor shall, on receipt of a notice given in that behalf by the Official Trustee, restore that sum to the Official Trustee."*

The winding up requires the assets and undertakings of the firm to be sold preferably as a going concern. The amount realised is first used to settle liabilities of the firm, and the surplus is shared among the partners in accordance with the partnership agreement, and if there is no agreement, then according to the provisions of the Act. The amount realised from the assets of the firm are applied in the following order of priority:

- (a) Payment of the debts and liabilities of the firm to persons who are not partners in the firm;
- (b) Payment to each partner rateably what is due from the firm to that partner for loans made to the firm
- (c) Payment to each partner rateably what is due from the firm to that partner in respect of capital; and
- (d) Any amount left is paid to the partners in the proportion in which profits are divided.

Section 50 of Act 152 also sets out how losses are to be borne and accounts settled between or among the partners.

Dissolution of the firm

After the winding-up of the firm, the Registrar is empowered to dissolve the firm. Dissolution, therefore, comes after winding up of the firm. Dissolution entails the Registrar striking off the name of the firm from the register of partnership and making a publication to that effect in the Gazette.

The firm is deemed dissolved from the date of the publication. Section 51 of Act 152 deals with general dissolution by providing as follows:

- “(1) When the Registrar is satisfied that the winding up of the affairs of the firm is complete then, unless the undertaking of the firm has been disposed of as a going concern to another partnership and the change duly registered in accordance with section 7 of this Act, the Registrar shall strike the firm off the register and notify the same in the Gazette.*
- (2) The firm shall thereupon be deemed to be dissolved as at the date of the publication in the Gazette.*
- (3) If any property of the firm has not in fact been effectually disposed of in the winding up, it shall be deemed to be vested, in the case of a voluntary winding up, in the partners and, in any other case, in the Official Trustee upon trust to pay thereout any outstanding debts and liabilities of the firm and subject thereto for the former partners in accordance with their rights under the partnership agreement.*
- (4) Notwithstanding the dissolution of the firm the former partners shall remain jointly and severally liable to pay the debts and liabilities of the firm in so far as these have not been fully discharged in the winding up or otherwise.”*

It should be noted that notwithstanding the dissolution of the firm, the former partners remain jointly and severally liable to discharge the debts and liabilities of the firm that were not discharged during the winding up.

Section 52 of Act 152 empowers the Registrar to dissolve moribund firms without going through full winding up. A moribund firm refers to a firm that is inactive or has not been in operation. The proceedings for the dissolution of such a firm are provided in section 52 as follows:

- “(1) Where the Registrar, of his own knowledge or upon information supplied by any partner or creditor of a firm, has reasonable cause to believe that a firm is not carrying on business whether by reason of the fact that the business has ceased or has been transferred to a company incorporated under the Companies Code or to some other person, he may send to the last registered principal place of business of the firm a letter by registered post enquiring whether the firm is carrying on business, and stating that if it is not so carrying on business or if no reply is received within two months from the date thereof a notice will be published in the Gazette with a view to striking the firm off the register.*
- (2) If the Registrar either receives a reply from the firm to the effect that it is not so carrying on business or does not within the specified time receive any answer thereto, the Registrar may publish in the Gazette and send by registered post to the last registered principal place of business of the firm, a notice that at the expiration of*

two months from the date of that notice the firm shall, unless cause be shown to the contrary, be struck off the register and dissolved.

- (3) At or after the expiration of the time mentioned in the notice the Registrar may, unless cause is shown, strike the firm off the register and shall publish notice thereof in the Gazette and on such publication in the Gazette the firm shall be dissolved:*

Provided that,

- (i) the joint and several liability of every partner in the firm for the firm's debts and obligations shall continue and may be enforced as if the firm had not been dissolved;*
 - (ii) nothing in this section shall affect the power of the Court to order the winding up of the firm.*
- (4) If the Registrar is satisfied that a firm dissolved in accordance with the foregoing provisions of this section is carrying on business he may at any time restore the firm to the register and publish notice thereof in the Gazette and thereupon the firm shall be deemed never to have been dissolved, but for the purposes of section 9 of this Act the partners shall be deemed to remain in default until the date of publication of the notice in the Gazette."*

Firms that are in violation of the Act or engaged in unlawful or illegal business can also be dissolved by the Registrar without full winding up. Section 53 of Act 152 provides:

"(1) The Registrar may strike a firm off the register if, in his opinion,

- (a) the business of the firm is unlawful or the firm is being operated for any illegal purpose;*
 - (b) the firm has committed a breach of any of the provisions of this Act.*
- (2) The Registrar shall not strike a firm off the register on the grounds specified in paragraph (b) of subsection (1) of this section unless,*
- (c) he shall have sent by registered post to the last registered principal place of business of the firm a letter specifying the breach and requiring it to be remedied or ended to his satisfaction within the time therein specified and stating that if not so remedied or ended the firm may be struck off the register and dissolved; and*
 - (d) the breach is not, within the time so specified, remedied or ended to his satisfaction.*
- (3) On striking the firm off the register the Registrar shall publish in the Gazette and send by registered post to the last registered principal place of business of the firm a notice that the firm has been struck off the register and dissolved and on such publication in the Gazette the firm shall be dissolved:*

Provided that,

- (i) *the joint and several liability of every partner in the firm to pay the firm's debts and obligations shall continue and may be enforced as if the firm had not been dissolved;*
- (ii) *nothing in this section shall affect the power of the Court to order the winding up of the firm.*

The decision of the Registrar to dissolve a moribund firm or a firm which does not conform to the Act or has engaged in unlawful or illegal business can be challenged by the firm through court action.¹⁶⁵

2.3.3 STATUTORY CORPORATIONS

Introduction

Statutory corporations may generally be defined as a body corporate set up under a specific Act of Parliament, pursuant to an Act of Parliament, or by the President for a specific function as stated under the establishing instrument.¹⁶⁶ In other words, statutory corporations are set-up by statutes. The purpose may be to undertake a public function including the regulation of a sector or undertake a commercial venture.¹⁶⁷ The body corporate may be independent and autonomous from the executive or semi-autonomous or deemed part of the government machinery.

Statutory Corporations include “public corporation” as provided for under Chapter 14 (the Public Services) of the Constitution, 1992. Article 295 of the Constitution defines “**Public Corporations**” as “**a corporation or any other body of persons established by an Act of Parliament or set up out of funds provided by Parliament or other public fund**”. The definition connotes that a public corporation is not only limited to entities set up by an Act of Parliament but includes all entities set up out of funds provided by Parliament or which are set up out of any public fund. A company or partnership set up out of funds provided by Parliament or public fund may qualify as a public corporation. However, this will not be the case as Article 192 of the Constitution provides that “**A public corporation shall not be established except by Act of Parliament.**” In addition, the Public Finance Management Act, 2016 (Act 921) defines a “public corporation” as “**a body corporate established under an Act of Parliament in accordance with article 192 of the Constitution**”.¹⁶⁸ The combined effect of articles 295 of the Constitution which defines “public corporation” and article 192 of the Constitution which states the only way a public corporation can be established, is that entities other than those set up by an Act of Parliament, are not public corporations. State-owned companies

¹⁶⁵ Sections 54 and 55 of Act 152.

¹⁶⁶ Section 1 of Act 232 and articles 192 and 295 of the Constitution.

¹⁶⁷ Article 190(4) of the Constitution.

¹⁶⁸ Section 102 of Act 921.

are, therefore, not public corporations and are also not statutory corporations even though public funds have been used to set them up. Statutory corporations set up by subsidiary legislations are not public corporations.

The definition of public corporations limits statutory corporations that may be considered public corporations. Statutory corporations include body corporates set up under an Act of Parliament; pursuant to an Act of Parliament or by a legislative instrument; or set up by the President through an executive instrument. Once a statute, be it an Act of Parliament or a subsidiary legislation, sets up a body corporate, that body corporate pursuant to the Statutory Corporation Act, 1964 (Act 232) as amended, becomes a statutory corporation. However, for the statutory corporation to be considered a public corporation, it must be set up by an Act of Parliament. In addition, the Constitution provides that public corporations (except those set up for commercial activities) are part of the public services under the Constitution. All public corporations are, therefore, statutory corporations as they are set-up under an Act of Parliament, but all statutory corporations are not public corporations as they may be set-up under statutes that are not necessarily an Act of Parliament.

Establishment & characteristics of statutory corporations

The main characteristic of Statutory Corporations is that they are established by statute, principal or subsidiary legislations. A company incorporated under the Companies Act, 2019 or a partnership registered under the Incorporated Private Partnership Act, 1962 (Act 152), are both body corporates but are not statutory corporations. There is no specific statute setting up specific partnerships or companies. The most distinctive feature of a statutory corporation is that it has its own legislation or instrument establishing that body corporate as a statutory corporation. The Instrument establishing the corporation must provide for:

- (a) name of Corporation;
- (b) governance structure;
- (c) functions, objects or purpose of the Corporation;
- (d) source of funding available to the Corporation; and
- (e) powers of the Corporation.

Section 2 of Act 232 provides as follows:

- “(1) An instrument made under the foregoing section may make provision for such incidental or supplementary matters as appear to the President to be necessary or expedient for or in connection with the establishment and functioning of the corporation.*
- (2) The incidental or supplementary matters referred to in the foregoing subsection include—*

- (a) the name of the corporation and the composition and functions of the corporation and its governing body;*
- (b) the staff of the corporation (including the transfer to the corporation of public officers), their remuneration, pensions and allowances;*
- (c) the application or continued application as respects any person employed by the corporation of any enactment relating to pensions, with or without modifications;*
- (d) the provision of finance for the corporation, including the provision thereof out of moneys provided by the National Assembly [i.e. Parliament] or charged upon the Consolidated Fund;*
- (e) the exemption of the property and activities of the corporation from any tax, rate or duty, subject to the prior approval of the Minister responsible for administering the enactment which authorises the tax, rate or duty;*
- (f) the application of any enactment relating to the compulsory acquisition of land or any other property, with or without modifications; and*
- (g) the making of bye-laws or other instruments by the corporation to regulate matters falling within the scope of its functions."*

Generally, a statutory corporation established by legislation has the following powers:

- (a) It has perpetual succession and a common seal.
- (b) It can sue and be sued in its name.
- (c) It has power to carry out its function as provided under the law.
- (d) It can enter into contracts or any transactions for the purpose of its objects.
- (e) It can acquire and hold any property in its name.

Section 3 of Act 232 provides:

"Every corporation established under this Act—

- (a) shall have perpetual succession and a common seal;*
- (b) may sue and be sued in its own name;*
- (c) subject to the provisions of the instrument by which it was established shall have power, for any purpose which, in the opinion of its governing body, is necessary or expedient for or in connection with the proper exercise of the functions of the corporation, to acquire and hold any movable or immovable property, to sell, lease, mortgage or otherwise alienate or dispose of any such property, and to enter into any other transaction."*

Statutory corporations and companies

As indicated above, a statutory corporation is not a company. The statutory corporation is not established under the Companies Act. It is set up by specific legislations. More importantly, a statutory corporation is not a public company. However, a statutory corporation has many similar characteristics as a company since both are body corporates. The distinctive factor is the mode of establishment. In addition, whereas business companies are registered with shares, statutory corporations are generally not established with shares. Technically, there are therefore no shareholders of a statutory corporation. The entities are in a loose sense owned by the State. This is different from the instance where the State is a shareholder in a company incorporated under Act 992 either wholly or in association with others. Both statutory corporations and companies in which the State owns shares are generally referred to as state-owned enterprises or entities. The Public Finance Management Act, 2016 (Act 921) provides that *“state-owned enterprise” means an entity whether incorporated or not under the Companies Act, 2019 (Act 992) whose shares are wholly or partially held or controlled by the Government*.¹⁶⁹ The distinction still remains that statutory corporations are not companies since they are not incorporated under the Companies Act.

Examples of statutory corporations include almost all the Regulators generally referred to as Authorities or Commission. In addition, local government entities Metropolitan, Municipal, and District Assemblies (MMDAs) are established as statutory corporations or body corporate. Example of statutory corporations in Ghana include the Bank of Ghana, Electoral Commission, Commission for Human Rights and Administrative Justice, National Media Commission, University of Ghana, Ghana Institute of Management and Public Administration, Ghana Education Services, Ghana Health Services, Armed Forces, Korle Bu Teaching Hospital, Ghana Ports & Harbour Authority, Volta River Authority, Cocoa Marketing Board, Ghana National Petroleum Corporation, Accra Metropolitan Assembly, Millennium Development Authority, Securities and Exchange Commission, National Identification Authority, National Health Insurance Authority, Ghana Atomic Energy Commission, Volta River Authority, Office of the Registrar, National Lotteries Authority, National Labour Commission, Petroleum Commission, National Petroleum Authority, Kwame Nkrumah University of Science and Technology, University of Cape Coast, Ghana Infrastructure Investment Fund, Minerals Commission, Public Procurement Authority, Environmental Protection Agency, National Pensions Authority, Social Security and National Insurance Trust, Ghana Civil Aviation Authority and others.

Examples of entities which are owned by the State but not a statutory corporation includes Ghana Water Company Limited, State Transport Company, Metro Mass, Electricity Company of Ghana Ltd, Ghana Trade Fair Company, Ghana Commercial Bank, Ghana Airways Company Ltd and others. Some of these entities are private companies. Examples of the private companies are Ghana

¹⁶⁹ Section 102 of Act 921.

Water Company Limited, Electricity Company of Ghana Limited and Ghana Airways Company Ltd. Ghana Commercial Bank is a public company.

Conversion of corporations to companies

The confusion between statutory corporations and companies whose shares are held by the State may have been contributed to the fact that a number of statutory corporations have been converted to companies even though the entities maintain their previous name with little variations. The conversion was principally due to economic policies implemented by Government. The Government, especially from the era of the Provisional National Defence Council, due to some economic policies opted to privatize statutory corporations or divest government interest in such entities. Since statutory corporations essentially do not have shares that could have been sold by Government, and short of implementing assets sale arrangements, the Government opted to convert statutory corporations to companies. This was done under the Statutory Corporations (Conversion to Companies) Act 1993, (Act 461) and Statutory Corporations (Conversion to Companies) (Schedule Amendment) Instrument, 1998 (LI 1648). In all, fifty-one (51) corporations were listed for conversion with the power of the Minister to add to the list.

Act 461 provides for companies to be incorporated under the Companies Act and vested with the assets, properties, rights, liabilities and obligations of statutory corporations listed as a schedule to the Act¹⁷⁰ and L.I. 1648. The incorporation is to be done by preparing the regulations or constitution of the company, delivering same to the Registrar for registration and issue of a certificate of incorporation. Upon the coming into force of Act 992, the process will require submission of completed application satisfying the requirements of section 13 of the Act to the Registrar of companies. The shares of the company are to be issued to the Republic or any other person as directed by the Minister responsible for finance. Unless otherwise directed, shares are to be issued in the name of the Minister. Under Act 461, once a company is registered, the statutory corporation whose assets, rights and liabilities are vested in the incorporated company ceases.¹⁷¹ The date of registration of the company is the date of cessation of the statutory corporation, and the law under which the statutory corporation is established also ceases to have effect.¹⁷²

Governance system of statutory corporations

The Companies Act, 2019 provides for the governance systems of companies subject to permitted adjustments in the constitution of the company. In relation to state-owned enterprises, the

¹⁷⁰ Section 2 of Act 461.

¹⁷¹ Section 3 of Act 461.

¹⁷² Ibid.

governance system is affected by the introduction of the State Interest and Governance Act, 2019 (Act 990).

Act 990 establishes the State Interests and Governance Authority which is to oversee and administer the State interests in state-owned enterprises, joint venture companies and other State entities and to provide for related matters. The Authority has an object to acquire, receive, hold and administer or dispose of shares of the State in state-owned enterprises and joint venture companies.¹⁷³ The implementation of the mandates of the Authority is done in consultation with the respective sector Ministers. Where there is a sale or acquisition of the State interests in specified entities, the Authority will advise the Minister accordingly.¹⁷⁴ The Authority is to assist the Minister responsible for finance to oversee the sale or acquisition of the State's interests in specified entities.¹⁷⁵

The general governance structure of statutory corporations require a board of directors or governing board as provided in the establishment law and in compliance with the Constitution. The day-to-day management is the responsibility of the chief executive officer or executive secretary together with the management team. The board members and chief executive officers are generally appointed by the President in the consultation of the Council of State or the Public Services Commission. The President may also delegate such appointment powers. Corporations that are part of the Public Services are also affected by the Public Services Commission Act, 1994 (Act 482). The board generally operates under an oversight minister or office of the President as stated under the establishment law. The minister generally gives policy directives to the board and responsible for providing the enabling subsidiary legislations for the functions of the statutory corporation. The powers of the board are dependent on the extent the corporation is independent or autonomous from the executive arm of government.

Application of the Companies Act to a statutory corporation

Since statutory corporations are not companies, they do not come under the Companies Act, 2019. The Act, therefore, technically does not apply to statutory corporations. However, since both are body corporates and in most cases, the law establishing statutory corporation does not contain detailed provisions dealing with the operations of the statutory corporations as a body corporate, the regulation of a statutory corporation is *de facto* done in accordance with the Companies Act. However, this will be the case, if the application of the Companies Act is not inconsistent with the law establishing the statutory corporation or the relevant applicable laws to the corporation. In some instances, the establishing law may expressly provide for the application of the Companies Act or parts of the Companies Act. For example, the Corporate Insolvency and Restructuring Act, 2020 (Act

¹⁷³ Section 3 of Act 990.

¹⁷⁴ Section 4 of Act 990.

¹⁷⁵ Ibid.

1015) which governs the administration and compulsory winding up of companies provides that statutory corporations may be wound up pursuant to Act 1015.¹⁷⁶

The Companies Act, 2019 also provides in section 380 that: *“The Minister may, by legislative instrument, direct that any of the provisions of this Act shall apply to a body corporate formed in the Republic otherwise than under this Act or to certain classes of those bodies corporate or to certain named bodies corporate formed in the Republic, as specified in the instrument, as if they were companies registered under this Act.”* The Minister of Justice can, therefore, extend the application of any of the provisions of the Companies Act, 2019 to any other body corporate. This must be done by a legislative instrument.

It must, however, be emphasised that as a general principle, the Companies Act, 2019 is not applicable to statutory corporations. The scope of application of the Companies Act, 2019 does not cover body corporates other than companies.¹⁷⁷

2.3.4 COOPERATIVE SOCIETIES

Introduction

A cooperative society has been defined by International Cooperative Alliance as *“an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned enterprise”*. It is, therefore, a voluntary association to meet a particular need of the members of the association. The cooperative may be a consumer cooperative which refers to an association owned and managed by the persons using the services, this may include an estate association. A cooperative may also be a workers cooperative which refers to organisations owned by persons who work at a particular institution or who undertake the same activities. An example is a farmers’ cooperative association. It may also be a communal cooperative which can be any of the above which simply exists to provide required assistance to members. It is a voluntary association of persons, whose motive is the welfare of the members.

In relation to a business entity, a cooperative society is a voluntary business entity which is owned and controlled by the members, which operates at a cost, and obtains its capital from the members, who share the risks and benefits equally or in proportion to their contributions. Membership is

¹⁷⁶ Sections 145 of Act 1015 provides Act 1015 is applicable to all body corporates that has an office or place of business in Ghana or assets situated in Ghana. Section 146 of Act 1015 excludes body corporates whose legislation makes specification for the winding up of that body corporate.

¹⁷⁷ Section 1 of Act 992.

therefore voluntary. Members have equal voting right and the society is to provide services to the members. The society acquires a separate legal personality from the members.

In Ghana, cooperative societies are established and regulated under the Cooperative Societies Decree, 1968 (N.L.C.D. 252)¹⁷⁸ (the Decree). Section 2 of the Decree provides that *“Subject to the provisions of this Decree, any society which has as its object the promotion of the economic interest of its members in accordance with co-operative principles, may be registered under this Decree with or without limited liability.”* The law in Ghana, therefore, permits the registration of cooperative societies with limited and unlimited liability. The critical consideration, however, remains that the purpose of the society must be to promote the economic interest of its members. A society that carries on the business of banking is required to be regulated under the banking laws which will take precedence over the Decree.

Formation

The Decree provides for the appointment of a Registrar of cooperative societies (the Registrar) who is to be responsible for the registration of a cooperative society.¹⁷⁹ A minimum of ten persons is required for the registration of a cooperative society under the Decree.¹⁸⁰ The persons must be qualified in accordance with the Decree which provides for two criteria:

- (a) the person must be capable of entering into a contract
- (b) must be resident within or in occupation of land within the area of operations of the society as defined in the bye-laws of the society.¹⁸¹

The Registrar is empowered to grant exemptions from the resident or occupation requirement in the case of societies with limited liability.¹⁸² In the event of a dispute as to the qualification of a member, that is to be determined by a committee responsible for the management of the society.¹⁸³ The dispute can be escalated to the Registrar for final determination in the event of unsatisfactory resolution by the committee.¹⁸⁴ A company or unincorporated entity cannot be a member of a cooperative society unless an exemption is granted by the Registrar.¹⁸⁵

¹⁷⁸ NLCD 292 has been amended by Cooperative Societies (Amendment) Decree, 1968 (N.L.C.D. 292) and Cooperative Societies (Amendment) Law, 1986 (P.N.D.C.L. 158).

¹⁷⁹ Section 1 of NLCD 252.

¹⁸⁰ Section 3(1) of NLCD 252.

¹⁸¹ Section 34(1) of NLCD 252.

¹⁸² Section 34(2) of NLCD 252.

¹⁸³ Section 34(3) of NLCD 252.

¹⁸⁴ Ibid.

¹⁸⁵ Section 35 of NLCD 252.

The Decree also permits the registration of a central society responsible for coordinating other cooperative societies.¹⁸⁶ The minimum number of societies required for that is two.¹⁸⁷

The name of the society must include “cooperative society” and where the liability is limited, the word “limited” must be the last word of the name of the society.¹⁸⁸ It is an offence for any business or association to have the name “cooperative” within its name when it is not a cooperative society registered under the Decree.¹⁸⁹ A society cannot be registered with a name which is identified with an existing society or the name of a body or association registered under any enactment or use a name that in the opinion of the Registrar is calculated to deceive. The Registrar has the power to refuse to register a society where the name is misleading as to the identity of the society or the nature of its business.¹⁹⁰ In the event that it is already registered, the Registrar can direct the society to change its name.¹⁹¹

Registration is done by application to the Registrar. Section 4 of the Decree provides that:

- “(1) Every application for registration shall be made to the Registrar and shall be signed—*
- (a) in the case of a society other than a central society, by at least ten persons qualified for membership; or*
 - (b) in the case of a central society by persons duly authorised by each such society.*
- (2) The application shall be accompanied by three copies of the bye-laws of the society, and the persons by whom or on whose behalf the application is made shall furnish any information in regard to the society as the Registrar may require.”*

The application is required to be signed by at least ten qualified persons in the case of cooperative societies other than central societies. In the case of central societies, the application must be signed by authorised persons or members of the cooperative societies. The application must be submitted with three copies of the bye-laws of the society.

The Registrar has the power to refuse the registration in the following instances:

- (a) where the name is misleading or identified with existing society or any body or unincorporated association, or calculated to deceive;¹⁹²
- (b) where the intended society does not comply with the Decree; or

¹⁸⁶ Section 3(2) of NLCD 252.

¹⁸⁷ Ibid.

¹⁸⁸ Section 3(6) of NLCD 252.

¹⁸⁹ Section 65 of NLCD 252.

¹⁹⁰ Section 3(7) of NLCD 252.

¹⁹¹ Section 3(8) of NLCD 252.

¹⁹² Section 3 of NLCD 252.

(c) where the object is contrary to the bye-law.¹⁹³

If none of the above grounds is satisfied, the Registrar must register the society and the bye-laws.¹⁹⁴ If the registration is refused, aggrieved persons have the right to appeal to the Minister responsible for labour and social welfare.¹⁹⁵

The Registrar upon registration of the society and bye-laws must issue a certificate of registration. Section 7 of the Decree provides that:

“A certificate of registration, signed and sealed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.”

Capacity of cooperative society

A registered cooperative society is an incorporated entity. Section 6 of NLCD 252 provides as follows:

- “(1) A society registered under the provisions of this Decree shall be a body corporate with perpetual succession and may sue and be sued by the corporate name under which it is registered.*
- (2) A registered society shall have a common seal to be approved by the Registrar.*
- (3) A registered society shall have power to hold movable and immovable property of every description and may enter into contracts and do all things necessary for the purposes of its constitution.”*

Once registered, a cooperative society becomes an incorporated entity with the capacity to act in its own name. It can sue and be sued in its name, it can enter into legal relations in its name, it can acquire and hold property. However, the Decree in a number of respects limits some specific activities that a cooperative society may undertake or in undertaking the specific activities, there are certain limitations the cooperative society must observe. Some of the provisions affecting the acts engaged in by or with the society are briefly discussed below.

- (a) Power to grant loan – even though a cooperative society is an incorporated entity, it is restricted to granting loans only to its members.¹⁹⁶ A central society may also grant a loan to another cooperative society who is a member of the central society.¹⁹⁷ The Decree however

¹⁹³ Section 5(1) of NLCD 252.

¹⁹⁴ Ibid.

¹⁹⁵ Section 5(2) of NLCD 252.

¹⁹⁶ Section 16 of NLCD 252.

¹⁹⁷ Ibid.

prohibits the grant of loans to non-members. The Registrar has power to issue directives on the maximum loan that can be granted or restrict the grant of a loan without security over immovable property.¹⁹⁸

The Decree also treats all money due and payable by members to the cooperative society as a debt.¹⁹⁹

- (b) Exercise of borrowing powers – as an incorporated entity, a cooperative society can exercise borrowing powers. However, the Decree restricts the capacity of the cooperative society to taking deposits and borrowing from only its members.²⁰⁰ The capacity of a cooperative society to take deposits from non-members is dependent on conditions prescribed by regulations or its bye-laws.²⁰¹
- (c) Taking of deposit – cooperative societies in most instances mobilise resources from their members including contributions and deposits for the activities of the society. The Decree restricts the taking of deposits by the society from its members.²⁰² The society can only take deposits from non-members in accordance with conditions prescribed by regulations or its bye-laws.²⁰³ In the event that the cooperative society is engaged in the business of banking, the banking laws are applicable and take precedent over the Decree.²⁰⁴ The Decree also permits cooperative societies to receive deposits from or on behalf of minors and pay such minors or their guardians for their use of the deposit and interest due on the deposit.²⁰⁵
- (d) Activities relating to non-members – the very essence of a cooperative society is for the economic benefit of its members. It operates as a mutually beneficial organization. However, for the benefit of members, a cooperative society may obtain deposits from non-members in accordance with conditions prescribed by regulations or its bye-laws.²⁰⁶ To avoid a cooperative society becoming a general business, the Decree provides that *“transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions as may be prescribed.”*²⁰⁷

¹⁹⁸ Section 17 of NLCD 252.

¹⁹⁹ Section 22 of NLCD 252.

²⁰⁰ Section 19 of NLCD 252.

²⁰¹ Ibid.

²⁰² Section 19 of NLCD 252.

²⁰³ Ibid.

²⁰⁴ Section 3(5) of NLCD 252.

²⁰⁵ Section 20 of NLCD 252.

²⁰⁶ Section 19 of NLCD 252.

²⁰⁷ Section 21 of NLCD 252.

- (e) Charge on shares of members – the Decree creates a charge over shares and interest on capital of members of the society in favour of the society. This permits the cooperative society to set-off any payment due from the members to the society against the payment due from the society. Section 23 of the Decree provides that *“A registered society shall have a charge upon the shares or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus, or accumulated funds payable to a member or past member in respect of any debt due from the member or past member to the society, and may set off any sum credited or payable to a member or past member in or towards payment of any such debt.”*

The shares or interest of a member in the capital of the society cannot, however, be attached or realised under a court order for the payment of debt or satisfaction of liability of the member.²⁰⁸

- (f) Priority of claims – section 24 of the Decree provides:
- “(1) Subject to any prior claim of the Government and to any claim in respect of rent—*
- (a) any debt or outstanding demand owed to a society by any member or past member shall be a first charge—*
 - (i) upon any crops or other agricultural produce raised in whole or in part by means of a loan obtained from the society by the member or past member; and*
 - (ii) upon any cattle, fodder for cattle, agricultural or industrial implements, or raw materials for manufacture, or workshops, stores or places of business, supplied to the member or past member by the society, or purchased by him in whole or in part with the proceeds of any loan, whether in money or goods, granted to him by the society;*
 - (b) any outstanding dues payable to a housing society by any member or past member in respect of rent, share capital, loans, purchase money, or any other rights or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society.*
- (2) Nothing in this paragraph shall affect the claim of any bona fide purchaser or transferee without notice.”*

The essence of the section is to ensure that claims against members by the society must first be made in relation to products of the activity for which the loan from the society is granted. The amount must therefore be charged to such products. Notwithstanding that priority is

²⁰⁸ Section 25 of NLCD 252.

created over such produce in respect of claims by the society against the member, bona fide purchasers or transferees without notice are protected.

- (g) Investment of funds – cooperative societies may invest funds mobilized from the members or deposit such sums of money in any bank registered under the laws of Ghana.²⁰⁹ However, the Decree limits investment to securities issued or guaranteed by the Government or shares of other registered societies.²¹⁰ The Registrar has the power to permit deposits and investments other than in a bank registered in Ghana or securities issued or guaranteed by the Government or shares of registered societies.²¹¹
- (h) Contract with members to dispose of produce – section 27 of NLCD 252 provides as follows:
- “(1) A registered society having as one of its objects the disposal of any produce of agriculture or animal husbandry or handicraft or fishing or any other product, may contract with any member that the society shall dispose of all such produce of the member or of such amount or description as may be stated therein, not being produce in respect of which he has previously entered into a contract for its disposal to some other person, to or through the society; and may in the contract provide for infringement of the contract.*
- (2) Any such contract shall, subject to any existing charges, create in favour of the society a first charge upon all produce mentioned therein to cover any expenses incurred in connection with the marketing of the same.*
- (3) No contract entered into under the provisions of this paragraph shall be contested in any Court on the ground only that it constitutes a contract in restraint of trade.”*

The cooperative society is permitted to enter into contract with its members to dispose of produce on behalf of the members. Farmers' cooperative society may aggregate the produce of members in order to be able to leverage the volume of the produce for better price. Such a contract is valid in accordance with the terms agreed between the society and the member. In addition to the charge created in favour of the society over the produce as stated earlier, additional charge is created over the produce to cover expenses incurred in marketing the produce. The Decree does not permit the challenge of such contract in court on the ground that it constitutes restraints of trade.

²⁰⁹ Section 26 of NLCD 252.

²¹⁰ Ibid.

²¹¹ Section 26(2) of NLCD 252.

- (i) Payment of dividends and bonus – a cooperative society is permitted to pay dividend or bonuses to its members out of its net surplus. However, such payment is subject to the following conditions:
- that the balance sheet has been certified by auditor;²¹²
 - that the scheme for distribution has been approved by the Registrar;²¹³ and
 - that one-fourth of the net surplus disclosed from the profit and loss for the year is transferred to the Reserve Fund.²¹⁴

Even though a cooperative society is an incorporated entity, the Decree expressly excludes any application of the Companies Act to the activities of a cooperative society. Section 66 provides that:

“The provisions of any enactment relating to the formation and registration of companies shall not apply to societies registered under this Decree.”

The governance system prescribed under the Decree requires the establishment of a committee that is responsible for managing the society. Section 10(2) of the Decree provides that:

“(2) The governing body of a registered society to whom the management of the affairs of the society is entrusted (in this Decree referred to as “the committee”) or such other person as may be specified by its bye-laws shall enforce the provisions of this paragraph.”

Right and liabilities of members

The rights and liabilities of members of a cooperative society are provided in the bye-laws. However, the Decree makes prescriptions on the rights and limitation on those rights as well as liabilities of members of a cooperative society. These include the following:

- (a) A member cannot exercise the rights of membership of the cooperative society unless and until the member makes payment to the society in respect of membership or acquires such interest in the society as prescribed by regulations or the bye-laws of the society.²¹⁵
- (b) A member is prohibited from holding more than twenty percent of the shares of a registered cooperative society.²¹⁶ Since the law requires a minimum of ten qualified persons, it is reasonable to impose such a restriction. However, a registered cooperative society can hold

²¹² Section 28 of NLCD 252.

²¹³ Ibid.

²¹⁴ Section 29 of NLCD 252.

²¹⁵ Section 36 of NLCD 252.

²¹⁶ Section 37 of NLCD 252.

more than twenty percent in another registered society.²¹⁷ This may be the case for central societies.

- (c) A member of a registered society who has the power to grant loans to the members, is prohibited from becoming a member of another society with similar powers.²¹⁸
- (d) Each member of a registered society is to have one vote irrespective of his holdings in the society.²¹⁹ In the event of a tie, the chairman of the society have a casting vote.²²⁰ For a central society, the voting power of its members is in accordance with its bye-laws.²²¹ A cooperative society which is a member of a central society may appoint any of its members as a proxy for the purposes of voting in the central society.²²²
- (e) The Decree restricts the ability of a member to transfer any share held by him in the society or his interest in the capital of the society. The transfer can only be made after he has held the shares or interest for at least one year and the transfer is to the society or a member of the society.²²³
- (f) A charge or transfer of share or interest of a member in the capital of the society must be subject to conditions as to maximum holding that may be prescribed.²²⁴
- (g) Upon the death of a member, his share or interest in the capital of the society may be transferred to his heir or legal personal representative.²²⁵ In the event of a society with unlimited liability, the heir or personal representative may request for the value of the share or interest to be paid.²²⁶ In the case of a society with limited liability, the society may transfer the share and interest to the heir or legal personal representative provided the person qualified to be a member of the society.²²⁷

²¹⁷ Ibid.

²¹⁸ Section 38 of NLCD 252.

²¹⁹ Section 39(1) of NLCD 252.

²²⁰ Section 39(2) of NLCD 252.

²²¹ Section 39(3) of NLCD 252.

²²² Section 39(4) of NLCD 252.

²²³ Section 40(2) of NLCD 252.

²²⁴ Section 40(1) of NLCD 252.

²²⁵ Section 41(1) of NLCD 252.

²²⁶ Ibid.

²²⁷ Ibid.

- (h) The liability of a past member continues for a period of two years after the financial year in which the member ceases to be a member.²²⁸ The estate of a deceased member continues to be liable for the debt of a deceased member for the same period.²²⁹
- (i) A member has a right to have his name entered in a register or list of members. Section 44 of NLCD 252 provides that such register or list kept by the society is *prima facie* evidence of particulars entered in it including the dates on which the member becomes a member and ceases to be a member.

Power of Registrar

In addition to powers conferred on the Registrar for the registration of a cooperative society, the Registrar also has the following powers:

- (a) The Registrar has the power to resolve disputes arising in relation to the business of a cooperative society.²³⁰ The dispute may be resolved by the Registrar or the Registrar may refer the dispute to be resolved by an arbitrator.²³¹ However, the Registrar cannot resolve a dispute relating to ownership, possession or occupation of land.²³²
- (b) The Registrar has the power to audit the accounts of the society including overdue debts and valuations of assets and liabilities.²³³ The Registrar may do the auditing by himself or cause the audit to be done by a person so authorised by him.²³⁴
- (c) The Registrar or person authorised by him has the power to inspect the books, accounts, papers, cash and securities of the society.²³⁵ Access must be given at all reasonable times to the Registrar or person authorised by him.²³⁶ The officers of the society must furnish all information relating to the working of the society requested by the Registrar or person undertaking the inspection.²³⁷
- (d) The Registrar may on his own application or application by majority of the committee or not less than one-third of the members hold an enquiry into the working, constitution and

²²⁸ Section 42 of NLCD 252.

²²⁹ Section 43 of NLCD 252.

²³⁰ Section 45 of NLCD 252.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ Section 46 of NLCD 252.

²³⁴ *Ibid.*

²³⁵ Section 47 of NLCD 252.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

financial condition of the society.²³⁸ The officers of the society are under obligation to furnish all information and books requested by the Registrar or person conducting the enquiry.²³⁹

- (e) The Registrar, on the application of a creditor, may inspect the books of an indebted society.²⁴⁰ The creditor must, however, satisfy the Registrar that the debt is due for payment, a demand has been made, but payment has not been made within a reasonable time, and the creditor must furnish security for the cost of inspection as the Registrar may request.²⁴¹ The result of the inspection must be communicated to the creditor.²⁴²

Dissolution and liquidation

A cooperative society is an incorporated entity and enjoys perpetual succession until dissolved under the Decree. A cooperative society may be dissolved if the Registrar is of opinion that it must be dissolved. The dissolution is by an executive instrument cancelling the registration in any of the following circumstances:

- (a) upon completion of an inspection;²⁴³
- (b) upon completion of an enquiry;²⁴⁴ or
- (c) where the members of the society fall below the required minimum number of ten.²⁴⁵

In any of the above instances where the Registrar is of the opinion that the society should be dissolved, the Registrar is required to cancel the registration of the society by an executive instrument. The Registrar must also make an order as to the custody of the books and accounts of the society.²⁴⁶

A corporate society ceases to be a body corporate by an executive instrument issued to cancel the certificate of registration. The date on which cooperative society ceases to be a corporate body depends on the grounds for cancellation. In the case of cancellation after an inspection or enquiry, the cooperative society ceases to be a body corporate on the date of the instrument. In the case of cancellation due to the number of members falling below the minimum of ten required,²⁴⁷ the corporate society will cease to be a body corporate when the order of custody of the books and

²³⁸ Section 48(1) of NLCD 252.

²³⁹ Section 48(2) of NLCD 252.

²⁴⁰ Section 49(1) of NLCD 252.

²⁴¹ *Ibid.*

²⁴² Section 49(2) of NLCD 252.

²⁴³ Section 54(1) of NLCD 252.

²⁴⁴ *Ibid.*

²⁴⁵ Section 55 of NLCD 252.

²⁴⁶ Section 54(2) of NLCD 252.

²⁴⁷ Section 56 of NLCD 252.

account were made.²⁴⁸ However, the powers of the society under sections 23 to 25, 33 and 41 of the Decree shall be vested in the appointed liquidator.²⁴⁹

Upon the cancellation by executive instrument, the Registrar may appoint one or more persons as a liquidator of the cooperative society.²⁵⁰ The liquidator is subject to the control and supervision of the Registrar.²⁵¹

The liquidator appointed has the following powers subject to powers given to the Registrar to control the liquidation:

- (a) decide the contributions to be made by members and past members of the society to its assets;
- (b) appoint by notice in the Gazette a day before which creditors shall state their claims for admission;
- (c) decide any question of priority which arises between creditors;
- (d) institute and defend suits and undertake legal proceedings on behalf of the society as liquidator of the society;
- (e) decide by what persons and in what proportions the costs of liquidation are to be borne;
- (f) give such directions in regard to the collection and distribution of assets as may be necessary in the course of winding up the society;
- (g) compromise any claim by or against the society with the prior sanction of the Registrar;
- (h) call such general meetings of members as may be necessary for the proper conduct of the liquidation upon giving not less than fourteen days' notice;
- (i) take possession of the books, documents and assets of the society;
- (j) realise the assets of the society;
- (k) carry on the business of the society so far as may be necessary for winding it up to the best advantage provided that he shall not for this purpose be entitled to issue any loan; and
- (l) distribute the assets of the society in accordance with any scheme approved by the Registrar.²⁵²

The Registrar has the following powers to control the liquidation of the society notwithstanding the appointment and powers of the liquidator:

- (a) rescind, vary or stay any decision, appointment, direction or other action given, made or taken by the liquidator and give, make or take such other decision, appointment, direction or other action as he may deem necessary, provided that this power shall not be exercised to the prejudice of a bona fide purchaser or transferee for value;

²⁴⁸ Section 56 of NLCD 252.

²⁴⁹ Section 56(2) of NLCD 252.

²⁵⁰ Section 57 of NLCD 252.

²⁵¹ *Ibid.*

²⁵² Section 58 of NLCD 252.

- (b) remove a liquidator from office;
- (c) call for all books, documents, and assets of the society;
- (d) upon such terms as the Court may direct, withdraw any action instituted by a liquidator;
- (e) in writing limit the power of a liquidator;
- (f) require accounts to be rendered to him by the liquidator;
- (g) procure the auditing of the liquidator's accounts and authorise the distribution of the assets of the society; and
- (h) determine the remuneration of the liquidator.

The Registrar and liquidator have the powers of the High Court to summon witnesses and call for the production of books and accounts and examine witnesses under oath.²⁵³ The oath is administered by the Registrar or the liquidator.²⁵⁴ A decision of the Registrar or liquidator relating to the payment of any money by any person is binding on the parties and can be enforced by Court.²⁵⁵

2.3.5 BUILDING SOCIETIES

Introduction

Another entity which is established to provide for restricted business is the building societies. Building societies are established under the Building Society Ordinance, 1955 (No. 30)²⁵⁶. The Ordinance defines a building society to mean *“a society formed for the purpose of raising by the subscriptions of members a stock or fund from which to make advances to members and registered in accordance with the provisions of this Ordinance”*.²⁵⁷ Generally, a building society is a financial institution that provides banking and other financial services to its members. The critical feature of a building society is that there are no external stakeholders. It is a financial institution owned by its members in the form of a mutual organization. The deposit and financial services provided by the building society is limited to its members. The general purpose for which the financial services are provided, as the name of the entity implies, relates to assisting members to build or investing in buildings for the purpose or benefit of members in the form of return on investment which are in the nature of dividends.

²⁵³ Section 60 of NLCD 252.

²⁵⁴ Ibid.

²⁵⁵ Section 61 of NLCD 252.

²⁵⁶ This Act is amended by the Building Societies (Amendment) Act, 1957 (No.9 Of 1957) and the Building Societies (Amendment) Act, 1959 (No.59 Of 1959).

²⁵⁷ Section 2 of Ordinance No. 30.

Formation

The main characteristic of a building society is that there are no external members. It is a society formed to provide financial services to its very own members. It is not incorporated under the Companies Act but it is established through registration as prescribed by the Building Society Ordinance, 1955 (No. 30).

The Registrar of building societies is responsible for the registration of building societies. The Ordinance allows for the deputy and assistant registrars to perform tasks and functions as directed by the Registrar.²⁵⁸ The Ordinance requires a minimum of seven persons for the purposes of registration of a building society.²⁵⁹ These persons are referred to as “members”. Members may include persons under 21 years, where the rules do not prohibit the admission of such young persons.²⁶⁰ Such young persons may give necessary acquaintances, consent to the dissolution of the society or by next friend petition for a winding up. However, members below 21 years cannot vote at meetings, hold office, transfer a share standing in their names, or execute a valid mortgage to secure advances made to them by the society.²⁶¹ Furthermore, two or more persons may jointly hold a share or shares in a Building Society.

Members are required to adopt the rules provided in the Ordinance on the content of the rules of Building Societies.²⁶² The content of the Rules that are to be adopted by members for registration is provided in the Ordinance.²⁶³ The rules regulate the building society and provide for the governance system of the society. The rules are binding on the members and officers of the society and on the persons claiming on account of a member or under the rules, all of whom shall be deemed and taken to have full notice of the rules.²⁶⁴

The members must send to the Registrar an application for Registration in a form prescribed together with two copies of the rules adopted and agreed upon by members.²⁶⁵ The submission of the documents should be made within fourteen days, or such period allowed by the Registrar by an extension before the expiration of the fourteen days²⁶⁶. Where the Registrar is satisfied with the application and the rules, the Registrar will retain and register a copy of the rules. The Registrar is

²⁵⁸ Section 3 of Ordinance No. 30.

²⁵⁹ Section 7 of Ordinance No. 30.

²⁶⁰ Section 35 of Ordinance No. 30.

²⁶¹ *Ibid.*

²⁶² Section 7 of Ordinance No. 30.

²⁶³ Section 10 of Ordinance No. 30.

²⁶⁴ Section 30, Building Society Act 1955, No. 30

²⁶⁵ Section 7 of Ordinance No. 30.

²⁶⁶ *Ibid.*

required to issue a Certificate of Incorporation upon the registration of the building society.²⁶⁷ The Certificate is sent including the rules to the Secretary of the Building Society.²⁶⁸ Business cannot commence until the Certificate of Incorporation has been issued.²⁶⁹

The registered building society becomes a body corporate by its registered name with perpetual succession until terminated or dissolved under the Ordinance.²⁷⁰ As is the case with the name of other corporate bodies or business names, a building society will not be registered where the name is identical to that of a building society previously registered and is subsisting, or which so nearly resembles the same as to be likely to deceive, unless the subsisting society is in course of being terminated or dissolved and the Registrar consents to the registration.²⁷¹ The building society will also not be registered where the Registrar thinks that the name is undesirable.²⁷² The name of the building society is required to end with the words "Building Society".²⁷³ The Society cannot use any other name other than that which was registered.²⁷⁴

A building society is required to have a registered office and a postal address in the Republic to which communications and notices may be addressed²⁷⁵.

After registration, a building society by special resolution may make alterations, additions or rescind the Rules. This alteration must be registered with the Registrar who must be satisfied with the alteration, addition or rescission within fourteen days from the date of the meeting at which the resolution was adopted to make the Special Resolution valid.

The content of the rules of a building society is set out under the Ordinance as follows:

- (a) the name of the society and the chief office or place of meeting for the business of the society;
- (b) the manner in which the funds of the society shall be raised;
- (c) the terms upon which shares shall be issued and withdrawn and the manner in which contributions shall be paid to the society;
- (d) whether preferential shares may be issued and, if so, within what limits;
- (e) the manner in which advances shall be made and repaid, the deductions, if any, for premiums, and the conditions upon which a borrower may redeem the amount due from

²⁶⁷ Section 7(3) of Ordinance No. 30.

²⁶⁸ *Ibid.*

²⁶⁹ Section 8 of Ordinance No. 30.

²⁷⁰ Section 7(2) of Ordinance No. 30.

²⁷¹ Section 9 of Ordinance No. 30.

²⁷² *Ibid.*

²⁷³ Section 9(2) of Ordinance No. 30.

²⁷⁴ Section 9(3) of Ordinance No. 30.

²⁷⁵ Section 10, Building Society Act 1955, No. 30

him before the expiration of the period for which the advance was made, with tables, where applicable in the opinion of the Registrar, showing the amount due from the borrower after each stipulated payment;

- (f) the manner in which losses shall be ascertained and provided for;
- (g) the manner in which membership shall cease;
- (h) whether the society shall be entitled to borrow money and if so, within what limits: provided that the limits shall not exceed those provided by this Ordinance;
- (i) the purposes to which the funds of the society may be applied and the manner in which they may be invested;
- (j) the manner of altering and rescinding the rules of the society and of making additional rules;
- (k) the manner of appointing, remunerating and removing the board of directors, or committee of management, auditors and other officers;
- (l) the manner of calling general and special meetings of the members;
- (m) provision for an annual or more frequent audit of the accounts and inspection by the auditors of the mortgages and other securities belonging to the society;
- (n) whether disputes between the society and any of its members or any person claiming by or through any member or under the rules shall be settled by reference to the Court, the Registrar or arbitration;
- (o) provision for the device, custody and use of the common seal of the society;
- (p) provision for the custody of the mortgages and other securities belonging to the society;
- (q) the powers and duties of the board of directors, or committee of management and other officers;
- (r) the fines and forfeitures which may be imposed on members of the society; and
- (s) the manner in which the society may be terminated or dissolved.

The registration of building society is evidenced by a certificate issued by the Registrar. Section 4 of the Ordinance provides that: *“Any certificate of incorporation, certificate of registration or other document relating to a building society purporting to be signed by the Registrar shall, in the absence of any evidence to the contrary, be admissible as evidence without proof of the signature.”* A certificate of incorporation will, therefore, be admissible as evidence of the registration of the building society.

Characteristics

The building society upon registration becomes a body corporate. It, therefore, essentially has all the characteristics of an incorporated entity. Some of these characteristics have been restated in the Ordinance with limits on the powers that a building society can exercise. These include:

- (a) power to borrow,²⁷⁶
- (b) power to hold land,²⁷⁷
- (c) power to make advances to members,²⁷⁸
- (d) power to invest,²⁷⁹
- (e) enjoys perpetual succession,²⁸⁰ and
- (f) capacity to enter into transactions in its own name.²⁸¹

Governance of building society

The Ordinance sets out the governance system of a building society registered under the Ordinance. The power to manage the society is vested in the board of directors or committee of management.²⁸² A building society is required to have a Board of Directors or a committee of management consisting of three or more persons, of whom the secretary may be one.²⁸³ Since the main purpose of the society is financial services for the members in terms of mobilizing funds from members and investment in landed property, a director or a member of the committee of management is required to personally be satisfied with the arrangements made for assessing the adequacy of securities to be taken in respect of advances to be made by the society.²⁸⁴ The directors or members of the committee are reasonably expected to ensure that the adequacy of security so taken will be assessed by a competent and prudent person experienced in the matters relevant to the determination of the value of that security.²⁸⁵ In addition, directors or members of the committee of management are not precluded from approving an arrangement by reason only that the arrangement provides for the assessment of the adequacy of the security by the member personally or any other director or member of the committee of management of the society.²⁸⁶

Where a person is appointed a director or member of the committee of management of a building society or ceases for a reason to be a director or member of the committee of management of a building society, the society shall within fourteen days after that happening send to the Registrar notice of the change.²⁸⁷

²⁷⁶ Section 22 of Ordinance No. 30.

²⁷⁷ Section 23 of Ordinance of 1955 (No. 30).

²⁷⁸ Section 24 of Ordinance of 1955 (No. 30).

²⁷⁹ Section 25 of Ordinance of 1955 (No. 30).

²⁸⁰ Section 7(2) of Ordinance of 1955 (No. 30).

²⁸¹ Section 9(3) of Ordinance of 1955 (No. 30).

²⁸² Section 13 of Ordinance of 1955 (No. 30).

²⁸³ Section 13(1) of Ordinance of 1955 (No. 30).

²⁸⁴ Section 13(2) of Ordinance of 1955 (No. 30).

²⁸⁵ *Ibid.*

²⁸⁶ Section 13(3) of Ordinance of 1955 (No. 30).

²⁸⁷ Section 48 of Ordinance of 1955 (No. 30).

A building society must also have a secretary.²⁸⁸ An assistant, deputy secretary or any officer of the society can be authorised generally or specifically by the board of directors or committee of management, to act on behalf of the secretary where the office is vacant for any other reason other than the secretary's incapability of action.

A building society must also have more than one auditor, who must be approved for that purpose by the Registrar.²⁸⁹

Meetings of members

A Building Society is required to hold an Annual General Meeting within four months after the close of the previous calendar year in addition to any other meetings in that year.²⁹⁰ The notice must expressly indicate the meeting as an Annual General Meeting.²⁹¹ However, a building society incorporated after 30th September of the year is not required to hold Annual General Meetings for that year.²⁹²

The Board of Directors or Committee of Management of a building society can call for any other general or special meetings in accordance with the rules or when desired.²⁹³ A call for a general or special meeting can be on the application of one-tenth of the members or, in the case of a society consisting of more than one thousand members, of one hundred members.²⁹⁴

Annual accounts and statement

Building societies must maintain books of account. The Ordinance requires that as soon as it is practicable, and not more than three months after the expiration of each calendar year, a building society must prepare accounts of the receipts and expenditure of the society during that year and a general statement of its funds, liabilities and asset.²⁹⁵ The account and statement must show the following:

- (a) the amounts due to the holders of the various classes of shares respectively;
- (b) the amounts due to depositors and creditors for loans;
- (c) the balance due or outstanding on mortgage securities (not including prospective interest);
- (d) the amount invested by the society in other securities; and

²⁸⁸ 14(1) of Ordinance of 1955 (No. 30).

²⁸⁹ Section 15 of Ordinance of 1955 (No. 30).

²⁹⁰ Section 27 of Ordinance of 1955 (No. 30).

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Section 29 of Ordinance of 1955 (No. 30).

- (e) the amount of any loan outstanding to any director of the society or member of the committee of management or to any company in which such a person is a shareholder or has a beneficial interest in any shares thereof.²⁹⁶

The account and statement should be attested by auditors of the society and shall be countersigned by two directors or two members of the committee of management.²⁹⁷

Dissolution and winding up

A building society upon registration enjoys perpetual succession until dissolved in accordance with the Ordinance. A building society may be dissolved:

- (a) upon the happening of any event declared by its rules to be the termination of the society;
- (b) by dissolution in the manner prescribed by its rules;
- (c) by dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to an instrument of dissolution; or
- (d) by winding-up, either voluntarily under the supervision of the Court or by the Court.²⁹⁸

The notice of termination of a building society, the commencement and completion of the winding up must be delivered to the Registrar for registration.²⁹⁹

In the event of dissolution under an instrument of dissolution, the Ordinance requires that the instrument of dissolution must state:

- (a) the liabilities and assets of the society in detail;
- (b) the number of members, and the amount standing to their credit in the books of the society;
- (c) the claims of depositors and other creditors, and the provision to be made for their payment;
- (d) the intended appropriation or division of the funds and property of the society;
- (e) the names of one or more persons to be appointed trustees for the purpose of the dissolution, and their remuneration.³⁰⁰

In the event of winding up by the Court, the Ordinance permits the following persons to petition the Court for the winding up of a building society:

- (a) any member authorised to present a petition on behalf of the society by three-fourths of the members present at a general meeting of the society specially called for the purpose;

²⁹⁶ Section 29(3) of Ordinance of 1955 (No. 30).

²⁹⁷ Section 29 of Ordinance of 1955 (No. 30).

²⁹⁸ *Ibid.*

²⁹⁹ Section 64(2) of Ordinance of 1955 (No. 30).

³⁰⁰ Section 65(1) of Ordinance of 1955 (No. 30).

- (b) any judgment creditor for not less than three thousand Ghana Cedis; or
- (c) the Registrar as regards a building society of which registration has been cancelled by him under the provisions of section 63 of the Ordinance.³⁰¹

The Court, upon being satisfied with the ground of the petition, may order the building society to wind up voluntary under the supervision of the Court, or by the Court.³⁰² The rules relating to the winding up of a company under the supervision of the Court or by the Court (currently the Corporate Insolvency and Restructuring Act, 2020 (Act 1015)) is applicable to the building society.³⁰³

Liability of members of a building society

Section 68 of the Ordinance on the liability of members of the building society provides as follows:

- “(1) The liability of any member of a building society in respect of any share upon which no advance has been made shall be limited to the amount actually paid or which he has to pay until his share is fully paid up and in respect of any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society.*
- (2) When a building society is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security or under the rules of the society shall not be liable to pay the amount payable under the mortgage or other security or rules except at the time or times and subject to the conditions therein expressed.”*

Where a building society is a going concern, the liability of members is limited to the share of the members' contribution to the building society. The liability is the actual amount the member paid or which he is required to pay in respect of the shares. However, where an advance has been made in relation to the share, the liability of the member is calculated based on the amount payable on the mortgage or security or under the rule of the society. This is likely to include the amount advanced plus any interest due and payable on the amount.

In the event of dissolution or winding up of the society, a member's liability to pay is in accordance with the terms under which the advance has been made.

³⁰¹ Section 66 of Ordinance of 1955 (No. 30).

³⁰² Ibid.

³⁰³ Section 66(2) of Ordinance of 1955 (No. 30).

2.3.6 INCORPORATED TRUST

Introduction

A trust is a three-party fiduciary relationship in which the first party, the trustor or settlor, transfers (“settles”) a property (often but not necessarily a sum of money) to the second party (the trustee) for the benefit of the third party, the beneficiary. A trust can be set up either to benefit particular persons or for any charitable purposes (but not generally for non-charitable purposes): typical examples are a will trust for the testator’s children and family, a pension trust (to confer benefits on employees and their families) and a charitable trust. In all cases, the trustee may be a person or company, whether they are a prospective beneficiary.

Trustee (or the holding of a trusteeship) is a legal term which, in its broadest sense, is a synonym for anyone in a position of trust and so can refer to any person who holds property, authority, or a position of trust responsible for the benefit of another. A trustee can also refer to a person who is allowed to do certain tasks but not able to gain income. Although in the strictest sense of the term, a trustee is the holder of property on behalf of a beneficiary, the more expansive sense encompasses persons who serve, for example, on the board of trustees of an institution that operates for a charity, for the benefit of the general public, or a person in the local government.

The focus in this subchapter is on incorporated trust, which refers to an association run by trustees, who hold and manage property, for the benefit of the members of the association or designated beneficiaries which may either be the public, a group of persons or just for a particular purpose.

In relation to creating entities for purposes of the trust, the Trustees (Incorporation) Act, 1962 (Act 106)³⁰⁴ provides for the incorporation of trust as a body corporate. The Act provides that trustees of an unincorporated voluntary association of persons or body established for any religious, educational, literary, scientific, sports, social or charitable purposes, may be incorporated as a body corporate under the provisions of the Act.³⁰⁵

Formation

Act 106 regulates the formation of an incorporated trust. The Act requires that a voluntary association of persons or body that is established for the purposes of religion, education, science, sports, social or charitable activities may make application to the Minister designated for that purpose for registration.³⁰⁶ The trustee is to submit an application to the Minister (and not the

³⁰⁴ Amended by the Trustees (Incorporation) (Amendment) Law, 1993 (PNDC L 311).

³⁰⁵ Section 1(1) of Act 106.

³⁰⁶ *Ibid.*

Registrar) for a certificate of incorporation to be issued to create the incorporated trust as a body corporate. The application must state particulars required as per the Schedule to the Act, which particulars include:

- (a) the objects of the body or association,
- (b) the rules and regulations of the body or association
- (c) the date of, and parties to, every deed, will, or other instrument (if any) creating, constituting, or regulating the same.
- (d) a statement and short description of the land which at the date of application is possessed by, or belonging to, or held on behalf of the body or association.
- (e) the names, residences, and additions of the trustees of the body or association.
- (f) the proposed title of the body corporate, of which title the words "trustee(s)" and "registered" shall form part, unless the Minister otherwise directs.
- (g) the proposed device of the official seal.
- (h) the regulations for the custody and use of the official seal.³⁰⁷

The application must be in writing and signed by persons making the application.³⁰⁸ The Minister can also request for declaration or other evidence as proof of the particulars stated in the application.³⁰⁹ The trustees must also be appointed. The Minister is required to be satisfied with the appointment prior to the issue of the certificate of incorporation.³¹⁰

Upon being satisfied with the application and appointment of trustees, the Minister is to issue a certificate of incorporation. Section 1 of Act 106 provides that:

“(2) The Minister, having regard to the extent, nature, and objects and other circumstances of such body or association may grant a certificate accordingly, subject to such conditions or directions generally as he thinks fit to insert in the certificate.

(3) Such conditions or directions may include, in particular, provisions relating to the qualifications and number of the trustees, their tenure and vacation of office, the mode of appointing new trustees, the custody and use of the official seal, the amount of the land which the trustees may hold, and the purposes for which the land may be applied.”

A certificate of incorporation is, therefore, to contain conditions to be complied with by the trustee.³¹¹ The trustees are bound to operate in accordance with such conditions.

³⁰⁷ Section 3 of Act 106

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Section 4(1) of Act 106.

³¹¹ Section 7(1) of Act 106.

A certificate of incorporation issued by the Minister is conclusive evidence of the date of incorporation and of the fact that all preliminary requirements in respect of incorporation have been complied with.³¹²

Capacity of the incorporated trust

Section 1(4) of Act 106 states that:

“(4) Upon the grant of the certificate, the trustees shall become a body corporate by the name described in the certificate, and shall have perpetual succession and an official seal, and power to sue and be sued in such corporate name, and subject to the conditions and directions contained in the said certificate, to hold and acquire, and by instruments under the official seal to convey, assign, and demise any land now or hereafter belonging to, or held for the benefit of, that body or association, in like manner, and subject to such restrictions and provisions as the trustees might, without such incorporation, hold or acquire, convey or assign, or demise the land for the purposes of that body or association.”

Once the certificate of incorporation is issued, the trustees become a body corporate with powers of a body corporate unless expressly limited. The entity enjoys perpetual succession. The incorporated trust can sue and be sued, acquire and hold property (as determined by the Minister) and enter into any transaction.

Cancellation of the certificate

The legal status of an incorporated trust is evidenced by the certificate of incorporation. The Act permits the cancellation of the certificate. Section 7 of Act 106 provides that:

- “(2) The Minister may, whenever he is of the opinion that conditions contained in any certificate of incorporation are not being complied with or that the activities of the association or body, of its trustees, are contrary to public order or morality, make application to the High Court for the certificate to be cancelled.*
- (3) A certificate under the hand of the Minister that the activities of an association or body, or of its trustees, are contrary to public order or morality shall be sufficient evidence of the matter so certified.*
- (4) The High Court in cancelling a certificate may make such order as it thinks fit for the disposal of both movable and immovable property held by the trustees.”*

³¹² Section 5 of Act 106.

The Act thus states the grounds of cancellation of the certificate. The grounds stated are where trustees or the activities of the body corporate are contrary to public order or morality. In such cases, the Minister can apply to the High Court for the cancellation of the certificate. The High Court on making the order cancelling the certificate must make consequential orders relating to disposal of the assets held by the trustees.

Even though the Act does not indicate expressly the voluntary dissolution of the incorporated trust, in the event that the incorporated trust is inoperative or does not hold any property in trust for the association, it is suggested that it should be possible for the trustees to apply to the Minister for the cancellation of the certificate. The Minister may then make an application to the court if satisfied with the reason for the cancellation.

In 2019, there was an attempt to pass a new Non-Profit Organisation Bill, 2019 (the Bill) into law which will repeal the Trustees (Incorporated) Act, 1962 (Act 106) as amended. Even though it has not yet been passed, a review of some of the provisions of the Non-Profit Organisation Bill, 2019 which relates to the set-up of incorporated entities will suffice.

2.3.7 TRUST & CHARITABLE TRUST

Introduction

The Non-Profit Organisation Bill, 2019 (the Bill) provides for the registration of two entities – a trust or charitable trust and a non-governmental organization. This part deals with the registration of a trust or charitable trust which is the same as what is provided under the Trustees (Incorporated) Act, 1962 (Act 102) as amended. Once the Bill is passed into law, it will repeal Act 102 and regulate the registration of a trust or charitable trust as an incorporated entity.

The Bill provides for the capacity of a person who is eighteen years and above to create a trust for a lawful purpose and vest property in the trustee.³¹³ In the event that the property is an immovable property or consist partly of immovable property, there must be at least two trustees.³¹⁴ A trustee must have the capacity to contract and hold property. The number of trustees cannot exceed four.³¹⁵

The trust is created by a trust instrument signed by the person in the presence of two witnesses.³¹⁶ The trust instrument must specify:³¹⁷

³¹³ Section 1 of the Bill.

³¹⁴ Section 5 of the Bill.

³¹⁵ Section 6 of the Bill.

³¹⁶ Section 1(5) of the Bill.

³¹⁷ Section 3 of the Bill.

- (a) the intention to create a trust
- (b) the nature and purpose of the trust
- (c) the trustees of the trust
- (d) the beneficiaries of the trust
- (e) the conditions under which the beneficiaries are to enjoy the benefits under the trust
- (f) the trust property
- (g) the date of commencement of the trust
- (h) the duration of the trust
- (i) the circumstances under which the trust may be revoked
- (j) the method of appointment of a new trustee, if applicable
- (k) the remuneration of the trustee

The Bill also is to establish an Office of Administrator-General which is to be a body corporate with perpetual succession.³¹⁸ The functions of the Office is to, among others, regulate and monitor the activities of trusts, faith-based organisations, non-governmental organisations and other non-profit organisation.³¹⁹ The Office is to be governed by a Board to be established under the Act.³²⁰ Of relevance is the power of the Board to register voluntary associations and trust.

Registration of trustees of charitable association

The Bill provides for the registration of trusts. Trustees of voluntary associations of persons established for a faith-based, educational, literary, scientific, sports, social or any other charitable purpose may apply to the Board of registration as a charitable trust.³²¹ A trust is created for a charitable purpose if the trust is exclusively devoted to a charitable purpose, the object of the trust is not vague and uncertain and the beneficiaries are reasonably ascertainable.³²² A trust is charitable if it is created in the public interest for:³²³

- (a) advancement of education, religion or Ghanaian culture
- (b) relief of poverty
- (c) protection of the environment or fundamental human rights
- (d) promotion of health
- (e) any other purpose beneficial to a community

Registration must be done by application which must state:³²⁴

³¹⁸ Section 120 of the Bill.

³¹⁹ Section 122 of the Bill.

³²⁰ Section 123 of the Bill.

³²¹ Section 20 of the Bill.

³²² Section 8 of the Bill.

³²³ Section 7 of the Bill.

³²⁴ Section 21 of the Bill.

- (a) the object of the trust
- (b) the proposed name of the trust
- (c) the constitution, rules or regulations of the trust which must include the tenure of office of the trustees and the method of appointment of new trustees
- (d) dates and parties to a legal document or an instrument related to the trust
- (e) number, names, addresses and particulars of the trustees
- (f) particulars of its bank
- (g) proposed device of the official seal
- (h) regulations of the custody and use of the official seal
- (i) land that is held on behalf of the trust
- (j) tax identification number

The Board is to consider the application, particularly the nature and object of the association, as well as the appointment of the trustees.³²⁵ If satisfied, the Board is to register the association as a trust and issue a certificate of incorporation.³²⁶ The Board may refuse to register or cancel the registration on any of the following grounds:

- (a) upon receipt of information that there is reasonable ground to believe the applicant is making or likely to make available resources to a terrorist group or use the resources for criminal or illegal activities;
- (b) that a reasonable ground exists to believe that the purpose of the faith-based organisation or charitable trust is contrary to public morality or the integrity of the Republic.

Once a certificate of incorporation is issued, the Bill provides that the trust becomes a body corporate by the name stated in the certificate.³²⁷ The body corporate has the characteristics of an incorporated entity and enjoys perpetual succession; can sue and be sued in its name.³²⁸ The trustees constitute the governing body of the incorporated entity. The certificate of incorporation is conclusive evidence of the satisfaction of the requirements of registration. The date of incorporation is the date indicated on the certificate.³²⁹ The trustees are required to comply with conditions and directions stated in the certificate of incorporation. The conditions or directions in the certificate are binding on the trustees.³³⁰ A certificate may be revoked by the Administrator-General in the event of a breach of such conditions.³³¹

³²⁵ Section 21(3) of the Bill.

³²⁶ *Ibid.*

³²⁷ Section 23(1) of the Bill.

³²⁸ *Ibid.*

³²⁹ Section 23(5) of the Bill.

³³⁰ Section 24(1) of the Bill.

³³¹ Section 24(2) of the Bill.

The duties³³², general powers³³³ and rights³³⁴ of the trustees are prescribed under the Bill. A trust is to keep proper books of account which must be audited by its auditor.³³⁵ In addition, the Bill empowers the Auditor-General, at the request of the Board, to audit or review the operations of a faith-based organisation or a trust.³³⁶

2.3.8 NON-GOVERNMENTAL ORGANISATION

Introduction

The Non-Profit Organisations Bill, 2019 also introduces the establishment of non-governmental organisations which are not a company incorporated under the Companies Act, 2019 (Act 992). This type of organisation is not a trust registered under the Bill but an organisation to pursue public interest. The Bill provides that *“a person who is eighteen years or more may establish an organisation to pursue a purpose which is lawful and oriented towards a public interest.”*³³⁷ Such an organisation is excluded from engaging in party political activity.³³⁸ Membership of the organisation is voluntary.³³⁹ The organisation is required to be institutionally independent and autonomous from government institutions but must operate within the law.³⁴⁰ Generally, a non-governmental organisation, as the name suggests, is to be independent of governmental involvement. However, the organisation may have access to public funds and benefits from government, including partnering with government to deliver public goods and services.³⁴¹

In most instances as well, the organisation is a non-profit organisation. However, the Bill provides that where it engages in business for the purpose of making profit, it must submit relevant documents to the Ghana Revenue Authority for the payment of tax on profit.³⁴² Generally, the object of a non-governmental organisation is not to make profit but to pursue some public interest. As such, it qualifies for tax exemption. The Board of the Office of the Administrator-General is mandated to make recommendations to the Minister responsible for finance for tax waivers and variation.³⁴³

³³² Sections 30 to 42 of the Bill.

³³³ Sections 44 to 58 of the Bill.

³³⁴ Sections 59 to 64 of the Bill.

³³⁵ Section 27 of the Bill.

³³⁶ Section 28 of the Bill.

³³⁷ Section 92(1) of the Bill.

³³⁸ Section 92(2) of the Bill.

³³⁹ Section 92(4) of the Bill.

³⁴⁰ Section 92(5) of the Bill.

³⁴¹ Section 94(4) of the Bill.

³⁴² Section 92(6) of the Bill.

³⁴³ Sections 94(5) and (6), and 95 of the Bill.

Registration of a non-governmental organisation

It is unlawful for an organisation to operate as a non-governmental organisation without registration.³⁴⁴ The Bill mandates that such an organisation must first be registered with the Administrator-General prior to operating. The registration is by application to the Administrator-General by any person who is eighteen years and above.³⁴⁵ The application must be made in accordance with rules to be made by the Board of the Office of Administrator-General.³⁴⁶ The registration of a non-governmental organisation is valid for the period determined by the Board.³⁴⁷ Upon registration, the organisation is issued with a certificate of registration which must have a unique identification number.³⁴⁸

The registration may be refused on the same grounds as the registration of a trust can be refused. In addition, the Board can refuse to register or cancel the registration of an organisation on any of the following grounds:

- (a) the proposed name already exists
- (b) the proposed name is offensive and likely to offend the public
- (c) the organisation is pursuing a different purpose from that for which it was registered
- (d) the organisation is not complying with the Act
- (e) the organisation has not carried out any activity for a consecutive period of twenty-four months.

The Bill did not state the effect of registration or issue of the certificate of registration to the organisation in terms of whether it becomes a body corporate. However, the Bill provides that the organisation registered under the Act enjoys the privileges, benefits and facilities provided under the Act.³⁴⁹ This includes the ability of the organisation to organise public collection,³⁵⁰ enjoy tax waivers,³⁵¹ receive grants, sponsorships, and other financial assistance,³⁵² receive benefits from government,³⁵³ enter into a contract or other engagements at the request of government,³⁵⁴ and

³⁴⁴ Section 96(1) of the Bill.

³⁴⁵ Section 96(2) of the Bill.

³⁴⁶ *Ibid.*

³⁴⁷ Section 96(3) of the Bill.

³⁴⁸ Section 96(4) of the Bill.

³⁴⁹ Section 94(1) of the Bill.

³⁵⁰ Section 94(3) of the Bill.

³⁵¹ Section 94(5) of the Bill.

³⁵² Section 94(3) of the Bill.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

employ persons³⁵⁵. This is in addition to requirements for the organisation to keep books of account that must be audited.³⁵⁶

In view of all the above, it can be concluded that the organisation has a legal personality. It can, therefore, sue and be sued as an organisation. Since the Bill is yet to be passed, it is recommended that the status of such organisations be clearly stated as a body corporate to avoid any confusion.

The Administrator-General has the power to cancel the certificate on the same grounds on which she can refuse to register the organisation as indicated above. Upon cancellation of the certificate of registration, the organisation is to return the certificate to the Administrator-General. The organisation forfeits the privileges, benefits and advantages conferred by law upon the cancellation.

The following chapters talk about a company, which is the main subject of this book. A company is an incorporated entity registered under the Companies Act, 2019 (Act 992). The Act recognises the entities registered under it as legal entities

³⁵⁵ Section 95(2) of the Bill.

³⁵⁶ Section 102 of the Bill.

3.0 COMPANIES

3.1 Introduction

The word “company” implies an association of individuals with a common purpose – whether to carry on business for profit or to carry on not-for-profit activity including social, educational, religious or charitable activity or communal activities. In this sense, the word “company” may connote an unincorporated entity or incorporated entity. A company is incorporated if it has a separate legal personality different from its members as recognised under the Companies Act, 2019 (Act 992). It is unincorporated if it does not have a separate legal personality independent of its members.

It is unlawful for a company or an association of more than twenty persons to carry on business for purposes of gains without being registered under the Act. Section 3 of Act 992 provides “*A company, or an association consisting of more than twenty persons shall not be formed for the purpose of carrying on a business that has for the object of the company or association, the acquisition of gain by the company or association or by the individual members of the company or association, unless the company or association is registered under this Act or is formed in pursuance of any other enactment.*” The essence of the section is not to mandate every association of more than twenty persons to register as a company. The purpose is to make it unlawful for an unregistered company to carry on business for gains. Secondly, it is to prohibit associations of persons, who are twenty or more, from carrying on business for the purpose of gains without being registered under the Companies Act or any other enactment. The prohibition of association of twenty or more persons is limited to where the association carries on business for the purposes of acquisition of gain.

*The Director: Mineral Development, Gauteng Region, Sasol Mining (Pty) Ltd. v. Save the VAAL Environment, Ronsand Ranch (Pty) Ltd & Others*³⁵⁷ - in an action by an unincorporated association, Save, seeking to prohibit mining by the Sasol Mining close to a river, it was alleged that Save was an illegal association based on section 30(1) of the Companies Act, 61 of 1973 which reads: “*No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law or was before the thirty-first day of May, 1962, formed in pursuance of Letters Patent or Royal Charter.*” The object of Save according to its written constitution, is to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations with a specific focus on the area between the Letaba Weir and the Barrage. In dismissing the claim that Save is an illegal association, Olivier JA in his ruling noted that:

³⁵⁷ Suit No.133/98 (CA, 12 March 1999).

*“The prohibition contained in sec 30(1) should be kept within its proper bounds. The underlying purpose of the prohibition in our country, as in England, is to prevent mischief arising from trading undertakings being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting (see *Smith v Anderson* (1880) 15 Ch D 247 (CA) at 273; *Mitchell’s Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A) at 169 I - 170 B). On the facts before us it cannot be said that *Save* was trading or carrying on a business with the object of the acquisition of gain. Consequently, the objection cannot be upheld.”*

*Smith v. Anderson*³⁵⁸ - in this case, shares in a number of telegraph companies of the nominal amount of £400,000 were purchased by subscription and vested in trustees. The trusts of the funds were declared by a deed between the trustees and a covenantee on behalf of the certificate holders who were more than twenty persons. The trustees were to apply the income of the shares in payment of interest at six percent on the nominal amounts of the certificates and apply the surplus in redeeming the certificates. It was provided that the trustees might at their discretion sell any of the shares if at a meeting of the trustees it was unanimously resolved to be for the interest of the certificate holders that shares to be specified in the resolution should be sold. The proceeds of every sale were to be applied in the redemption of certificates, unless the trustees, by a unanimous resolution confirmed by a meeting of certificate holders, determined to re-invest in submarine telegraph shares. Meetings of the certificate holders were to be held for the purpose of receiving reports from the trustees on the affairs of the trust, of appointing auditors, and of appointing new trustees in the place of trustees who should die, retire or become incapable to act. On whether this arrangement contravened section 4 of the 1862 Act which prohibited the formation of an association consisting of more than 20 persons ‘for the purpose of carrying on any business that has for its object the acquisition of gain’ unless it was registered in accordance with the Act, it was held per Brett LJ:

“The Act says that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act. For what? ‘For the purpose of carrying on any business’; and it is contended that the trust deed before us constitutes an association of more than twenty persons formed ‘for the purpose of carrying on business’. I am unable to agree with the Master of the Rolls in the conclusion that it does. I cannot find that this deed constitutes any association whatever between the persons who are supposed to be socii. The expression “carrying on” implies a repetition of acts and excuses the case of an association formed for doing the particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business...The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object.”

³⁵⁸ (1880) 15 Ch.D 247

For the purpose of this book, a company is an entity incorporated, registered or continued in existence under the Companies Act, 2019 (Act 992). In Ghana, a company can therefore only be formed in accordance with the Companies Act³⁵⁹. Any other entity registered or established by any other law in Ghana is not a company within the meaning of the law notwithstanding the entity is a body corporate.

Under Act 992³⁶⁰ (First Schedule), a company means *“a body formed and registered under this Act”*. A body corporate is defined as *“a corporation formed under this Act or otherwise and whether in Ghana or elsewhere but does not include a corporation sole such as an incorporated office”*. A body corporate may be formed under the Companies Act, 2019 or any other enactment. Whilst every company is a body corporate, not all bodies corporate are companies. A company is just one type of body corporate. It is only when a body corporate is registered, incorporated or continued in existence under the Companies Act, 2019 (Act 992) that it is a company.

Companies exist in all sectors of society and are encountered everywhere. Companies provide most of the goods and services that are used in everyday activities. Companies own large and small stores; run transport; telephone and communication systems; supply water and power; and run schools and hospitals, manufacture, distribute, sale and consume products, provide services, and undertake works. A company can be small, medium or large organisations in terms of its capital, number of employees, income, turnovers, value of assets of the company or other factors.

A company is formed by a person or an association of persons for the purpose of carrying on business or pursuing a not-for-project object. Not-for-profit activities may not only refer to charitable activities but also activities that are not strictly charitable but for the benefit of a group of persons. The entity registered under the Companies Act, 2019 is given a legal status that is separate, distinct and independent of the status of the person(s) forming the company. Section 14(2) of Act 992 provides that from the date of incorporation, the company becomes a body corporate by the name contained in the application for incorporation and is capable of performing the functions of an incorporated company. In addition, Section 18 of Act 992 states the company upon formation under the Companies Act have the full capacity to carry or undertake any business or activity, do any act, or enter into any transaction, and have full rights, powers and privileges in the exercise of its full capacity. The person(s) who formed the association become ‘owners’, shareholders or members, of the company upon its formation. A company is an incorporated entity and have all the characteristics of an incorporated entity as discussed in the preceding chapter. All the characteristics flow from the fact that the Companies Act, 2019 recognises the company as a legal person in its own name and confer on it a separate legal personality as stated in the case of *Salomon v. Salomon & Co. Ltd.*³⁶¹

³⁵⁹ Sections 12, 13 and 14 of Act 992.

³⁶⁰ Section 383 of Act 992 – referred to First Schedule – Definitions section.

³⁶¹ [1897] AC 22 @ 51; [1895-9] All ER 33.

The position has been confirmed in a number of cases and has been stated as the foundation on which the Companies Act, 1963, which is reproduced in substance in the Companies Act, 2019.³⁶²

What makes a company remarkable is that it is a legal person in its own right, not simply groups of individuals working together in a common enterprise or a sole person undertaking some activities. That is, the company is an incorporated entity and is recognised in law as a distinct legal person, albeit artificial person. Company law therefore not only addresses the types of rules that enable one person or group of persons to work together in an organization but also addresses the rules that enable a non-human or artificial person to perform a wide variety of acts for itself.

The company requires resources for its operation, and these resources are referred to as capital of the company. The capital of the company is the resources of the company and not resources of the owners. The capital is either provided by the 'owners', shareholders or members, or raised by the company. The provision of the resources by the 'owners' do not confer on the 'owners' the power of management of administration of the company. Management is separated from ownership and it is the officers of the company that are responsible for the management of the company. The officers may not necessarily be the 'owners', shareholders or members, of the company.

In summary, a company upon its incorporation becomes a legal entity that is separate, distinct and independent from the persons who created it or are responsible for its management. The company has shareholders or members, who have interest in the company and has officers who are responsible for the management and administration of the company. The officers and members need not be the same persons. The company is created to undertake a business or pursue an object. The capital the company requires to carry its business or pursue its objects are resources of the company.

3.2 Formation of a company

It is an offence for a company to carry on business or pursuing its objects without the incorporation or registration of the company or association under the Companies Act, 2019.³⁶³ In view of that, Act 992 also specifies the requirements and steps that must be taken for the incorporation of a company in Ghana. The steps are provided in sections 12, 13 and 14 of Act 992.

The Act provides in section 6 of the Act that *"One or more persons may form an incorporated company under this Act."* There are, however, a number of qualifications on the person who may form a company in terms of the number, capacity and nationality of the person.

³⁶² Morkor v. Kuma (East Coast Fisheries Case) [1998-99] SCGLR 620; see subchapter 2.2 - "Distinction between Unincorporated and Incorporated Entities".

³⁶³ Section 3 of Act 992.

Act 992 provides that any one person may form an incorporated company in Ghana³⁶⁴. One person can, therefore, form a company in Ghana. The minimum number of persons that can form a company in Ghana is one person, unlike a partnership where the minimum number of individuals is two partners. Even at the time in England, where the requirement was for a total of seven persons to form a company, the courts have held that even where there is one person with substantial shares, it does not affect the legal status of the company.

In *Salomon v. Salomon & Co. Ltd*³⁶⁵, Lord Herschell stated @ pg. 45 that:

"It is said that the respondent company is a "one man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact."

Lord Macnaghten concurring with the judgment of Lord Herschell stated @ pg. 48 that:

"Provided the formalities of the Act are complied with, a company will be validly incorporated even if it is only a "one person" company and the courts will be reluctant to treat a shareholder as personally liable for the debts of the company. "...when the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the

³⁶⁴ Section 6 of Act 992.

³⁶⁵ [1895-9] AII ER 33; [1897] AC 22.

subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

The above position is no longer relevant as Act 992 expressly states that the minimum number required is one person. On the maximum number, section 7(5) of Act 992 provides that the membership of a private company, together with debenture holders, should not exceed fifty persons. The maximum of fifty persons, in relation to a private company, relates to the totality of shareholders or members in addition to the number of debenture holders. Therefore, for a private company, the maximum number of persons, who are members and debenture holders, is fifty. There is no limitation on the number of persons who can be members or shareholders of a public company. There is, therefore, no maximum number in respect of a public company.

As noted, section 6 of Act 992 states that *"one or more persons may form an incorporated company under this Act"*³⁶⁶. Unlike Act 152 which uses the word "individual", the use of the word "persons" without any restriction means that either natural persons or artificial persons can form a company. A company can, therefore, form another company and be a member or shareholder of that company, the same way a partnership, statutory corporation and other incorporated entities can be a member or shareholder of a company.

The Companies Act, 2019 does not also qualify the use of "person" with any nationality. Act 992 does not, therefore, restrict the formation of a company to a Ghanaian. A foreigner or a foreign corporation can form a company in Ghana under the Companies Act, 2019. However, other laws affect the activities that a foreign entity or foreigners can undertake in Ghana. As such, if the particular activity is restricted and a foreigner or a foreign entity is prohibited from engaging in such activity, a foreigner cannot circumvent the requirement by incorporating a company to use the company to undertake that activity. For example, the Ghana Investment Promotion Centre Act, 2013 (Act 865) prohibits foreigners from undertaking retail business unless they meet a minimum capital requirement or undertaking taxi services unless a minimum of ten cars is acquired for the business. By implication, a foreigner cannot, therefore, register a company to carry on such business unless those conditions are met.

Under the now repealed Companies Act, 1963 (Act 179), the Registrar is expressly empowered under section 14 to refuse to register a company if the authorised business is unlawful. However, the Companies Act 2019 (Act 992) does not expressly provide for a similar power for the Registrar of Companies. This is because, the Companies Act, 2019 does not require promoters to state authorised

³⁶⁶ Emphasis mine.

business of a company since Act 992 permits a company to undertake any activity and there is no limitation on the business of a company. In other words, the registration document does not state an authorised business in which case the company will be limited to carry on specific authorised business. It will be impossible for the Registrar at the time of registering a company to determine the business the company intends to undertake, let alone to conclude that the business is unlawful so as to refuse to register the company. In view of that, the previous power of the Registrar to prevent companies incorporated by foreigners to undertake business foreigners are prohibited from undertaking cannot be exercised. The conclusion is that a foreigner can therefore generally incorporate a company in Ghana. However, if such a business is subject to license requirement, the license will not be granted to enable the company to undertake such businesses.

Section 12 of Act 992 provides that *“subject to this Act, a person of the age of eighteen years and above may apply for incorporation of a company under this Act”*. Section 13(3) of Act 992 requires subscribers to sign the application for registration of a company. The subscriber who applies for incorporation of a company must be eighteen years and above. The lawful age for incorporation of a company in Ghana is, therefore, eighteen years and above. The Registrar can refuse to register a company under Section 14 of Act 992 if any of the persons applying for registration of the company or the subscriber to the application for registration of the company is a person below eighteen years. Under section 14 of the repealed Companies Act, 1963 (Act 179), the Registrar also had express power to refuse to register a company if a subscriber to the Regulations of the proposed company is of unsound mind. Even though the Companies Act, 2019 (Act 992) does not restate such power of the Registrar, one cannot argue that the Registrar should be bound to register a company where the subscriber to the application is of unsound mind. This position will be supported by the fact that even though subscribers do not need to submit constitutions (previously Regulations) of the company, one is automatically applicable upon registration of the company. By the operation of section 29 of Act 992, the applicable constitution becomes a contract under seal binding on the subscriber as a member. The general contract principle will abhor binding a person of unsound mind with a contract if the other subscribers know of the mental state of that person. In the same light, one cannot hold a subscriber with unsound mind bound by the terms of the constitution of the company upon the incorporation of the company on clear evidence that such a person was of unsound mind at the time of submitting an application for incorporation of the company. The Registrar must, therefore, be deemed to retain the implied power to refuse to register the application for incorporation of a company submitted by a person of unsound mind under section 14(1) of Act 992.

Mechanism for incorporation

Section 13 of Act 992 states the requirements and the steps to be taken to incorporate a company under the Act. Activities for incorporations are generally undertaken by promoters of the company,

some of which may be subscribers. The registration is done by the Registrar of Companies.³⁶⁷ It should be noted however that sections 12 and 13 of Act 992 which expressly provides for what should be done for the incorporation, do not expressly state that the act must be done by a promoter. Section 12 of Act 992 provides any person who is eighteen years and above may apply for incorporation and section 13 of Act 992 requires the application to be signed by the subscribers. The definition of a promoter, however, implies that a person making the application and determination on information to be provided, and providing the information qualifies as a promoter.

Section 10(1) of Act 992 provides that a person who has been engaged or is interested in the formation of a company is a promoter of that company. Subsection (2) of section 10 of Act 992 created an exception to the definition under subsection (1) by providing that a person acting in a professional capacity for persons engaged in procuring the formation of the company is not a promoter of that company. A promoter of a company is therefore any person who has been engaged or is interested in the formation of a company. However, Act 992 excludes persons providing professional services who have been engaged by those interested or engaged in the formation of a company. Promoters are therefore persons who promote or take the various steps that are required for the formation of a company except persons acting in their professional capacity.

The Office of the Registrar is established under Act 992 with the object of registering and regulating all types of business in conformity with the Act and any other laws.³⁶⁸ The President is to appoint a Registrar of Companies in accordance with article 195, who is to perform the functions stated in the Companies Act and other enactments.³⁶⁹ The President cannot appoint the Registrar-General to perform the function of the Registrar of Companies.³⁷⁰ The Registrar of Companies under section 13 of Act 992 is responsible for receiving the application for incorporation of the company and the registration of the company. Act 992 also provides that the use of the word “Registrar” in the Act includes the Office of the Registrar of Companies. For the purpose of this topic, the Registrar, therefore, is the public officer appointed and charged, among other things, with the responsibility of receiving applications for registering a company and the registration of companies in accordance with the provisions of the Companies Act, 2019 (Act 992). The Registrar is also charged with the administration of the Companies Act, 2019.

Application for incorporation of companies

Section 13(1) of Act 992 provides that in order to incorporate a company in Ghana, an application for incorporation must be submitted to the Registrar in the prescribed form. Section 12 of Act 992

³⁶⁷ Section 353 of Act 992.

³⁶⁸ Sections 351 and 353 of Act 992.

³⁶⁹ Section 363 of Act 992.

³⁷⁰ *Ibid.*

provides that the person applying for the incorporation of the company must be eighteen years and above. The combined effect of both sections is that a person who is at least 18 years may apply for incorporation of a company under the Act upon submitting an application in the prescribed form to the Registrar.

Subsection (2) of section 13 of Act 992 provides for particulars or information that must be provided in the application. These are:

- (a) the name of the company;
- (b) indication of the type of company;
- (c) nature of the proposed business in the case the company is to be incorporated with an object;
- (d) address of the proposed registered office and principal place of business of the company in Ghana, telephone number and the post office box, private mail bag or digital address of the registered office of the company;
- (e) email address and website of the company (if available);
- (f) particulars of the subscribers
 - date and place of birth
 - present full name and former name
 - residential, occupational, postal and email addresses, and telephone number
 - nationality;
- (g) particulars of proposed directors
 - present full name and any former name
 - particulars of any business occupation and other directorship held by the director as provided in section 215
 - residential, occupational, postal and email addresses, and telephone number;
- (h) a statutory declaration by each proposed director that he/she has not been
 - charged with or convicted of a criminal offence involving fraud or dishonesty
 - charged with or convicted of a criminal offence relating to the promotion, incorporation or management of a company; or
 - declared insolvent or if that proposed director has been insolvent, the date of the insolvency and the particulars of that company;
- (i) the consent of the proposed director;
- (j) particulars of the proposed Company Secretary
 - present full name and any former name
 - usual postal, occupational and email address
 - residential address in the case of an individual
 - business occupation as provided by section 215;
- (k) particulars of the proposed auditor of the proposed company
 - present full name and any former name

- postal and email addresses and telephone number
 - residential address in the case of an individual
 - consent of the auditor;
- (l) particulars of subscribers
- full name and any former name
 - date and place of birth
 - telephone number
 - nationality and proof of identity
 - residential, postal or email address
 - place of work and position held;
- (m) particulars of each beneficial owner of the proposed company
- full name and former name
 - date and place of birth
 - telephone number
 - nationality, national identity, passport number or other appropriate identification and proof of identity
 - residential postal or email address
 - place of work and position
 - nature of the interest including the details of the legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership; and
 - confirmation as to whether the beneficial owner is a politically exposed person;
- (n) if the company is one with shares, the following details
- the amount of proposed stated capital as defined in section 68
 - number of authorised shares of the company of each class; and
- (o) in the case of a company limited by guarantee, the specified amount each member undertakes to contribute to the assets of the company in the event of the company winding up while that person is a member or within a stipulated period after ceasing to be a member, for payment of costs, charges and expenses of winding up, and the adjustments of the rights amongst members.

The application in the prescribed form with the above particulars is required under subsection (3) of section 13 of Act 992 to be signed by the subscriber(s) of the proposed company. In the event the company is one to be registered with shares, the subscribers must write opposite the name of the subscriber the number of shares the subscriber intends to take in the company and the amount in cash payable by the subscriber. For a company with shares, the subsection requires that the subscriber must take at least one share. Section 13(4) of Act 992 provides that subscription is required even for companies that intend to register a constitution.

Section 13(5) of Act 992 requires that application for incorporation is effected by delivering to the Registrar a completed application, or completed application with the proposed constitution (that is for companies that intend to register a constitution). In addition, subsection (6) of section 13 of Act 992 requires that the applicant must furnish the Registrar with appropriate evidence of his/her identity and place of residence at the time of the delivery of the completed application form for the incorporation.

The above incorporation process replaces the previous two-staged process of registration of the Regulations of a company to obtain a certificate of incorporation, and compliance with requirements for commencement of business as provided in sections 27 and 28 of Act 179 to obtain a certificate to commence business. The process is now a single process that involves submission of application in the prescribed form with the required information. Information required can be classified into:

- (a) information on the proposed company – name, type, nature of business, address, etc;
- (b) information of directors and statutory declaration relating to their non-disqualification. The statutory declaration is a new introduction that was not in the repealed Act 179. The purpose may be to ensure that directors commit under the penalty of punishment under the Statutory Declaration Act that they have not been convicted or declared insolvent thereby disqualified from being directors. This is in addition to the written consent of the proposed director;
- (c) information on the company secretary;
- (d) information on the auditor;
- (e) information on subscribers;
- (f) beneficial ownership disclosure;
- (g) disclosure of stated capital and authorised shares for companies with shares; and
- (h) undertaking of payment by members of a company limited by guarantee.

An additional requirement for incorporation is to obtain a Tax Identification Number (TIN) for the proposed company and any person whose name appears on the application. This is pursuant to the Revenue Administration Act, 2016 (Act 915). Subscribers, directors, auditors, applicants, beneficial owners are all required to have and provide their TIN for the incorporation process.

Generally, it is the duty of the promoters, who may include subscribers, to make determinations on the above information and provide the required information in the prescribed form to be delivered to the Registrar for the incorporation of the company. The promoters for example will determine the name of the company, where it is to be located and other addresses, determine the qualifications of directors, approach directors, obtain their consent and appoint such directors, secretary and auditors, etc. It is the promoters that will complete the form, and ensure it is signed by the subscribers. Where the proposed company intends to adopt a constitution, it is the duty of the promoters to prepare the constitution ensuring that it satisfies the requirements of Act 992. It is the

promoters who must deliver the application to the Registrar and pay the required fees for the incorporation. The promoters are dealt with in chapter 5.0 of this book.

Incorporation

Act 992 provides under section 14 that once the Registrar is satisfied that the application for incorporation of a company complies with the Act and subject to payment of the prescribed fees, the Registrar must certify under the Registrar's seal that the company is incorporated. In the event the company is one with limited liability, the Registrar must indicate that the liability of the members is limited. The certification is done by the Registrar issuing a Certificate of Incorporation to the applicant. Section 14(2) of Act 992 provides that from the date of incorporation, the company becomes a body corporate by the name contained in the application for incorporation and capable of performing the functions of an incorporated company.

In the case of *Dupaul Wood Treatment v. Asare*³⁷¹, Sophia Akuffo JSC stated @ pgs. 696 to 697 that: *"By virtue of section 14 of the Code, a company comes into existence when its regulations are delivered to the Registrar of Companies and he enters the same into his register. It is the act of registration that incorporates the company, such incorporation being evidenced by the Registrar's certificate of incorporation."* This should now be read in line with section 14 of Act 992 which provides that upon satisfaction of the Registrar with the application and payment of the prescribed fee, the Registrar issues a certificate of incorporation which from the date of incorporation as indicated in the certificate, the company becomes a body corporate and is capable of performing the functions of an incorporated company.

The repealed Companies Act, 1963 (Act 179) provides expressly under section 14 the grounds upon which the Registrar can refuse to register a company. The following grounds were expressly stated under the repealed Act:

- (a) The Regulations do not comply with the Act;
- (b) The objects for which the company is being formed or the business for which it is to carry on is unlawful;
- (c) Any of the subscribers to the Regulations is an infant or of unsound mind;
- (d) Any of the directors named in the Regulations is, under section 182 of the Code, incompetent to be appointed a director; or
- (e) The name of the company is misleading or undesirable.

Even though the same grounds are not restated in the same manner under Act 992, it seems the Registrar still retained the power to refuse registration of a company on such grounds. First, section 14 of Act 992 requires the Registrar to certify the incorporation only when satisfied that the

³⁷¹ [2005-2006] SCGLR 667.

application for incorporation of a company complies with the Act. This is broad enough to empower the Registrar to refuse registration on any of the ground stated above. Secondly, various sections in the Act provide for sanctions should the company, members and officers fail to comply with the Act. It will be absurd to argue that the Registrar is bound to register an application where the stated business (in the event provided) is unlawful, subscribers do not have the capacity or directors are disqualified as per the Act. Section 21(2) of Act 992 empowers the Registrar to refuse to register a company if the name is misleading or undesirable.

*R v. Registrar of Companies, Ex parte Attorney-General*³⁷² – the AG applied to cancel the incorporation and registration of a company, Lindi St Claire (Personal Services) Ltd, by the Registrar of Companies. There was a previous attempt to register the company as “Prostitute Ltd”, which was refused. Subsequently, the company attempted to register with the proposed name “Hookers Ltd”. This was also rejected by the Registrar. The company was subsequently registered by the Registrar under the name Lindi St Claire (Personal Services) Ltd. The object of the company was to “carry on the business of prostitution”. The only director of the Company Miss St Claire described herself specifically as a “prostitute”. In seeking to quash the registration of the company, it was held that the company was formed for the purpose of carrying on a trade that involved illegal contracts because the purpose is a sexually immoral purpose and as such against public policy

However, as indicated, where the Registrar is satisfied that the application for incorporation complies with the Act and payment of the prescribed fee is made, the Registrar must certify under the seal of the Registrar the incorporation of the company by issuing a Certificate of Incorporation. Where the company is one that has limited liability, the Registrar must indicate that the liability of the members is limited.

For the avoidance of doubt, one must be mindful of the various sections that affect incorporation of the particulars required to be stated in the application required under section 13(2) of Act 992 for the incorporation of a company. These include:

- Sections 7 & 8 – determination of the type of company;
- Section 13 – application and information required;
- Section 21 – determination of name of the company;
- Sections 26 (content), 27 (form) and 28 (subscription) of the constitution of the company – on the content, form and subscription of the constitution of the company in the event the company intends to adopt a registered constitution;
- Sections 13 & 33 – subscribers or members of the company;
- Sections 170, 171, 173, 182 – requirement on directors;
- Section 211 – secretary of the company;
- Sections 138 and 139 – auditors; and

³⁷² [1991] BCLC 476.

- Sections 68 and Part F – company with shares.

The above requirements are not exhaustive and are in addition to requirements under sector specific legislations and laws of general application that are likely to affect the activities of the company.

3.3 Name of the Company

This is dealt with under sections 21 and 22 of the Companies Act, 2019 (Act 992). Section 125 of Act 992 also mandates the name to be affixed or painted outside its registered office and every office or place of business; conspicuous position and legible characters on its seal and at the head of all business letters, invoices, receipts, notices, etc. Default in any of this is subject to a fine imposed on officers and the company.

For the purpose of identification of the type of company, section 21 dictates the last word of the different types of companies as follows:

- Private company limited by shares – Limited or LTD
- Public company limited by shares – Public Limited Company or PLC
- Company limited by guarantee – Limited by Guarantee or LBG
- Unlimited private company – Private Unlimited Company or PRUC
- Unlimited public company – Public Unlimited Company or PUC

Under section 21(2) of Act 992, the Registrar has the power to refuse to register a company whose name is, in the opinion of the Registrar, misleading or undesirable.

*R v. Registrar of Companies, Ex parte AG*³⁷³ – as discussed above, the Registrar rejected the use of the names “Prostitute Ltd” and “Hookers Ltd”.

*R v. Registrar of Companies, Ex parte Bowen*³⁷⁴ - in this case, an application was made to the Registrar of Companies to register the memorandum and articles of association of a proposed company under the Companies Act, 1908. The name of the company was “The United Dental Service, Limited.” The objects of the company, stated in the memorandum, included: “To carry on the practice, profession, or business of practitioners in dentistry in all its branches.” The memorandum and articles were signed by seven persons who were all members of a society called “The Incorporated Dental Society, Limited,” the members of which were all unregistered practitioners in dentistry. The Registrar refused to register the company unless the memorandum provided that the work of the company should be undertaken only by means of duly qualified dental practitioners, that is, dental practitioners registered under the Dentists Act, 1878 (1), or the title of the company

³⁷³ [1991] BCLC 476.

³⁷⁴ [1914] 3 KB 1161.

was amended so as not to include the word "dental," "dentist," or any similar or equivalent word. In an action for the Registrar to show cause why mandamus should not be granted to compel him to register the memorandum and articles of association delivered to him on behalf of "The United Dental Service, Limited". It was held that the use of the proposed name was unlawful. Lord Reading CJ stated:

"In my opinion the question turns in the main, although not entirely, in view of the arguments addressed to us, upon whether the use of these words, "The United Dental Service," would amount to an offence under the Dentists Act, 1878. In other words, whether the use of those words is a description implying that the persons who are intending to practice under that name are persons "specially qualified to practice dentistry"; that is, whether those words mean that the persons who are ready to perform that service are, or may be, persons who hold a licence, diploma, degree, or whatever the term may be which is used, implying that such persons are entitled to be registered under the Act for the reason that they hold such licence, &c. Does the use of those words amount to an offence under the Dentists Act, 1878? In my opinion it does not."

Avory J concurring with the judgment of Lord Reading CJ concluded:

"I am of the same opinion. I think that, in order to justify the refusal of the Registrar in this case, this Court at least must be satisfied that the use of the title, "United Dental Service, Limited," by persons who are practicing the business of dentistry, will amount to a breach of s. 3 of the Dentists Act, 1878; in other words, that the title, "United Dental Service, Limited," implies that the persons carrying on the business are either registered under the Act, or that they are persons specially qualified to practice dentistry. If the Court is not satisfied of that, then I think we certainly have no right to refuse this remedy in a case where the duty is ministerial... That being so, it appears to me that the words or title, "United Dental Service, Limited," do not go so far, and certainly are not capable of the same implication that the words "Dental Institute" might possibly have borne. It is difficult to understand words more apt to express that the persons carrying on this business are prepared to do certain acts or render certain services in dentistry than the words "United Dental Service." It appears to me that "United Dental Service, Limited," is only another way of saying, as Buckley L.J. said, that a man does dental acts, or, as in this case, that he is prepared to render dental services. For that reason I think that the Registrar was bound to register in this case...."

In instances where the Registrar has registered companies that use names or the name has word forming part of the name that can lead to passing off, the courts have granted an order of injunction to restrain the use of the name by the defendants.

*Exxon Corporation v. Exxon Insurance Consultants Int. Ltd*³⁷⁵ – an action was commenced by the plaintiff against the defendant on the ground that the use of “Exxon” as part of its company name will lead to passing off. The court granted an order restraining the defendant company who were in no way related to the plaintiff company from maintaining “Exxon” as part of its company name. Graham J. stated @ pg. 127 that:

“It seems, however, that the plaintiffs’ previous trademark Esso, which was also part of their name in many of their companies, is still being used, certainly in this country, and that the word Exxon is really a substitute for wider use throughout the world in place of the previous mark Esso. The defendant has no connection with the plaintiffs or any of them, but none the less it has adopted the plaintiff’s name Exxon as part of its corporate name. This I think must be so; and I have already indicated in argument, and I now confirm, that the plaintiffs are, in my judgment, entitled to an injunction and ancillary relief to restrain such passing off by continued use by the defendant of the word Exxon... Having listened to the arguments on both sides and having been referred to Anciens Etablissements Panhard et Levassor S.A. v. Panhard Levassor Motor Co. Ltd. [1901] 2 Ch. 513 and to Suhner & Co. A.G. v. Suhner Ltd. [1967] F.S.R. 319, where Plowman J., who had also been referred to the previous Panhard et Levassor case [1901] 2 Ch. 513, decided that the injunction should be in the form of that granted by Farwell J. in the Panhard et Levassor case, I agree that, in the circumstances, that is the right injunction to make, namely, an injunction to restrain the company from allowing its name to remain on the register in its present form, using the word Exxon.”

*Panhard et Levassor v. Panhard Levassor Motor Co.*³⁷⁶ – in an action for an injunction restraining the defendant company and its directors from passing off its goods as those of the plaintiff, and restraining the directors from allowing the defendant company to remain registered in its present name, brought against the defendant company, Farwell J stated @ pg. 479 that:

“The defendants have registered a company in England under the name of the Panhard-Levassor Motor Co. Ltd. The seven signatories are joined as defendants. There is absolutely no sort of excuse or justification for taking the name “Panhard-Levassor.” It is said that their object is not so much to annex the reputation, and get the benefit of the reputation of the plaintiff company, as it is to shut out the plaintiff company, and prevent them interfering with some other company which is not a party to this action... The conclusion I have come to is ... that the defendant company has the fraudulent intention of annexing the benefit of the plaintiffs’ name, that the persons who have formed that company and caused it to be registered are

³⁷⁵ [1991] BCLC 476.

³⁷⁶ [1901] 2 Ch 513; see also Reckitt & Coleman Ltd v. Borden Inc [1990] 1 All ER 873 which establishes the tests for the tort of passing off.

guilty in the eye of this court of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, has attempted to do... It really goes more to the point of the injunction, and as these defendants are the directors and the sole shareholders in the company, I see no reason why I should not grant an injunction against them ..."

Act 992 further provides in section 21(3) that a company cannot be registered with a name of a company that has been dissolved within the last five years of the intended registration. This is related to early provision on avoiding misleading names. It is estimated that five years is enough cooling off period in relation to a particular name to avoid confusing the dissolved company with the new company with the same name. This may be problematic in situations where owners of defunct companies, for purposes of restarting a business, choose to structure the transaction that entails dissolving the existing company and forming a new company with the same name. One option to avoid the five-year requirement will be to incorporate the company as a subsidiary with similar name prior to dissolving the parent company. In this case, it will not be the same name but a variation of the name. Alternatively, one may use a different name which may be changed after the expiration of the five years cooling off period. A restructuring arrangement through merger can also be used as a mean of retaining the name of a company that is dissolved in the merging process.

The selection of a name of a company is also affected by Protection Against Unfair Competition Act, 2000 (Act 589) which provides:

"Section 1—Causing Confusion with Respect to Another's Enterprise or its Activities

- (a) Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another person's enterprise or its activities, in particular, the products or services offered by that enterprise, constitutes an act of unfair competition.*
- (b) Confusion may, in particular, be caused with respect to—*
 - (a) a trademark, whether registered or not;*
 - (b) a trade name;*
 - (c) a business identifier other than a trademark or trade name;*
 - (d) the presentation of a product or service; or*
 - (e) a celebrity or well-known fictional character.*

Section 2—Damaging Another Person's Goodwill or Reputation

- (1) Any act or practice in the course of industrial or commercial activities, that damages or is likely to damage the goodwill or reputation of another person's enterprise or its activities constitute*

an act of unfair competition, whether or not the act or practice causes confusion.

- (2) *Damaging another person's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to—*
- (a) a trademark, whether registered or not;*
 - (b) a trade name;*
 - (c) a business identifier other than a trademark or a trade name;*
 - (d) the appearance of a product;*
 - (e) the presentation of a product or service; or*
 - (f) a celebrity or a well-known fictional character.*

Section 3—Misleading the Public

- (1) *Any act or practice in the course of industrial or commercial activities, that misleads or is likely to mislead the public, with respect to an enterprise or its activities, in particular, the products or services offered by that enterprise, constitutes an act of unfair competition.*
- (2) *Misleading may arise out of advertising or promotion and may, in particular, occur with respect to—*
- (a) the manufacturing process of a product;*
 - (b) the suitability of a product or service for a particular purpose;*
 - (c) the quality or quantity or other characteristics of a product or service;*
 - (d) the geographical origin of a product or service;*
 - (e) the conditions on which a product or service is offered or provided; or*
 - (f) the price of a product or service or the manner in which the price is calculated.”*

In selecting a name, therefore, the name must not cause or likely cause confusion with another company or mislead or likely mislead the public with respect to another company. Where the name selected will lead to any of these, that will constitute a breach of the Unfair Competition Act which entitles the injured party to maintain an action to prevent the use of the name and to sue for damages under section 8 of Act 589.

Subsection (4) of section 21 of Act 992 permits the company in writing to change its name subject to special resolution and written approval of the Registrar. The Registrar also has the power to direct a company to change its name where the company was first registered inadvertently or otherwise with

a name that in the opinion of the Registrar is misleading or undesirable³⁷⁷. The new name is subject to the approval of the Registrar. Where the Registrar has so directed, the company has six months within which to effect the name change.³⁷⁸ The Act also provides in section 21(7) that where the Registrar is of the view that by change of the object or nature of business of the company, the name of the company is undesirable or misleading, the Registrar may direct the company to change its name and the company has six weeks within which to change the name unless the company appeals against the directive to court. The court may confirm or cancel the directive for the name change, and where confirmed, the company shall effect the name change within six weeks of the confirmation.³⁷⁹ The Registrar has the power to unilaterally change the name of the company if the company fails to change the name within any of the circumstances above where the Registrar directed the company to change the name.³⁸⁰ In addition, a fine is imposed on directors of the company.³⁸¹

Where the company changes its name, the Registrar must record the new name and issue a new certificate of incorporation. The Registrar must also advertise the name change in the Companies Bulletin, Registrar's website and one newspaper published in Ghana and circulated in the district of the registered office of the company.³⁸² Subsection (13) of Section 21 of Act 992 provides that a certificate or an advertisement in the Companies Bulletin is conclusive evidence of the change of name. A change of name by a company does not affect the rights and obligations of the company or render defective legal proceedings by or against the company.³⁸³ In addition, any legal proceedings that might have been continued or commenced against the company under the former name may be continued or commenced against the company under the new name.³⁸⁴

Cowries Finance v. Pako Bay³⁸⁵ – the case involved change of name from Akaba & Associates to Cowries Finance. The defendant had taken a loan from the plaintiff and failed to pay. On application for summary judgment, the defendant objected *inter alia* on the ground that the plaintiff had not complied with sections 15 (now section 21 of Act 992) and 22 (now section 30 of Act 992) in changing its name. The court found that the plaintiff had provided evidence of the special resolution and approved the change of name by the Registrar. The court held the plaintiff has complied with the Act. Further, the court held that the defendant had been made aware of the change of name before

³⁷⁷ Section 21(4) and (5) of Act 992.

³⁷⁸ Section 21(6) of Act 992.

³⁷⁹ Section 21(8) of Act 992.

³⁸⁰ Section 21(9) of Act 992.

³⁸¹ Section 21(10) of Act 992.

³⁸² Section 21(11) and (12) of Act 992.

³⁸³ Section 21(14) of Act 992.

³⁸⁴ Section 21(14) of Act 992.

³⁸⁵ [1999-2000] 1 GLR 514.

the issue of the writ and they could not, therefore, be heard to complain about the change of name. Akoto-Bamfo J. stated @ pg. 521 that:

"Section 15(3) of Act 179 provides that: "A company may, by special resolution and with the approval of the Registrar signified in writing change its name." Exhibit CA 7 was signed by G Lomotey on behalf of the Registrar of Companies. If the registrar did not give his approval, certainly his signature would not have appeared on the document. There is therefore no merit in the objection and I accordingly dismiss same. It was further contended that the company continued to do business in its original name ... the operations of companies are regulated by the Registrar General in accordance with the provisions of Act 179. Where therefore a party has complied with the statutory provisions, does the mere fact that it fails to effect changes on its letter head negate the fact that there has been a compliance? I think not. There is evidence that the company subsequently effected the change in its dealings with the respondent. Indeed, as per CA 5, the receipt issued to the defendant upon the issuance of the post-dated cheques, the name Cowries Finance Co Ltd appeared. CA5, the receipt, was issued to the defendant. It is dated 5 June 1996. Significantly it was to signify that the plaintiff had received the sum of €10 million from the defendant. It is pertinent to note that the cheque for €10 million was issued in the name of Akaba & Associates. If the defendant draws a cheque in favour of Akaba & Associates, and receives a document stating that Cowries Finance Ltd is acknowledging receipt, why did the defendant not raise an objection that the wrong party had received the amount on the face of the cheque? It is my considered view that the defendant was made aware of the change well before the issuance of the writ and he cannot now be heard to complain."

Section 22 of Act 992 provides that the Registrar also has the power to reserve a name on application and payment of a fee pending the registration of a company or change of the name of a company provided the period of reservation shall not exceed two months.

3.4 Certificate of Incorporation

Section 14 of Act 992 provides that: *"(1) Where the Registrar is satisfied that the application for incorporation of a company complies with this Act, the Registrar shall, after payment of the prescribed fee, certify under the seal of the Registrar that the company is incorporated and in the case of a limited liability company, that the liability of the members is limited."* Certification is thus required for the incorporation of a company. The certification is done by the Registrar through the issue of a certificate of incorporation. A certificate of incorporation is, therefore, issued by the Registrar to evidence the incorporation of a company. The section requires the certificate to have the seal of the office of the Registrar and an indication that the liability of the members is limited, in the

case of a limited liability company. The certificate will also bear the name of the company and the date of incorporation, as well as the assigned registration number of the company.

In the case of *Dupaul Wood Treatment v. Asare*³⁸⁶ – Sophia Akuffo JSC, as she then was, stated @ pgs. 696 to 697 that: *“By virtue of section 14 of the Code, a company comes into existence when its regulations are delivered to the Registrar of Companies and he enters the same into his register. It is the act of registration that incorporates the company, such incorporation being evidenced by the Registrar’s certificate of incorporation.”* This should now be read in line with section 14 of Act 992 which provides that upon satisfaction of the Registrar with the application and payment of the prescribed fee, the Registrar issues a certificate of incorporation which from the date of incorporation as indicated in the certificate, the company becomes a body corporate and is capable of performing the functions of incorporated companies.

Per section 14(2) of Act 992, from the date of incorporation, which must be indicated on the certificate of incorporation, the company becomes a body corporate by the name contained in the application for incorporation and capable of performing the functions of an incorporated company. From that date, the company becomes a separate legal person, which is distinct, separate and independent from its owners and officers. The company as an incorporated entity enjoys perpetual succession and has the legal capacity as provided under the Act to act in its own name; enter into legal relations in its own name; acquire and hold property in its own name; sue and be sued in its own name and incur debts and liabilities in its own name. The Act, thus, confers full legal capacity on the company to pursue any business or object subject to restrictions imposed in the Act or any other enactment.³⁸⁷ The full capacity here refers to the powers of a natural person of full capacity. The company can therefore do everything a natural person of full capacity can do so far as the particular activity is capable of being undertaken by an artificial person.

Section 15 of Act 992 provides that the certificate of incorporation, or a copy certified by the Registrar as correct, is conclusive evidence that the company is duly incorporated under the Act. Once certified under the seal of the Registrar, section 15 of Act 992 provides the certificate of incorporation offers conclusive evidence of incorporation of the company. As such, no proceeding shall be instituted in court to cancel or annul the incorporation.³⁸⁸ This means that even where a mistake is made by the Registrar in the registration process or the information provided on the application is incomplete, the Registrar cannot, on that ground, seek to cancel or annul the registration of the company. The option open for the Registrar is provided under section 16 of Act 992, which is to institute proceedings to liquidate the company in accordance with section 274 of Act 992.

³⁸⁶ [2005-2006] SCGLR 667.

³⁸⁷ Section 18 of Act 992.

³⁸⁸ Section 15 of Act 992

*Peel v. London and North Western Railway*³⁸⁹ - after signing but before registration, a proposed memorandum of association had been altered without the authority of the subscribers so materially that the alteration entirely neutralized and annihilated the original execution and signature of the document. The company, however, was registered, and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers, and that the provisions of the Act had not been complied with. Lord Cairns commenting on the effect of the Registrar's certificate of incorporation stated that:

"But the certificate of incorporation is not merely a prima facie answer, but a conclusive answer to such objection ... when once the certificate of incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings."

*Bowman and Others v. Secular Society Ltd*³⁹⁰ - in this case, on the question of the validity of a bequest of residue to the respondents, the Secular Society Ltd, it was argued by the appellant that the objects of the respondents' society were such that the bequest was not enforceable and that some of the objects stated in the memorandum of the society were illegal. The main object with which the company was formed was to promote the principle *"that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action,"* together with ancillary objects hostile to or critical of the Christian religion. Thus, making the society an illegal association, and as such incapable of acquiring property by gift. In a counter argument, it was asserted that the certificate of incorporation is conclusive to show that the objects of the society are not unlawful, and since some of the objects were not unlawful and it cannot be presumed that the legacy in question would be applied to any but lawful objects. Lord Parker of Waddington in his judgment stated @ pg. 17 that:

"I do not think this argument is open to the appellants, even if their major premise be correct. By the first section of the Companies Act 1900 [CA 2006 s 15(4)] the society's certificate of registration is made conclusive evidence that the society was an association authorised to be registered—that is, an association of not less than seven persons associated together for a lawful purpose. The section does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorised by the memorandum. In like manner a contract entered into by the company for an unlawful object, whether authorised by the memorandum or otherwise, could not be enforced either in law or in equity. The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status

³⁸⁹ [1907] 1 Ch 5.

³⁹⁰ [1917] AC 406.

and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose... Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it would be open to the court to stay its hand until an opportunity has been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that neither s 1 of the Companies Act, 1900, nor the corresponding section of the Companies (Consolidation) Act, 1908, is so expressed as to bind the Crown, and the Attorney-General, on behalf of the Crown, could institute proceedings by way of certiorari to cancel a registration which the registrar in discharge of his quasi-judicial duties had improperly or erroneously allowed. But, as will appear later, I do not think that the present is a case requiring such action on the part of your Lordships' house."

Lord Finlay @ pg. 7 stressed on the effect of the Certificate of Incorporation when he stated:

"Section 18 deals with the effect of registration and enacts that the certificate of incorporation shall be conclusive evidence that all the requirements of the Act in respect of registration have been complied with, and s 192 repeats this provision and adds that the certificate is to be conclusive evidence that the company is authorised to be registered under the Acts. The Companies Act, 1900, enacts by s 1 that the certificate shall be conclusive evidence that all the requisitions of the Companies Act in respect of registration and in matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under the Companies Acts... It was argued before us that the society could not have been properly incorporated if its objects were illegal, and that as the certificate is conclusive to show that the company is one authorised to be registered and duly registered, it follows that it cannot for any purpose be contended that the objects are illegal. In my opinion, this argument is an attempt to extend the effect of these enactments beyond their fair meaning and manifest object. What the legislature was dealing with was the validity of the incorporation and it is for the purpose of incorporation, and for this purpose only, that the certificate is made conclusive."

*Oakes v. Turquand and Harding*³⁹¹ - a memorandum of association, which was registered, differed from the prospectus on which it professed to be founded. The Appellants alleged, in substance, that the representations made by the directors of the company were false and fraudulent. Consequently, they had become the holders of the shares based on false and fraudulent representation. The

³⁹¹ [1867] L.R. 2 J.L. 325.

appellants alleged they were, therefore, released from all liability to have their names kept on the list of members, and be made to contribute to the debts of the company. On the issue of whether the appellants were released from liability by reason of the fraudulent registration of the memorandum of association of the company, it was held per the Lord Chancellor, Lord Chelmsford @ pgs. 352-355 that:

"I think that persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus (a fact which may be easily ascertained), the persons who have so taken shares on the faith of the prospectus ought, in my opinion, to be held to be bound by acquiescence ... The first of them strikes at the root of the company's existence, for it asserts that there was no memorandum of association subscribed by seven persons, and, consequently, that there never was any incorporated company. This, as I understand, is founded upon an alleged variance between the prospectus and the memorandum of association, which is made the ground of a separate objection. The short answer to this objection is found in the Companies Act, 1862, which, in the 6th section, provides that any seven or more persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the Act in respect of registration, form an incorporated company. And, by the 18th section, upon the registration of the memorandum of association, the registrar shall certify under his hand that the company is incorporated, and a certificate of the incorporation of the company given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with ... but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned. I think the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case, that all previous requisites had been complied with..."

Even though section 15 of Act 992 restated the position in the above cases, that the certificate of incorporation or a copy of that certificate certified as correct by the Registrar is conclusive evidence of the incorporation of the company, and proceedings cannot be brought in Court to cancel or annul the incorporation. However, section 16 of the Act permits the institution of proceedings to liquidate the company. Section 16 of Act 992 states that: *"Section 15 does not preclude the institution of proceedings to wind up the company in accordance with section 274."*

Under the repealed Companies Act, 1963 (Act 179), notwithstanding the issue of the certificate of incorporation, an incorporated company cannot commence business, incur indebtedness or exercise borrowing powers. Sections 27 and 28 of the repealed Act 179 as amended by Act 920 provides for the filing of a return and satisfaction of a minimum capital requirement prior to commencement of business, incurring indebtedness or exercising borrowing power. Even though not expressly stated in the Act, the satisfaction of these additional requirements under sections 27 and 28 of the repealed Act 179 is evidence by the issue of a certificate to commence business by the Registrar. There was, therefore, a two-stage incorporation process for a company prior to a company commencing business, incurring indebtedness or exercising borrowing powers. The second registration process has now been abolished under the Companies Act, 2019. Once the certificate of incorporation is issued, section 14(2) of Act 992 provides that from the date of incorporation, the company is capable of performing the function of an incorporated company. No limit is placed on the functions or activities the company can undertake on the understanding that further requirements need to be satisfied.

3.5 Minimum capital requirement

As stated above, under the repealed Companies Act, 1963 (Act 179), one of the requirements to be satisfied by a company limited by shares prior to commencement of business, exercising borrowing powers and incurring liability is to satisfy what has been referred to as minimum capital requirement under the Act as provided in section 28. This requires the company to provide a declaration to the effect that there has been paid valuable consideration for the issue of its share, part of which is cash. The company must deliver to the Registrar for registration a declaration in the prescribed form verifying such payment. The Act then sets specified amount for private and public companies to meet. The repealed Companies Act, therefore, sets general statutory minimum capital requirements for a company limited by shares, public or private, subject to sector specific legislations that may affect such minimum capital requirement.

This requirement has been abolished under the Companies Act, 2019 (Act 992). Act 992 does not set any statutory minimum capital requirements for companies limited by shares – public or private. The Act, however, requires the application in case of a company with shares to include the amount of the proposed stated capital and the number of authorised shares of the company of each class.³⁹² Act 992 does not however specify any minimum amount in terms of the stated capital. One may therefore conclude that there is no general statutory minimum capital requirement for incorporation of companies in Ghana.

³⁹² Section 68(5) requires that within 28 days after raising the stated capital, the company must deliver to the Registrar for registration particulars in the prescribed form showing the amount of money so raised and the stated capital. Subsection (6) impose penalty for failure to comply with subsection (5).

However, other sector specific legislation may provide for minimum capital requirements for companies engaged in specific businesses or based on the involvement of foreigners. Examples includes the following:

- Under the Ghana Investment Promotion Centre Act, 2013 (Act 865), an enterprise with foreign participation is required to register with the Centre prior to commencement of business. In registration, the enterprise is to comply with the following minimum capital requirement – for a joint venture company, with Ghanaian having not less than 10%, the foreigner is to contribute a minimum capital of US\$200,000; for a wholly foreign-owned company, the minimum capital to be contributed by the foreigner is US\$500,000; and for a trading enterprise owned by a foreigner, the minimum capital to be contributed by the foreigner is US\$1,000,000.³⁹³
- Under the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930), the Bank of Ghana is given the power to prescribe minimum paid-up capital of banks and specialised deposit-taking institutions. For companies that seek to engage in banking business, the Bank of Ghana has set the minimum capital at GHS400,000,000 (in effect as of March 2021).
- Under the Insurance Act, 2006 (Act 724), a company limited by shares that is a direct insurer shall have a minimum capital of cedi equivalent of US\$1,000,000; and a reinsurer, a cedi equivalent of US\$2,000,000 (both amounts as of January 2021).
- Securities and Exchange Commission has pursuant to section 209 of the Securities Industry Act, 2016 (Act 929) set minimum capital requirements for market operators as follows: Broker-Dealer – GHC1,500,000; Clearing House – GHC 50,000,000; Credit Rating Agency – GHC1,000,000; Custodian – GHC50,000,000; Fund Manager – GHC2,000,000; Investment Adviser (Corporate) – GHC1,000,000; Investment Adviser (Individual) – GHC200,000; Issuing House – GHC1,000,000; Margin Trader – GHC2,000,000; Market Maker – GHC3,000,000; Nominee – GHC1,000,000; Primary Dealer – GHC400,000,000; Registrar – GHC1,000,000; Securities Depository – GHC50,000,000; Securities Exchange – GHC10,000,000; Trustee – GHC50,000,000; and Underwriter – GHC2,500,000.³⁹⁴

In the event a specific sector law prescribes a minimum capital requirement, that requirement must be complied with in the application for incorporation even though not stated in the Companies Act, 2019 (Act 992).³⁹⁵

3.6 Characteristics of a company

Upon incorporation, the company assumes the characteristics of a legal person. Based on the status, the company assumed the following features.

³⁹³ As of January 2021.

³⁹⁴ Amounts that are in force as of January 2021.

³⁹⁵ Section 4 of Act 992.

(a) Separate legal personality

The most fundamental attribute of the company upon incorporation is that the company becomes a separate legal person that is separate, independent and distinct from its founders and officers. The concept of a separate legal entity applies to the company pursuant to section 14 of the Act. The company is recognised under the Act as a separate, distinct and independent legal person from that of its owners and managers. That is, the entity exists in its own right and separate from the owners or managers of such entity. The Companies Act, 2019 therefore, recognises the company as having a legal capacity of its own and the company on its own can undertake recognised acts, enjoy rights and incur liabilities on its own which is not dependent on the capacity of the owners or managers of the company.³⁹⁶ As part of that recognition, the Act requires that acts done by the company must be done in its own name and not the name of the owners or managers of the incorporated entity.³⁹⁷ The company as a legal person on its own has legal rights and obligations attributed to the entity. The company can therefore act as an independent legal person in its own name the same way that natural beings are able to do.³⁹⁸

As already indicated, the separate legal personality must be conferred by legislation that created the entity. Under the Companies Act, 2019, section 14(1) provides that *“From the date of incorporation, the company becomes a body corporate by the name contained in the application for incorporation and ... is capable of performing the functions of an incorporated company”*.

There is a plethora of cases that illustrate the separate legal personality of a company incorporated under the Companies Act. These includes:

*Salomon v. Salomon & Co. Ltd*³⁹⁹ is the most authoritative case on the principle of separate legal personality. In that case, Mr. Aron Salomon previously carried on a leather and boot manufacturing business as a sole proprietorship. A company was incorporated and one of the objects of the company which was implemented was the acquisition by the company of the business then carried on by Mr. Salomon. The business had been a prosperous one and was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons. The wife and children of Mr. Salomon each subscribing for one share. Mr. Salomon afterwards had 20,000 shares allotted to him. The company afterwards became insolvent and went into liquidation. In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the

³⁹⁶ Sections 14 and 18 of Act 992.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ [1895-9] All ER 33; [1897] AC 22.

debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. The learned judge thought the liquidator was entitled to the relief asked for, and made the order complained of. He was of the opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal, the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company ... was a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures. On the issue of whether the company is the agent of the subscribers or trustees of the company thus formed, the House of Lords held that the company after incorporation attained a separate legal personality distinct from its members.

Lord McNaghten stated @ pg. 52 that:

"When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."

Lord Davey concurred and stated @ pg. 56 that:

"Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust. The ground on

which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity"

The above position in Salomon's case has been applied in a number of subsequent cases including *Lee v. Lee's Air Farming Ltd*⁴⁰⁰; *Prest v. Petrodel Resources Ltd*⁴⁰¹ and *Foss v. Harbottle*⁴⁰² which are discussed subsequently in this book.

It is helpful for the understanding of the state of the law prior to the judgement of the House of Lords in the Salomon's case. In this respect, the article of R. Grantham, the Doctrinal Basis of Law⁴⁰³, is illustrative when he stated that:

"[Prior to Salomon v Salomon & Co. Ltd] despite the general availability of incorporation, the courts persisted with the idea that the company was in essence little more than a large partnership. The conclusion that the members were the proprietors was thus quite illogical, while the separate legal personality of the company was neither obvious nor particularly significant. In relation to the creation of the company this meant, first, that the members who were incorporated, rather than a new "person" being created and secondly, that if there was no genuine association of the members as partners the incorporation was improper. As Sir Frederick Pollock commented in contemporary note of Salomon's case, "when the founders of company legislation spoke of seven or more persons being "associated" they meant such an association, as, without help of the statute would have made those persons members of an ordinary partnership.' Although hidden beneath an ingenious reliance on the literal wording of the relevant Companies Act, the judgments in the House of Lords represent a fundamental paradigm shift. In holding that the company was properly incorporated, even though Mr Aron Salomon was

⁴⁰⁰ [1960] 3 All ER 420.

⁴⁰¹ [2013] UKSC 34.

⁴⁰² (1843) 2 Hare 461.

⁴⁰³ R. Grantham. 'The Doctrinal Basis of Company Law' (1998) 57 Cambridge Law Review 554, 560-1.

the only active member of the business, their Lordships departed from the assumption that had formerly underpinned the law's view of the company. As indicated above, the Companies Act of 1844 was not seen as creating a new form of trading institution. Rather, it took the partnership that was the joint stock form and conferred separate existence upon it. The existence of a genuine partnership was therefore, a prerequisite to incorporation, both legally and historically. In holding that the company was properly incorporated the House of Lords thus radically reformulated the corporate concept. It moved the law's paradigm from that of an association of individuals, governed by partnership principles to something that more closely resembled the old chartered corporation. Incorporation has not to be viewed as the creation of an entity distinct from its members rather than merely a means for the members to trade as a collective."

The position has been reflected in the company law of Ghana and stated as a foundation on which our Companies Act is based.

*Morkor v. Kuma (East Coast Fisheries Case)*⁴⁰⁴ – In a sale agreement between the parties for some metric tons of fish to the first defendant which was a company, the chief executive and shareholder of this company entered into the sale agreement on behalf of the company and when the company defaulted in payment of the remaining amount, it was sued together with the chief executive. The trial court held that the chief executive of the company was liable. On appeal, the issue for determination was whether the appellant was a proper party to the suit. It was held that the proper defendant in an action on a contract is the person (or persons) who made the promise, the breach of which created the cause of action. Since the first appellant had been sued jointly' with the first defendant, she would be a proper party to the suit only if specific personal liability were established against her, or the veil of incorporation could be lifted to make her acts synonymous with those of the company, or vice versa. Akuffo JSC stated @ pgs. 631 and 632 that:

"It is clear on the face of exhibit A, the sale agreement that the transaction was between the respondent and the company. Furthermore, the claim against the appellant was grounded solely in this sale agreement. It is also patently clear from the statement of claim that the only reason the appellant was sued was because she was the chief executive, a director and the main shareholder of the first defendant company. The statement of claim made no averments against the appellant that would, prima facie, attach any personal liability to her, or render her jointly liable with the first defendant, under the agreement. The fundamental question, therefore, is "were there any circumstances that justified the lifting of the veil of incorporation?"... Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its

⁴⁰⁴ [1998-99] SCGLR 620.

authorised business. In this capacity a company is a corporate being, which, within the bounds of the Companies Code, 1963 (Act 179) and the regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it. From the time the House of Lords clarified this cardinal principle, more than a century ago, in the celebrated case of Salomon v Salomon & Co [1897] AC 22, HL it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Act 179 is grounded ... For the purposes of taxation, there are numerous statutory provisions which in effect require the corporate veil to be pierced; and the courts have in recent years shown an increasing tendency for such purposes to look at the economic consequences of transactions rather than their strict format, thus in effect bypassing the question of corporate identity. ... Turning to the instant case, it is clear from the record that the proceedings, in which the allegations of fraudulent trading were made, were ex parte. It is also clear that in none of the affidavits filed by the respondent in the subsequent proceedings on notice did the respondent repeat these allegations of fraudulent trading. Therefore, it was erroneous for the majority of the Court of Appeal to base their finding that the circumstances justified the lifting of the veil of incorporation, upon these allegations. Neither the appellant nor the defendant was ever in a position or had the opportunity to respond to the same ... The fact that the appellant was at all material times a shareholder, director and manager of the first defendant is not in dispute, although as to whether she was the majority shareholder, we have no proper evidence and it is, in any event, quite irrelevant. As has already been noted, it is also clear on the face of the agreement that the same was between the first defendant company per se, and the respondent as agent for his principals. There is no evidence that the appellant negotiated the agreement on her own behalf or for her immediate personal purposes. Rather, what is quite clear is that she negotiated the agreement in the normal course of the first defendant's business. As the chief executive officer of the first defendant, it would be part of the normal functions of the appellant to negotiate agreements on behalf of the company. Although the appellant co-executed the agreement, she did so with another director of the company, as is the common practice with corporate bodies. The signature of a single director is not usually acceptable in such circumstances. Furthermore, since a company is non-human the only means by which it may execute an agreement is for its directors, or some other authorised person, to sign on its behalf. When an officer of a company, in the normal course of her duties, so negotiates or signs an agreement entered into by the company, no personal liability

is thereby created, in the absence of other clear indications to the contrary. We see no such indications in this case."

*Owusu v. R.N Thorne Ltd*⁴⁰⁵ - the plaintiff-applicant sued the first defendant, a limited liability company and the second defendant, who was a shareholder and director, as its agent. By an ex parte application, he obtained an absconding warrant against one R.N. Thorne who, together with his wife, also a director of the first defendant company, on the grounds that they had closed the company offices and sold their property and that R.N. Thorne was going on leave and was not likely to return to Ghana. He, therefore, prayed for an order that R.N. Thorne be ordered to furnish personal bail for appearance under the rules of court. The court held that the company existed apart from the directors and members. That R.N. Thorne was not sued personally and was therefore not a defendant within the meaning of rules of court for the court to go into the question of security. Per Boison J. stated @ pg. 92 that:

"What the court has to determine in this motion is whether R. N. Thorne personally or the company is the first defendant in this case. The theory of legal personality of corporations has its own practical problems but it is clear that a limited company or corporation has legal existence apart from the directors and members, and it is in a few recognised exceptions that the law lifts the "corporate veil," as it has been put, and looks to the directors and members personally. On the plaintiff's own pleadings he sued R. N. Thorne Ltd. the first defendant and one other as the second defendant – the first defendant was the master of the second defendant. It may well be and undoubtedly is true that R. N. Thorne and his wife are the only directors of the company but the company exists apart from the directors and the members. To hold that the directors are personally the first defendant in this case will be defeating the doctrine of the separate existence of a limited liability company. The action is not against R. N. Thorne personally. I am not determining the liability of the first defendants as a company. The question here is: Is R. N. Thorne personally sued as the first defendant so that he is a "defendant" within Order 35? The answer is no. As far as the court is aware the company is not in the process of being wound up and even if that were so, it would not make R. N. Thorne personally the first defendant in this case. In the absence of R. N. Thorne from Ghana, another director has been appointed. The company as far as the court can gather is still in existence and R. N. Thorne is not and cannot be personally the first defendant herein so as to go into the question of his security."

*Quartson v. Quartson*⁴⁰⁶ – the petitioner in an action against the respondent for divorce seeks from the respondent payment of her director's fees and allowances as a director of Pious Trading and

⁴⁰⁵ [1966] GLR 90.

⁴⁰⁶ [2012] 2 SCGLR 1077.

Construction Company Limited of which the respondent has coveted as “his” company. The Supreme Court in dismissing an appeal on this claim stated per Ansah JSC @ pg. 1080 that:

“The appellant seeks a declaration from this court that she is entitled to directors’ fees and dividends from Pious Trading and Construction Company Limited. The law on the separate legal personality of companies vis-à-vis the personality of the directors and shareholders, is trite. This court would follow the reasoning of a long line of cases beginning with Salomon v. Salomon [1897] A.C. 22, H.L. that a company has separate legal personality and unless certain exceptions can be shown, the court is reluctant to lift that veil of incorporation, see Morkor v. Kuma (East Coast Fisheries Case) [1998-99] SCGLR 620. The appellant here has not shown that this case can be brought under any of the allowed exceptions that warrant the lifting of the corporate veil. The proper person for an action for directors’ fees and dividends would be the company, Pious Trading and Construction Company Ltd and not Pious Pope Quartson himself.”

*Soon Boon Seo v. Gateway Worship Center*⁴⁰⁷ – the defendant promised to raise funds for the second plaintiff whilst on a projected trip to Korea. The defendant on his return from the trip informed the church that he had been able to raise the funds from a benefactor. There was no disclosure of how much was raised, neither did the defendant hand over the funds to the respondent church. The funds were lodged in his bank account and part subsequently used to acquire the disputed land. An action was commenced by the pastor of the church as the first plaintiff and the church, acting by its trustees against the defendant in the Circuit Court for a declaration of title to the land in dispute, recovery of possession, perpetual injunction, an order for accounts and other orders. The Circuit Court granted the relief sought by the respondent except the order to account. On appeal to the Court of Appeal and subsequently, to the Supreme Court, the defendant-appellant alleged that taking into account the claim and evidence in the matter, the first plaintiff, the pastor, had no *locus standi* in the suit and should have been struck out as a party. It was held per Akuffo JSC @ pages 291-292 that:

“In Ground One of the Notice of Appeal, the Defendant challenged the locus standi of the pastor of the Second Plaintiff church to be party in the case. The Court of Appeal reached the conclusion that, on the evidence on record, the beneficial ownership or interest in the property and/or funds in question vested in the Second Plaintiff, and no one else. As is clear from the record, the Second Plaintiff is a company limited by guarantee and incorporated under the Companies Act, 1963 (Act 179) (as revised). As a result, pursuant to Section 24 of the Companies Act, it has all the powers of a natural person of full capacity. As such, it is a fully-fledged legal entity, with a personality separate from the natural persons forming it, and with capacity to sue and be sued in its own name. In law, the members of a company have no direct proprietary rights over its assets, the company being the sole owner

⁴⁰⁷ [2009] SCGLR 1077.

of its assets (see Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd. [1962] 1 GLR 122). Since it is patent from the record that the subject matter of the action was being claimed as the Church's asset rather than the joint property of the church and the First Plaintiff, there was no reason why the First Plaintiff should have been included as a co-claimant. From the record, Pastor Ben Adjei really has no business in the suit, since he does not make any claim of interest or right in the subject matter of the suit. The Second Plaintiff church is capable of handling its own litigation and the First Plaintiff is an unnecessary party."

*Republic v. High Court, Accra; Ex parte Appiah and others*⁴⁰⁸ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate filed included house no. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all sums of money received in respect of the estate of the deceased, the court on the issue of inclusion of the house in the estate of the deceased stated per Ampiah JSC @ page 425 that:

"In the instant case, the orders made seem to involve an incorporated body. By the deceased's presumed 100 percent shareholding, Lims Co Ltd, the second defendant, seems to have been included in the estate of the deceased. The presumption being that since he owned 100 per cent of the shares, he and the company are one and that the company is owned by the deceased as his personal property. That may factually be so, but the legal position is that an incorporated company has a legal personality of its own different from those who form it. It could sue and be sued as a legal entity. There is no dearth of authority on this issue: see Salomon v. Salomon Co [1897] AC 22, HL.

Consequently, though the late Kofi Boye Safo could be the owner of the 100 per cent shares in the company, he is not the company so as to make the company his personal property. As a legal entity the company is governed by rules and regulations of the company. Its management is vested in the board of directors whose managing director is directly involved in the day to day activities of the company and who is responsible to the board and the shareholders. Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later

⁴⁰⁸ [1999-2000] 2 GLR 420.

distribute them to the beneficiaries who then would have their name entered in the register of the company as members."

(b) Limitation of liability

The separate legal concept of a company mandates that rights and liabilities arising from an act of the company are ascribed to the company and not the owner, members or any other person associated with the company. In other words, the general proposition is that owners of a company are not liable for the debt and obligations of the company. This position is reflected in the judgement of *Salomon v. Salomon & Co. Ltd*⁴⁰⁹; *Morkor v. Kuma (East Coast Fisheries Case)*⁴¹⁰; *Owusu v. R.N. Thorne*⁴¹¹ and many others. The first use of the concept of limitation of liability generally illustrates the position that a company assumes responsibility for its own liabilities resulting from its act. Such liability is not the liability of the owners, members or managers of the incorporated entities.

In the strict sense, however, limitation of liability refers to the ability of members of a company to limit the extent to which they can be held liable to contribute to the satisfaction of the liabilities of the company. As such, owners or members of a company can limit their liability for the acts of the company to either amount made available to the incorporated entity for use in its activities, or amount that they agreed to contribute in the future either as specified time or upon the occurrence of an event, or required to be provided by law.

Members of a company may contribute the capitals or invest the money required for the running of the company. Members stand to lose the amount invested or contributed to the company in the event the company uses the capital to satisfy liabilities incurred to third parties and cease operation. In that respect, one may loosely say that the members assumed the liability of the company. Further, in respect to companies with shares, where the shareholders acquire shares, the shareholder is under liability to pay the stated amount for the shares.⁴¹² The shareholder will remain liable to make the full payment for the shares and in the event the company incurs a liability that it does not have the resource to settle, the owner will be forced to pay the balance owed on the shares either to the company to be used to settle the company's liability or make such payment directly to the debtor or persons who the company owes the liability. The extent of the payment to be made by the shareholder depends on whether the type of company in which the member acquired shares has limited or unlimited liability. If the liability is limited, the shareholder's liability will be limited to the amount he owes on the shares, but if the liability is unlimited then the shareholder will be liable

⁴⁰⁹ [1895-9] AII ER 33; [1897] AC 22.

⁴¹⁰ [1998-99] SCGLR 620.

⁴¹¹ [1966] GLR 90.

⁴¹² Section 40 of Act 992.

to the full extent of the liability of the company.⁴¹³ For companies limited by guarantee, which do not have and, therefore, do not issue shares, the liability of the members is limited to the amount they promise voluntarily to contribute to the company to settle its indebtedness in the event the company is itself unable to satisfy the liability when the company is winding up.⁴¹⁴

Company law also permits instances that the veil of incorporation may be lifted or pierced and liability of the incorporated entity assigned to the members. The concept of lifting or piercing the veil of incorporation provides for instance where the separate legal personality status is ignored by the court and the acts and liability of the company is assigned to the members, or assets of the company are deemed to be the assets of the members.⁴¹⁵ The concept is explained in chapter 9.0 of this book.

(c) Perpetual succession

An attribute of a company is the legal recognition that its continued existence is not affected by the demise of the owners or officers, or in the event that they ceased to be associated with the company in any other manner. That is, a company enjoys perpetual succession or continuity of legal existence. The company continues to exist notwithstanding that the owner or officers die, or the owner retires, transfer his interest or officers resigned or the engagement or appointment of the officer is terminated. The existence of a company is simply not affected by the demise of the incorporators or those who control the affairs of the company. A company will therefore continue to exist notwithstanding that the members or shareholders or directors ceased to exist or be associated with the company. The company, therefore, enjoys perpetual succession as it is deemed in law to continue in existence until deliberate actions and steps are taken in accordance with the law of incorporation to bring its life to an end. That deliberate action to bring the life of a company to an end is liquidation which may entail winding up followed by the dissolution of the entity or just dissolution of the entity.

Under the Companies Act, 2019 (Act 992), where a company ceases to have a member or the number of directors fall below the minimum, the company continues to exist. The prescription under the Companies Act, 2019 is for the company to cease to carry on business if it is to avoid penalties prescribed by the Act. Section 41 of Act 992 provides that if at any time a company ceases to have at least one member and carries on business, directors of the company during the time it continues to carry on business without a member shall be jointly and severally liable for the payment of all the debts and liabilities incurred by the company during the time it carried on business without a

⁴¹³ Section 7 of Act 992.

⁴¹⁴ Section 8 of Act 992.

⁴¹⁵ *Prest v. Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415.

member.⁴¹⁶ Further, section 171 of Act 992 provides that if a company fails to have a minimum of two directors and it continues to carry on business for more than four weeks, the company, every director and member of the company who is in default will be liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day that the company carries on business after the expiration of the four weeks without having at least two directors. Both sections 41 and 171 of the Companies Act, 2019 recognise the right of the company to enjoy perpetual succession. Therefore, the lack of members or directors of the required numbers does not affect the continued existence of the company. The liability imposed in both instances is in relation to holding directors liable or imposing administrative penalties.

(d) Capacity to enter legal relations

Flowing from the separate legal capacity conferred on incorporated entities, a company acquires the legal capacity to enter into legal relations including contracts and transactions in its own name. In view of the artificial legal nature of a company, it will ultimately act through natural persons who may be owners or representing an owner if the owner is an incorporated entity. Where such a person acts on behalf of a company, it is deemed to be the act of the company. There may be instances where the person acting for the company is required to show authorisation express or implied,⁴¹⁷ or instances where the act will only be the act of the company when the company is estopped from denying the act.⁴¹⁸ However, the general principle remains that a company has the capacity to enter into legal relations even though it acts ultimately through natural persons. Section 18 of Act 992 provides that:

“(1) Subject to this Act and to any other enactment, a company shall have:

- (a) full capacity to carry on or undertake any business or activity, to do any act, or enter into any transaction; and*
- (b) full rights, powers and privileges for the purposes of paragraph (a).”*

The Act, therefore, confers the capacity on a company, pursuant to the concept of its legal personality, to enter into legal relations, to undertake any business, activity or transaction. In so doing, the company has full rights, powers and privileges. This capacity is subject to limitations as provided under the Companies Act, 2019.

A number of cases illustrate the capacity of a company to enter into legal relations in its own name.

⁴¹⁶ Under the now repealed Companies Act, 1963 (Act 179), similar prescription was stated under section 38. However, section 38 gives a grace period of six months for which the company can carry on business without a member. The joint and several liability only arises if the company after the six months is unable to get a member and continue to carry on business.

⁴¹⁷ Section 148 of Act 992.

⁴¹⁸ Ibid.

These include the cases of *Salomon v. Salomon & Co Ltd*⁴¹⁹ and *Morkor v. Kuma (East Coast Fisheries Case)*⁴²⁰. In *Salomon's* case, the company, *Salomon & Co Ltd* had the legal capacity to enter into a contract pursuant to which it acquired the business of Mr. Aron Salomon and further issued secured debentures to Mr. Salomon and unsecured debentures to other debenture holders. In the *East Coast Fisheries Case*, the company was held to be the party to the contract and not the chief executive who executed the contract together with another director.

*Lee v. Lee's Air Farming Ltd*⁴²¹ - the appellant's husband, Mr. Lee, formed the respondent company for the purpose of carrying on the business of aerial top-dressing. Mr. Lee was the controlling shareholder and the governing director of the company. He was also employed as chief pilot of the company and paid himself salary. In his capacity as governing director and controlling shareholder, he exercised full and unrestricted control over all the operations of the company. Pursuant to its statutory obligations the company had insured itself against liability to pay compensation in the case of accident to him. While piloting an aircraft belonging to the company in the course of aerial top-dressing operations the aircraft crashed and Mr. Lee was killed. On a claim by the appellant against the respondent company for compensation, alleging that at the time of the accident her husband was a "worker" employed by the respondent company within the meaning of the Workers' Compensation Act, 1922, as amended, the court held that the deceased was a "worker" within the meaning of the Act. His position as the sole governing director did not make it impossible for him to be a servant of the company in the capacity of chief pilot, for he and the company were separate and distinct legal entities which could enter, and had entered, into a valid contractual relationship, which is not invalidated by the circumstances that the deceased was the sole governing director in whom was vested the full government and control of the company and also the controlling shareholder. Also, Mr. Lee and the company were separate legal entities also so as to enable the company to give orders to the deceased. One person may function in dual capacities and acting in one capacity gives orders to himself in another capacity. The contractual relationship was that of master and servant, and a contract of service was entered into and operated and the deceased was a "worker" within the statutory definition. Lord Morris of Borthy-Gest delivering the judgement stated:

"The substantial question which arises is, as their Lordships think, whether the deceased was a "worker" within the meaning of the Workers' Compensation Act, 1922, and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged

⁴¹⁹ [1895-9] AII ER 33; [1897] AC 22.

⁴²⁰ [1998-99] SCGLC 620.

⁴²¹ [1961] AC 12 (Privy Council).

to the company and when he was carrying out the operation of top-dressing farmlands from the air. He was paid wages for so doing. The company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships' view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased ... Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation. The deceased might have made a firm contract to serve the company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his contract would not have been affected. The circumstance that in his capacity as a shareholder he could control the course of events would not in itself affect the validity of his contractual relationship with the company. When, therefore, it is said that "one of his first acts was to appoint himself the only pilot of the company," it must be recognised that the appointment was made by the company, and that it was none the less a valid appointment because it was the deceased himself who acted as the agent of the company in arranging it. In their Lordships' view it is a logical consequence of the decision in Salomon's case that one person may function in dual capacities. ... the fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the company to give the orders does not alter the fact that the company and the deceased were two separate and distinct legal persons. If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal

existence of the company is recognised. Just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased."

(e) Capacity to sue and be sued

Another attribute directly derived from the separate legal personality conferred on a company is the ability of the company to sue and be sued in its own name. The company is recognised as a legal person on its own and can therefore act on its own, enjoy rights and suffer liability on its own. The natural offshoot is that the company must be able to maintain a legal action if its rights have been violated or breached by another person. Similarly, where the company incurs liability and failed to discharge that liability, the other person must be able to maintain an action against the company to recover debts or liabilities due. A company, therefore, has the capacity to sue to enforce its right against a third party. Such rights may arise pursuant to contract or law, be it common law or statute. A company in the same breath can also be sued if it breaches the obligations or infringes on the right of another person arising either in contract or law. The general position is therefore that a person cannot sue owners and officers of a company for the act of the company.⁴²² Similarly, the general principle is that the owners and officers cannot sue in their personal name to enforce the rights of the company.⁴²³ Both general principles are subject to recognised legal exceptions under both common law and statute which are discussed subsequently.⁴²⁴ The capacity of the company to sue and be sued is reflected in the Companies Act, 2019 (Act 992)⁴²⁵. This attribute is essentially a flipside to the attribute of the capacity of a company to enter into legal relations both of which are derived from the separate legal personality conferred on the company.

*Foss v. Harbottle*⁴²⁶ - Richard Foss and Edward Starkie Turton were two minority shareholders in the company called "Victoria Park Company". The Company had been set up in September 1835 to buy 180 acres (0.73 km²) of land near Manchester (which became Victoria Park, Manchester). The claimants alleged that a number of improper and fraudulent transaction have been entered into and the property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property. That the directors have made secret profit and breached their fiduciary duties to the Company. The Claimants asked that the guilty parties be held accountable to the company and that a receiver be appointed. The defendants were the five directors of the company – Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, Richard Bealey

⁴²² *Owusu v. R.N. Thorne And Another* [1966] GLR 90.

⁴²³ *Foss v. Harbottle* (1843) 2 Hare 461; *Bank of West Africa v. Appenteng* [1972]1 GLR 153.

⁴²⁴ See chapter 23.0 on Remedies of Corporate Wrongs.

⁴²⁵ Sections 14(1) and 18(1) of Act 992.

⁴²⁶ (1843) 2 Hare 461.

– and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane); and also H Rotton, E Lloyd, T Peet, J Biggs and S Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupts. The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has standing to sue. The company is the proper plaintiff to maintain an action when a wrong is committed against the company. Wigram, V-C stated:

“The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of The Attorney-General v Wilson (1840) Cr & Ph 1 (without going further) it may be stated as undoubted law that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in The Attorney-General v Wilson in this – that, instead of the corporation being formally represented as Plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of—the Plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

*It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative...”*

*Owusu v. R.N Thorne Ltd*⁴²⁷ - the plaintiff-applicant sued the first defendant, a limited liability company and the second defendant, who was a shareholder and director, as its agent. By an ex parte application, he obtained an absconding warrant against one R.N. Thorne who, together with his wife, also a director of the first defendant company, on the grounds that they had closed the company offices and sold their property and that R.N. Thorne was going on leave and was not likely to return to Ghana. He, therefore, prayed for an order that R.N. Thorne be ordered to furnish personal bail for appearance under the rules of court. The court held that the company existed apart from the directors and members. That R.N. Thorne was not sued personally and was therefore not a

⁴²⁷ [1966] GLR 90.

defendant within the meaning of rules of court for the court to go into the question of security. Per Boison J. stated @ pg. 92 that:

“What the court has to determine in this motion is whether R. N. Thorne personally or the company is the first defendant in this case. The theory of legal personality of corporations has its own practical problems but it is clear that a limited company or corporation has legal existence apart from the directors and members, and it is in a few recognised exceptions that the law lifts the “corporate veil,” as it has been put, and looks to the directors and members personally. On the plaintiff’s own pleadings he sued R. N. Thorne Ltd. the first defendant and one other as the second defendant — the first defendant was the master of the second defendant. It may well be and undoubtedly is true that R. N. Thorne and his wife are the only directors of the company but the company exists apart from the directors and the members. To hold that the directors are personally the first defendant in this case will be defeating the doctrine of the separate existence of a limited liability company. The action is not against R. N. Thorne personally. I am not determining the liability of the first defendants as a company. The question here is: Is R. N. Thorne personally sued as the first defendant so that he is a “defendant” within Order 35? The answer is no. As far as the court is aware the company is not in the process of being wound up and even if that were so, it would not make R. N. Thorne personally the first defendant in this case. In the absence of R. N. Thorne from Ghana, another director has been appointed. The company as far as the court can gather is still in existence and R. N. Thorne is not and cannot be personally the first defendant herein so as to go into the question of his security.”

*Bank of West Africa v. Appenteng*⁴²⁸ - the case is a consolidation of a number of cases. The facts relevant to the principle under consideration is that the Bank negligently advised a company, Mpotimma Ltd. The alleged negligent advice resulted in Mpotimma Ltd suffering financial loss. A shareholder of Mpotimma Ltd instituted an action against the Bank for the loss which the Mpotimma Ltd had suffered as a result of the negligent advice given by the Bank. The shareholder alleged further that he had been directly affected by the negligent advice as it resulted in the inability of Mpotimma Ltd to declare profit from which his dividend could have been paid. The court held the company was a separate legal person. That a shareholder could not sue in respect of a wrong committed against the company. The proper plaintiff to maintain the action was the company itself. That upon incorporation a company acquires the legal capacity to sue in its name. Siriboe JSC stated as follows:

“In that case, which went before Ollennu J. (as he then was), the principle enunciated in Foss v. Harbottle (1843) 2 Hare 461, that, as a general rule, a shareholder cannot sue for wrong done to a company or to recover money as

⁴²⁸ [1972] 1 GLR 153.

damages due to it, unless the action is taken by the company itself, and the exceptions to that principle were raised as has been done in the present suit. Then as now, it was submitted on behalf of the shareholders, that the shares held in the company are legal rights which, therefore, entitle the shareholders to sue for an invasion thereof ... It cannot be disputed that the purpose for which a shareholder invests money or, to be exact, buys shares in a company, is the hope that the company will be a going concern and, thereby, be able to declare profits and pay dividends. If that should so happily happen, then as Ollennu J. (as he then was) put it in the case of Appenteng v. Bank of West Africa Ltd. [1961] G.L.R. at p. 203, "good luck to him [the shareholder]." But if the opposite should be the case, that is, where a loss is declared and no dividends are payable, Ollennu J. (as he then was) continued at the same page, "then that's just too bad, he cannot sue anyone to compel profits to be declared where none has been made." The reason Ollennu J. gave at p. 203 for this which seems logical, is that "a shareholder has no legal right that a company should always be a going concern." That seems to be the basis for holding against the plaintiffs in suit 2/61: Appenteng v. Bank of West Africa Ltd. [1961] G.L.R. 196 at p. 203; "that loss of business interests and yearly profits and dividend do not constitute an invasion of any legal rights of the plaintiffs, shareholders of Mpotimma Ltd. ... This position was made clear in the recent judgment by Lassey J.A. delivered on 8 June 1970, in appeal No. 106/67, namely, Kwabena Appenteng v. Bank of West Africa Ltd., unreported. It is significant to note that in his judgment, the trial judge in the present case appeared to have misconceived the basis of Ollennu J.'s decision which he partly accepted but partly rejected, as if it was an appeal before him. For while he agreed with the decision that a shareholder cannot sue for wrong done to the company, he however, disagreed with the view expressed concerning the absence of a cause of action in the plaintiff to sue for loss of profits and dividends resulting from the liquidation of the company."

*Grant v. Tikobo*⁴²⁹ – in this case, a company that owes a debt to the plaintiff company. The shareholders and directors of the debtor company sold the business of the debtor company to another company. The plaintiff company instituted an action for recovery of the debt and brought an application to prevent the managing director of the debtor company from travelling outside the jurisdiction. The plaintiff company also requested that to permit the managing director to travel, the managing directors must provide security to the court for the claim against the company to recover the debt. The court, per Archer J. (as he then was) dismissed the claim. Relying on the case of *Salomon v. Salomon & Co Ltd*, the court stated that the plaintiff company was distinct and separate

⁴²⁹ (1968) C.C. 28.

from its managing director. The managing director could not be prevented from travelling outside the jurisdiction based on a debt owed by the company to which he is the managing director.

*Soon Boon Seo v. Gateway Worship Center*⁴³⁰ – the facts of which are discussed earlier, Akuffo JSC stated @ pgs. 291-292 that:

*“In Ground One of the Notice of Appeal, the Defendant challenged the locus standi of the pastor of the Second Plaintiff church to be party in the case. The Court of Appeal reached the conclusion that, on the evidence on record, the beneficial ownership or interest in the property and/or funds in question vested in the Second Plaintiff, and no one else. As is clear from the record, the Second Plaintiff is a company limited by guarantee and incorporated under the Companies Act, 1963 (Act 179) (as revised). As a result, pursuant to Section 24 of the Companies Act, it has all the powers of a natural person of full capacity. As such, it is a fully-fledged legal entity, with a personality separate from the natural persons forming it, and with capacity to sue and be sued in its own name. In law, the members of a company have no direct proprietary rights over its assets, the company being the sole owner of its assets (see *Majdoub & Co. Ltd. v. W. Bartholomew & Co. Ltd.* [1962] 1 GLR 122). Since it is patent from the record that the subject matter of the action was being claimed as the Church’s asset rather than the joint property of the church and the First Plaintiff, there was no reason why the First Plaintiff should have been included as a co-claimant. From the record, Pastor Ben Adjei really has no business in the suit, since he does not make any claim of interest or right in the subject matter of the suit. The Second Plaintiff church is capable of handling its own litigation and the First Plaintiff is an unnecessary party.”*

(f) Capacity to acquire and own property

Another consequence flowing from the separate legal personality concept is a company acquires the legal capacity to acquire and own property in its name. Such property is corporate property that belongs to the company and forms part of the corporate assets of the company which must be used to carry on business activities or pursue the object for which the company was incorporated. The corporate assets are separate from the personal assets of the members and officers of the company. The distinction between corporate assets and personal assets of members and officers, therefore, prevents the members and officers of the company from the use of the corporate assets for personal benefit. It also prevents a situation where the personal assets of the members and officers are attached by judgment creditors to satisfy the liabilities of the company. This means members and officers have no direct claim to the corporate assets. Ownership of shares in a company does not confer direct interest in the assets of the company.

⁴³⁰ [2009] SCGLR 1077.

Majdoub & Company Ltd v. Bartholomew & Co Ltd⁴³¹ - in this case, the defendants instituted an action against a partnership called Fattal & Majdoub & Co. for an amount being the balance of accounts. While the action was pending, the partnership was dissolved. A limited liability company (the plaintiffs) was formed to take over the business assets and liabilities of the partnership. The plaintiffs agreed to pay all the liabilities incurred by the partnership but they refused and the defendants obtained a judgment against the firm for the amount claimed. In execution of the judgment, the defendants attached the store which formerly belonged to the firm and now belong to the plaintiffs. The plaintiffs thus instituted an action for damages for unlawful attachment. It was held by the court per Djabanor J. that:

"A limited liability company is an artificially created body by statute and I think the law is entitled to recognise that artificial existence. In any case it seems to me that by that date there was no partnership for the assets to remain in. Lord Halsbury L.C. in the Privy Council case of Salomon v. Salomon & Co. Ltd.² said, "...it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." For my part as soon as I accept the evidence that Majdoub & Company Ltd. bought the assets of the old Fattal & Majdoub, which I do, I must necessarily hold that the defendants cannot attach their property in execution of a judgment-debt of Fattal & Majdoub because the two firms are quite separate, different, and distinct legal persons."

Macaura v. Northern Assurance Co. Ltd⁴³² - in this case, the owner of a timber estate sold the whole of the timber on the estate to a timber company in consideration of fully paid-up shares in the company. The owner was the sole shareholder of the timber company and subsequently the creditor of the company. The owner subsequently took out insurance to cover the timber against fire. The insurance was, however, taken in the name of the owner and not the company. Subsequently, a fire outbreak destroyed the greater part of the timber. A claim put in by the owner to recover the amounts under the insurance policies was rejected by the insurance company. The owner, therefore, sued the insurance companies to recover the loss. The actions were stayed and the matter was referred to arbitration in pursuance of the terms of the insurance policies. The arbitrator held that the claimant owner had no insurable interest in the timber insured and disallowed the claim: The court held that the claimant owner had not, either as shareholder or creditor any insurable interest in the goods because the goods belonged to the company. Lord Buckmaster reasoned @ pg. 626 as follows:

⁴³¹ [1962] GLR 122.

⁴³² [1925] AC 619.

"... It must, in my opinion, be admitted that at first sight the facts suggest that there really was no person other than the plaintiff who was interested in the preservation of the timber. It is true that the timber was owned by the company, but practically the whole interest in the company was owned by the appellant. He would receive the benefit of any profit and on him would fall the burden of any loss. But the principles on which the decision of this case rests must be independent of the extent of the interest held. The appellant could only insure either as a creditor or as a shareholder in the company. And if he was not entitled in virtue of either of these rights he can acquire no better position by reason of the fact that he held both characters. As a creditor his position appears to me quite incapable of supporting the claim. If his contention were right it would follow that any person would be at liberty to insure the furniture of his debtor, and no such claim has ever been recognised by the Courts... Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset - a calculation almost impossible to make..."

Lord Sumner concurring stated:

"My Lords, this appeal relates to an insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmills, Ltd., of Skibbereen, co. Cork. He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no "legal or equitable relation to" the timber at all. He had no "concern in" the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire. No authority has been produced for the proposition that the appellant had any

insurable interest in the timber in any capacity, and the books are full of decisions and dicta that he had none."

Lord Wrenbury further stated:

"My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation. Further, I have read and concur in the judgment delivered by my noble and learned friend, Lord Sumner. I think the appeal should be dismissed."

*R v. Arnaud and Powell*⁴³³ - in this case, the facts of which are stated in the judgement, the issue for determination was, whether a corporation aggregate, of which some of the members are foreigners, can claim to be registered in its corporate character. Per Lord Denman C.J holding that the Registering Authority registers the ship on the basis that the British Company was the ship's owner rather than the members of the company, reasoned as follows:

"The object of the present mandamus is to compel the Custom House officers to register a vessel, the property of the Pacific Steam Navigation Company. The company is a corporation, by charter of Her present Majesty, for the purpose of providing vessels and employing them in the Pacific Ocean. It is admitted by the defendants that the company, as a British corporation might be owners of British built vessels, and primâ facie would be, as such corporation entitled to register them under the provisions of stat. 8 & 9 Vict. c. 89, applicable to the registry of vessels by corporations. But it is said that some of the members of the corporation are not British subjects, but foreigners, and, consequently, that the vessel does not wholly belong to Her Majesty's subjects, as required by the fifth section of the Act, and is within the prohibition, contained in the twelfth section of the Act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered. Now it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the fifth section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. The individual members of the corporation, no doubt, are interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction: but in no legal sense are the individual members the owners. If all the individuals of the corporation were duly qualified British subjects, they could not

⁴³³ (1846) QB 115.

register the vessel in their individual names as owners, but must register it as belonging wholly to the corporation as owner."

*Gramophone & Typewriter Ltd v. Stanley*⁴³⁴ - the facts stated in the judgement of the Master of Rolls as follows:

*"This is an appeal from the Judgment of Mr. Justice Walton, who held that the Plaintiff Company, whom I shall call the English Company, are not liable to pay Income Tax in respect of £15,000, part of the profits of a German Company, not distributed in the way of dividend or transmitted to England, but written off by the German Company in Germany to meet the depreciation of patents. The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use words found in one of the authorities, 'stated the Appellants out of Court.' I may add that the arguments before Mr. Justice Walton proceeded upon this footing. The German Company was established in Germany in 1900 in accordance with German law. It was undoubtedly a Company with several shareholders who brought in considerable capital. One of those shareholders was an English Company, whose undertaking was subsequently acquired by the present English Company. At some date which is not stated, the English Company acquired all the shares of the German Company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a Company may give him the control of the Company in the sense that it may enable him, by exercising his voting powers, to turn out the Directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the Directors, or make the property or assets of the Company his as distinct from the Corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole of the shares. The business of the Company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more."*⁴³⁵

⁴³⁴ [1908-10] All ER 833 CA.

⁴³⁵ Emphasis mine.

*Short v. Treasury Commissioners*⁴³⁶ - Short Brothers (Rochester and Bedford) Ltd was nationalised and all the shares transferred to a nominee of the Minister of Aircraft Production. Each shareholder was entitled to compensation, measured at the market value of his shareholding. The shareholders argued that, since the entire share capital was transferred into state ownership, the compensation paid to each shareholder should be a proportionate part of the value of the company's assets at that date. At the Court of Appeal, it was held per Evershed LJ drawing distinction between holding shares and assets of the company as follows:

"Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the shareholdings. The claimants recognised this difficulty, and in this court their main argument was, we think, addressed to an alternative statement of their case, that is, that the value of their shares must be calculated on the basis of an apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred. This alternative is not in terms set out in the award; but, as we have already indicated, the real issues between the parties are, in our judgement, sufficiently raised by the award.

It is said on the one hand that it is of the essence of the matter that the Crown is, as it is bound to do, acquiring all the shares of the company. That is true; but, on the other hand, it is also the fact that the Crown is acquiring shares from a number of individual shareholders. "Prima facie" as it seems to us, and apart from any special words in the regulation, each shareholder is entitled to get, and to get only, the value of what he possesses; for that is all that he has to sell or transfer. If an individual shareholder in a company owns such a number of shares in that company as gives him effective control of the company's affairs, it may well be that the value to be attributed to that holding, on a sale of it as a separate transaction, is a figure greater than the sum arrived at by multiplying the number of his shares by the "market" value for the time being of a single share. In such a case the shareholder in question, it may be said, has and is able to sell something more than a mere parcel of shares, each having the rights as to dividend and otherwise conferred upon it by the company's regulations."

In adopting this decision, the House of Lord per Lord Porter reiterated the position by stating @ pgs. 177 to 179:

"As to the alternative argument that the value of the business as a going concern should first be ascertained and then that global sum should be divided in due proportions between the different classes of shareholders, no doubt, if the regulation had stated that the shareholders were to receive the value of their shares calculated on their value on the sale of their business as a going concern, ... the appellants'

⁴³⁶ [1948] SCV 177; [1948] KB 116.

claim would be correct, but, to my mind, the regulation makes quite a different stipulation. It is true that under the order all the shares are to be transferred, but though all are transferred to the nominees of the Treasury, all are not transferred from one person, and it is the value of the willing seller of his holding which has to be ascertained, not a potentiality of control which he does not possess. The paragraph speaks of the price of "any shares" which naturally refers to those embraced in any individual parcel and it is those shares, not the shares as a whole, the value of which is to be ascertained as between a willing buyer and a willing seller, a phrase which, in my mind, means a willing buyer and a willing seller of those shares. If it were not so, there would be great difficulty, if not impossibility, in distributing the total sum obtained as the price of the undertaking among the various classes of beneficiaries in cases where there were a number of different classes of shares, and even in the present case where the preference shareholders are only entitled to the nominal value of their shares on a winding-up the question might arise as to their value when they were being paid off, but the company was not being wound up."

*Republic v. High Court, Accra; Ex parte Appiah and others*⁴³⁷ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate filed included house no. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all sums of money received in respect of the estate of the Deceased, the court on the issue of inclusion of the house in the estate of the deceased stated per Ampiah JSC @ pgs. 424 to 425 that:

"In the instant case, the orders made seem to involve an incorporated body. By the deceased's presumed 100 percent shareholding, Lims Co Ltd, the second defendant, seems to have been included in the estate of the deceased. The presumption being that since he owned 100 per cent of the shares, he and the company are one and that the company is owned by the deceased as his personal property. That may factually be so, but the legal position is that an incorporated company has a legal personality of its own different from those who form it. It could sue and be sued as a legal entity. There is no dearth of authority on this issue: see Salomon v Salomon Co [1897] AC 22, HL.

⁴³⁷ [1999-2000] 2 GLR 420.

Consequently, though the late Kofi Boye Safo could be the owner of the 100 per cent shares in the company, he is not the company so as to make the company his personal property. As a legal entity the company is governed by rules and regulations of the company. Its management is vested in the board of directors whose managing director is directly involved in the day to day activities of the company and who is responsible to the board and the shareholders. Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later distribute them to the beneficiaries who then would have their name entered in the register of the company as members."

(g) Capacity to borrow and create charges over assets

As indicated above, a company as a separate legal person has its own legal capacity which legal capacity permits the company to enter into a contract that includes a contract to borrow money in its name. This characteristic enables a company to raise capital to carry out its business activities or objects without requiring all contributions to come from its members or "owners". Unlike a natural person who has no legal capacity from birth until attaining the age of majority, subject to some exceptions, a company from the day of incorporation has the legal capacity to exercise borrowing powers. Through the exercise of its borrowing powers, a company can source for funds in its own name to pursue the object or business for which it is incorporated. The company can raise capital from owners or borrow from third parties or owners to fund its activities.

However, third parties do not lend money to a company simply on the basis that it has the capacity to borrow. The company must be creditworthy. The company may demonstrate such creditworthiness by its ability to have adequate receivables to service the loan or provide security by creating a charge over its assets to give comfort to the lenders. The ability of the company to own assets and the separation of such corporate assets from the personal assets of the owners and managers enable the company to provide credible security for the payment of the loan. The company provides security by creating a charge over its assets in favour of the lenders, which entitles the lenders to take possession or realise the corporate asset for the satisfaction of the debt.

The Companies Act, 2019 in section 83 permits companies to borrow in the form of debenture or series of debentures or debenture stocks. Debenture is defined in the First Schedule of the Companies Act, 2019 as *"a written acknowledgement of indebtedness issued by a company in respect of a loan made to it..."*. Section 89(1) of the Companies Act, 2019 further provides that *"Debentures may either be secured by a charge over the property of the company or may be unsecured by a charge."* A company as an incorporated entity can therefore borrow and create a charge over corporate assets to secure the repayment obligations in favour of the lender or debenture holder.

(h) Taxable entity

A company is a legal person whose existence is separate and distinct from its owners and managers. As a legal person, it is liable to pay tax as a person. The Income Tax Act, 2015 (Act 896) in section 1 imposes income tax on a person who has chargeable income or a person who receives a final withholding tax. The tax is imposed on a person. A company is a person separate, independent and distinct from its members and officers. The company, therefore, is liable to pay income tax on its chargeable income. A company is a taxable unit on its own, separate and distinct from the members and managers of the company. Separate income taxes are payable by the members, managers or directors, and the company. On incorporation of a company, the company is liable to pay corporate tax on the profit of the company⁴³⁸ separate from the income tax payable by the shareholder on dividend received from the company⁴³⁹ and separate from income tax payable by the manager or directors on income and remuneration respectively received from the company⁴⁴⁰.

3.7 Types of companies

Introduction

Under the Companies Act, 2019 (Act 992) different types of companies may be formed. It is one of the duties of the promoters of the company to determine the type of company to incorporate. It is important to emphasize that there are other entities through which business can be undertaken or objects can be pursued. The first decision must, therefore, be which of the entities provide the best mechanism to undertake the intended business or pursue the intended object. Once the decision is made to set up a company, the promoters must decide which type of company to incorporate.

In *Erlanger v. New Sombrero Phosphate Co*⁴⁴¹, Lord Cairns indicated that promoters decide a number of things that the company would become such as the type of company. Non-legal factors which significantly influence the legal factors and options available to promoters include but not limited to the ultimate objective of the company, the number of potential shareholders, and the intended mode of raising capital.

Generally, the choice of the type of company to form depends on a number of factors which may include:

- (a) Amount of capital required
- (b) Nature of activity to be undertaken – business to be undertaken or object to be pursued

⁴³⁸ Section 58 of the Income Tax Act, 2015 (Act 896) as amended.

⁴³⁹ Sections 58 and 59 of the Income Tax Act, 2015 (Act 896) as amended on taxation of shareholders.

⁴⁴⁰ Section 1 of the Income Tax Act, 2015 (Act 896) as amended.

⁴⁴¹ (1878) 3 App Cas 1218.

- (c) Risks of members
- (d) Exposure of members for liability of the company
- (e) Legal requirement of the jurisdiction
- (f) Membership in terms of numbers permitted and how to become a member
- (g) Functions to be performed
- (h) Location of the company
- (i) Management structure
- (j) Duration of activity to be undertaken

The Companies Act, 2019 (Act 992) provides for two broad categories of companies incorporated in Ghana. On one hand, the distinction is based on limitation or otherwise of the liability of members. That is, is the liability of members limited or not limited? If it is limited, what is it limited to – amount unpaid on shares or amount guaranteed to contribute. In that regard, a distinction is drawn between companies limited by shares, companies limited by guarantee and unlimited companies. The distinctive element in this classification is whether the liability of the members of the company for the activities of the company is limited or not and if limited, what is it limited to? On the other hand, Act 992 distinguishes companies that are public and those that are private. The distinctive element is the size of membership of the company and the manner in which membership can be acquired. Act 992 also provides for another category of company that can be registered in Ghana which is the external company. This is an existing company outside Ghana, which is registered in Ghana. An external company is not incorporated in Ghana. It is a body corporate already incorporated outside Ghana that is registered in Ghana.

Section 7 of Act 992 provides that:

“(1) An incorporated company may be:

- (a) a company limited by shares;*
- (b) a company limited by guarantee;*
- (c) an unlimited company; or*
- (d) an external company.”*

“(4) A company of a type specified in subsection (1), may be a private company or a public company.”

The reading of the two sections strictly means there are eight (8) types of companies that can be incorporated under Act 992. These are:

- (i) Private companies limited by shares
- (ii) Private companies limited by guarantee
- (iii) Unlimited private companies.
- (iv) Public companies limited by shares
- (v) Public companies limited by guarantee

- (vi) Unlimited public companies
- (vii) Private external company
- (viii) Public external company

It seems that the last two classifications are a misnomer in relation to classification. First, an external company is technically not a company incorporated in Ghana. It is a company that exists outside the jurisdiction but which is registered as having a place of business in Ghana under the Act. There is, therefore, no separation of or distinction between the registered company in Ghana and the company outside Ghana. The type of company it is outside Ghana will be the exact type of company it will be in Ghana. If the company happens to have a characterization that conforms to one of the types of companies in Ghana, then it will fall into that characterization. An external company may simply be a company limited by shares, limited by guarantee or unlimited. In that respect, an external company may simply take the form based on classifications based on limitation or otherwise of liability⁴⁴², or whether public or private. It is also possible to have a company that has a characterization not within Act 992. That is the company outside Ghana which is registered in Ghana does not strictly have the characterization to be regarded as company limited by shares, guarantee or unlimited company, or fall into the categorization of a private or public company distinction in Ghana.⁴⁴³ Given the above, one can simply indicate that there are six types of companies that can be incorporated in Ghana and a seventh type, which is the registration of an existing company outside Ghana in Ghana. The types of companies can therefore be stated as follows:

- (1) Private companies limited by shares
- (2) Private companies limited by guarantee
- (3) Unlimited private companies.
- (4) Public companies limited by shares
- (5) Public companies limited by guarantee
- (6) Unlimited public companies
- (7) External company

3.7.1 Companies limited by shares

Act 992 under section 7(2)(a) provides that *“a company limited by shares is a company which has the liability of its members limited to the amount unpaid on the shares respectively held by them^{444”}*. Company limited by shares as the name implies must be registered with shares. Section 7(3) of Act 992 provides that a company limited by shares must be registered with shares. The shares held by each member represents their interest in the company and entitles the member to exercise all the

⁴⁴² See section 335 of Act 992.

⁴⁴³ See section 335(3) and section 342 of Act 992.

⁴⁴⁴ Section 7(3) of Act 992.

rights attached to the shares as a shareholder of the company⁴⁴⁵ including the right to share in the profit of the company and to the distribution of the company's net assets during winding-up. Section 33 of Act 992 requires each member of a company with shares to hold at least one share.

The distinctive element of a company limited by shares from the above definition is that the liability of the members is limited to the amount outstanding or unpaid on their shares. The shareholder is liable to pay the amount prior to the winding up of the company, either at the time agreed or upon a valid call being made by the company. Section 40(1) of Act 992 provides that *“(1) Before the winding up of a company, a member of the company with shares is liable to contribute the balance of the amount payable in respect of the shares held by that member in accordance with the terms of the agreement under which the shares were issued, or in accordance with a call validly made by the company.”* The shareholder is, therefore, not directly liable to the debtors, but is only under obligation to pay the amount outstanding as liability on the shares held by the shareholder before the winding up of the company. It also follows that if the shares have been fully paid by the shareholder, no additional liability is imposed on the shareholder. The shareholder may be called on to pay the unpaid liability by the liquidator in the event the company is in liquidation. Section 40(4) of Act 992 provides that:

“(4) In the event of a company being wound up, every present or past member is liable to contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the costs, charges and expenses of the winding up, and for the adjustment of the rights of the members and past members among themselves but subject to the following qualifications:

(c) in the case of a company limited by shares, a contribution shall not be required from a member or past member exceeding the amount of money unpaid on the shares in respect of which that member is liable as a present or past member;”

The liability is limited to the amount outstanding on the shares. The liability is, therefore, limited not to the full price for the shares, but the unpaid liability.

The limitation of liability of the shareholder can be both an advantage in terms of the fact that the personal assets of the members cannot be used to satisfy the debts and liabilities of the company once the shareholder is able to fully pay for the shares. It can also be a disadvantage in terms that creditors will not be willing to extend credit to the company. The owners are exposed to less risk.

⁴⁴⁵ Section 42 of Act 992.

A company limited by shares is incorporated to carry on business for the purpose of making profit. The portion of profit shared by the shareholders is called the dividend. A right attached to the shares held by the members or shareholders is the right to receive dividend.

3.7.2 Companies Limited by Guarantee

Section 7(2)(b) of Act 992 provides that *“a company limited by guarantee is a company which has the liability of its members limited to an amount that the members may respectively undertake to contribute to the assets of the company in the event of its being wound up”*.⁴⁴⁶ That is, the liability of the members is limited to the amount the members guarantee or undertake to contribute to the company in the event of winding up.⁴⁴⁷ It should be noted that like a company limited by shares, the liability of a company limited by guarantee is also limited but to the extent of the amount each member guarantees to contribute to the company in the event of winding up. Act 992 provides that *“the total liability of the members of a company limited by guarantee to contribute to the assets of the company in the event of the company being wound up shall not at any time be less than the amount of money specified in the application required for incorporation.”*⁴⁴⁸ The liability of the members of a company limited by guarantee is also limited. This is a characteristic shared with a company limited by shares. However, the liability of members of a company limited by guarantee is limited to the amount guaranteed by the members. Section 40(4) of Act 992 provides that:

“(4) In the event of a company being wound up, every present or past member is liable to contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the costs, charges and expenses of the winding up, and for the adjustment of the rights of the members and past members among themselves but subject to the following qualifications:

(d) in the case of a company limited by guarantee, a contribution shall not be required from a member or past member exceeding the amount of money undertaken to be contributed by that member to the assets of the company in the event of the company being wound up”

Under section 13(2)(o) of Act 992, the application for incorporation of a company limited by guarantee must state the amount each member guarantees or undertake to contribute in the event the company is winding while that person is a member or within a stipulated period after ceasing to be a member, for payment of the costs, charges and expenses of winding up, and the adjustments of the rights amongst members. Under the repealed Companies Act, 1963, there was a stated minimum

⁴⁴⁶ Section 7(2)(b) of Act 992.

⁴⁴⁷ Section 10(3) of Act 992.

⁴⁴⁸ Section 8(3) of Act 992.

total of GHS700.00⁴⁴⁹ that the undertakings of the members must add up to. In the event that the minimum amount is not attained and the company commences operation, the directors and members of the company who know of that fact are liable to a fine.⁴⁵⁰ However, the Companies Act, 2019 does not prescribe for any such minimum total. It however expressly provides that total liability of the members of a company limited by guarantee to contribute to the assets of the company in the event of the company being wound up shall not at any time be less than the amount of money specified in the application for incorporation. The template constitution for a company limited by guarantee as stated in the Fourth Schedule of Act 992 in regulation 6 mentions GHS5,000. This may be an indication of the minimum that the law intends to impose.

Section 7(8) of Act 992 provides that *“a company limited by guarantee shall not for the purposes of incorporation be registered with shares and shall not create or issue shares.”* A company limited by guarantee must, therefore, not be registered with shares. Since the company is not registered with shares and cannot create or issue shares, it cannot raise its capital through the issue of shares. A company limited by guarantee usually raise capital through contribution from the members in the form of subscription fees, dues and donations. A company limited by guarantee can also issue debentures to raise capital. That is borrow the money and have a written agreement to evidence the indebtedness. The capital can be borrowed from the members or third parties including financial institution.

Section 8(1) of Act 992 provides that *“A company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profit other than making profits for the furtherance of its objects.”* The underlined phrase is an addition to the prohibition on a company limited by guarantee under the repealed Companies Act, 1963. This type of company is to pursue not-for-profit activities which may include charitable activities. The general position is that a company limited by guarantee is not to carry on business to make profit which is to be distributed as dividends to members or distributed as net assets in the event of winding up of the company. This does not mean that the company may not make profit. The company may make profit for the purpose of furthering its objects. The objects of the company are to be construed as a whole to find the main object of the company. Even though the activities may generate profit, the main purpose of the object must be determined.

*North of England Zoological Society v. Chester RDC*⁴⁵¹ - a zoological society was incorporated as a company limited by guarantee. The object of the company was set out as: (a) take over as a going concern and conduct as a scientific and educational undertaking, the business heretofore carried on as the zoological gardens; (b) promote, facilitate, and encourage the study of biology, zoology and

⁴⁴⁹ Section 10(3) of Act 179.

⁴⁵⁰ Section 10(5) of Act 179.

⁴⁵¹ [1959] 3 All ER 116.

animal physiology and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life; and (c) establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine. A clause in the memorandum prohibited payment of dividends to members of the society and another clause provided that on the dissolution of the society its assets were not to be distributed among the members. In 1950 the society, not being a trading corporation for profit purposes, was allowed to omit the word 'Limited' from its name. The society took particular care to keep the animals in its zoological gardens in surroundings as similar as possible to their natural surroundings and had successfully bred a number of creatures. A school of tropical medicine made frequent use of the society's livestock for experimental purposes and other institutions had been provided by the society with material for research. During the last few years, the society's income, which was mainly derived from admission fees to the gardens, had appreciably exceeded its expenditure. The surplus income was used in improving the equipment and raising the standards of the zoological gardens. The society claimed, in respect of its zoological gardens and premises, the benefit of the limitation of rates afforded by Rating and Valuation (Miscellaneous Provisions) Act 1955 to charitable organisations. The court held that the society was entitled to the benefit under the 1955 Act in respect of its zoological gardens and premises, for the following reasons - looking at the history and operations of the society it was an organisation 'not conducted for profit' for the purpose of making profit, because the purpose for which it was conducted was for the advancement of education objects and its profits were used in furtherance of that purpose; and those main objects were charitable or, if they were not charitable; were at least 'otherwise concerned with the advancement of ... education' within the meaning of section 8(1)(a) of the Act. Lord Evershed MR stated:

"...in order to determine which of the numerous objects set out in the memorandum of association comprised the society's main objects, the court must first look at the memorandum, and then get some assistance from the evidence on the further question which of them have been in fact the main objects. In so far as the language might be equivocal it could be seen by reference to what had been done whether assistance could be obtained in solving the equivocation".

*In Re Assessment of Income Tax by the Commissioner of Internal Revenue: Chapel Hill School v. Attorney-General and Internal Revenue Service*⁴⁵² – the appellant was originally established as the Takoradi Chapel Hill Preparatory School in December 1962 by fourteen people who subscribed to its Instrument of Establishment and Government as founders. The Instrument of Incorporation purported to establish it as a corporation sole. The trial judge found that it was originally limited by guarantee. However, in 2001 the appellant was incorporated as a company limited by shares under the Companies Act, 1963 (Act 179). The Internal Revenue Service assessed the appellant to tax for the year 1994 to 2004 in the sum of 39,864.40 Ghana Cedis. When the appellant's objection to this assessment was turned down by the Commissioner of Internal Revenue, it appealed to the High

⁴⁵² [2009] SCGLR 432.

Court, Sekondi, in July 2005, seeking a declaration that the appellant is an educational institution of a public character and thus its income is exempt from tax. It also sought an order for the annulment of the tax assessments for the years 1994 to 2004. The learned High Court judge dismissed the appeal. Upon a further appeal to the Court of Appeal, that court also dismissed the appeal. Being aggrieved by the dismissal of its appeal by the two lower courts, the appellant appealed to the Supreme Court. Even though the crux of the case depended on interpretation to be placed on “of a public character”, the Supreme Court per Date-Bah JSC stated @ pg. 438 that:

“The appellant’s case is destroyed, in part, by its conversion in form from a company limited by guarantee into a company limited by shares. By this conversion, whether or not profits are actually distributed, the members of the company are entitled to profit from the business run by the company. The potential for there to be benefit to private individuals implies that, from 2001 onwards, the appellant school was no longer of a public character. However, before then the appellant’s case that it was of a public character is cogent and persuasive and, in our view, should be accepted. Section 10 of the Companies Act, 1963 (Act 179) provides that a company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profits. It spells out a sanction for officers and members of a company limited by guarantee who breach this prohibition against making profit. Accordingly, for as long as the appellant was a company limited by guarantee, there was a legal assurance that its business was not conferring any private benefit on individuals. Indeed, the company limited by guarantee, which was introduced into Ghanaian law by the Companies Act 1963, can be said to be functionally equivalent to a trust. This assurance was removed by appellant’s conversion into a limited liability company. We therefore consider that from the date of the conversion of the appellant from a company limited by guarantee into a company limited by shares, it ceased to be of a public character.”

Section 75(1) of Act 992 provides that a company limited by guarantee shall not at any time pay a dividend or make distribution or return of the assets of the company to members of the company. In addition, the general prohibition under section 8(1) of Act 992 requires that the object should not be to make profit other than for the furtherance of its object. That is the company may make profit only if the profit is to be reinvested in the activities of the company. Section 27(3) of Act 992 mandates that the constitution of a company limited by guarantee must state that the income and property of the company limited by guarantee shall be applied solely towards the promotion of the objects of the company and that no portion shall be paid or transferred, directly or indirectly, to members or directors of the company by way of dividend, bonus or profit provided that⁴⁵³:

⁴⁵³ Fourth Schedule of Act 992.

- (a) the constitution shall not prevent payment in good faith or reasonable and proper remuneration to officers of the company or members of the company for services rendered, or payment of interest for loan given, or reasonable and proper rent for premises,
- (b) members shall not be appointed to salaried office of the company or officer of the company paid by fees, and
- (c) no remuneration or benefit shall be given to the directors except in repayment of out-of-pocket expenses.

Act 992 makes it unlawful for a company limited by guarantee to carry on business for the purpose of making profit other than profit for the furtherance of its object. Where a company limited by guarantee carries on business for the purpose of profit other than profit for the furtherance of its object, section 8(2) of Act 992 provides that the officers and members cognizant of the violation are jointly and severally liable for the discharge of the debts and liabilities of the company incurred in carrying on that business. In addition, the company, every officer and member are liable to an administrative fine of twenty-five penalty units for each day during which the company carries on that business.⁴⁵⁴

3.7.3 Unlimited Companies

Act 992 provides that *“an unlimited company is a company which does not have a limit on the liability of its members”*⁴⁵⁵. That is, the liability of the members for the debts and liabilities of the company is not limited to the amount paid or payable for the shares but extends to the whole of the debts of the company. The liability of the shareholders is for the full debt of the company. However, the shareholders of an unlimited company are not directly liable to creditors for the debts of the company. When the company is operating as a going concern, the shareholders are only liable to contribute the unpaid amount on the shares that the shareholders have subscribed for in the company or amount due under personal commitments under an agreement with the company.⁴⁵⁶ On the liquidation of an unlimited company, however, the shareholders are liable to contribute the full amount to the extent of the remaining liability of the company. Section 40(4) of Act 992 provides that *“(4) In the event of a company being wound up, every present or past member is liable to contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the costs, charges and expenses of the winding up, and for the adjustment of the rights of the members and past members among themselves...”* In other words, the unlimited liability of the shareholders only arises when the unlimited company is insolvent at the time of its liquidation.

⁴⁵⁴ Section 8(2) of Act 992.

⁴⁵⁵ Section 7(4) of Act 992.

⁴⁵⁶ Section 40(1) and (2) of Act 992.

Section 7(3) of Act 992 mandates that an unlimited company must be registered with shares. An unlimited company is incorporated to carry on business for the purpose of making profit. The restriction imposed on a company limited by guarantee not to carry on business for profit does not apply to an unlimited company.

3.7.4 Private or Public Companies

Any of the above companies can either be a private company or a public company⁴⁵⁷. A private company according to section 7(5) of Act 992 must have four limitation or restrictions in its constitution. Section 7(5) of Act 992 provides that: A private company, other than a company limited by guarantee, is a company which by virtue of its constitutions

- (a) restrict the right to transfer its shares, if any;
- (b) limit the total number of the members and debenture holders to fifty, not including (i) persons who are genuinely in the employment of the company; and (ii) person who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be members or debenture holders of the company. Section 7(6) of Act 992 provides in addition that where two or more persons hold one or more shares or debentures jointly, they shall for the purpose of this section 7(3) be treated as a single member or debenture holder.
- (c) prohibits the company from making an invitation to the public to acquire shares or debentures of the company; and
- (d) prohibit the company from making any invitation to the public to deposit money for fixed periods or payable at call, whether bearing or not bearing interest.

This means that for companies with shares, the limitations or restrictions under section 7(5) of Act 992 must be applicable for such companies to qualify as private companies. But for a company limited by guarantee, the only requirement for it to be a private company is the membership of the company is fifty or less. This also means that for a private company limited by guarantee, the membership excludes the debenture holders. Section 7(7) of Act 992 provides that *“(7) A company which is not a private company is a public company except a company limited by guarantee which has a membership of fifty or less.”* This is understandable in relation to a company limited by guarantee since the Act prohibits such a company from registering with shares.⁴⁵⁸ Thus, there are no shares to impose restriction on transfer or to make public invitation to acquire those shares.

As noted, section 7(7) of Act 992 provides that a company, not a private company, other than a company limited by guarantee with fifty or less members, is a public company. This means that for a public company, there is:

⁴⁵⁷ Section 9(2) of Act 992.

⁴⁵⁸ Section 7(8) of Act 992.

- (a) no restriction on the right to transfer shares. Section 98(1) of Act 992 provides that shares are transferable without restriction except expressly provided in the constitution of the company. The constitution of a public company cannot provide for any restriction on the right to transfer share.
- (b) no limitation on the total number of members and debenture holders to fifty. This means a public company can have one or more members and debenture holders with no limitation on the total number.
- (c) no prohibition on the ability of the company to invite the members of the public to acquire shares or debentures of the company. The company can, therefore, advertise the sale of its shares to the public either by public offers or public invitation to acquire its shares.
- (d) no prohibition on the ability of the public company to invite the members of the public to deposit money with the company even though the company is not one whose authorised business is the mobilization of deposit.

Restriction on the right to transfer shares means the shareholders are prohibited totally from transferring the shares or the transfer is subject to stated conditions in the constitution. Such restriction on the right to transfer shares may relate to the requirement to first seek the consent of the directors or shareholders prior to transfer; the obligation to first offer the shares to existing shareholder prior to the transfer of the shares to third parties, which is right of first refusal or pre-emption right; or restriction on the time of transfer, or any other limitation. The requirement is that for a private company, there must be at least one restriction on the right to transfer shares. However, for a public company, there cannot be a restriction on the right to transfer shares. Shares of a public company are transferable without any restriction.⁴⁵⁹

In relation to the limitation on the number of members or shareholders and debenture holders, the Act restricts for a private company, the total number of members or shareholders and debenture holders to fifty. That means the total number of persons that acquire the shares of the company and lenders under written agreement of the company cannot exceed fifty. However, for the purposes of counting the shareholders and debenture holders, persons who acquire shares as part of the condition of employment or continue to hold the shares after cessation of employment are not to be counted. For a company limited by guarantee, the Act prescribes that it must than fifty members for it to qualify as a private company. Professor Gower explained that the exclusion of employees and ex-employees is designed to enable companies to institute co-partnership schemes without forfeiting their private status.⁴⁶⁰ In addition, where two or more persons jointly own shares or debentures, the persons are to be counted as one for the purpose of determination of the maximum number of fifty for a private company. There is no restriction on the total number of shareholders and debenture holders of a public company. For a company limited by guarantee, the Act prescribes that the only

⁴⁵⁹ Sections 98 and 322 of Act 992.

⁴⁶⁰ Gower's Report @ 57.

limit is that it must have less than fifty members for it to qualify as a private company. Where the members are more than fifty, the company limited by guarantee will be a public company.

A private company with shares is also prohibited from making an invitation to the public to acquire the shares or debentures of the private company. Section 295(1) of Act 992 provides for what amount to an invitation to the public to acquire shares or debentures of the company. There is a public invitation where a person makes an offer to the public or invite the public to make an offer to acquire the shares or debentures of a company, if the offer or invitation is:

- (a) communicated through an advertisement to the public through any means in Ghana,
- (b) made or circulated among persons, or made to one or more person who can renounce or assign the benefit of the invitation or shares or debentures to be acquired, or
- (c) made to persons to acquire shares or debentures on a stock exchange or for shares or debentures for which application is made to trade on a stock exchange.

Public invitation thus covers direct invitation to the public, invitation through intermediaries or renounceable right offers. Invitation through intermediaries will cover where a licensed dealer either purchased all the securities with the intent of selling to the public or makes an invitation on behalf of the public company. A private company with shares is prohibited from making an invitation to the public to acquire its shares or debentures, whilst a public company under section 294 of the Act can make such invitation subject to compliance with other conditions of the Act.

The last restriction on a private company with shares is the prohibition not to make an invitation to the public to deposit money with the company, whether bearing or not bearing interest, and whether for a fixed period or payable at call. A private company with shares cannot, therefore, place an advertisement for deposit to be made directly or indirectly to the company. The exception is in respect of a private company so licensed to carry on the business of banking under the Bank and Specialised Deposit-Taking Institution Act, 2016 (Act 930) or the Non-Banking Financial Institution Act, 2008 (Act 774). This is in view of section 4 of Act 992 which permits Act 930 and Act 774 to take precedent over Act 992 in the event of specialised regulated sectors.

A public company under section 294 is permitted to invite the public to deposit money with the company subject to the provisions of the Act. The conditions imposed on a public company in relation to public invitation for deposit of money is provided in section 316(1) of the Act. The public company must be either licensed to carry on the business of banking or written consent is granted by the Securities and Exchange Commission.

3.7.5 Conversion of one type of company to another

Act 992 permits the conversion of one type of company into another type of company. The Act also prohibits some form of conversions. The conversion permitted are those that do not result in the restriction of liability of persons who otherwise will be liable to contribute to the company to pay creditors or enable 'owners' take advantage of persons who have contributed to the company. The Act permits the conversion of a company limited by shares into an unlimited company. This opens up the liability of the shareholders. The Act also permits the conversion of a company limited by shares into a company limited by guarantee. This disadvantages the shareholders as they will no longer be entitled to distribution of profit. The Act, however, prohibits the conversion of an unlimited company into a limited liability company.⁴⁶¹ This will restrict the liability of shareholders. Further, the Act prohibits the conversion of a company limited by guarantee into a company limited by shares.⁴⁶² This will permit members who have received donations and contributions for a not-for-profit activity to share the profit. Act 992, under section 9, provides for the conversion of a company limited by shares into a company limited by guarantee. The Act also provides for the conversion of a private company into a public company.⁴⁶³

Notwithstanding the prohibited conversions under the Act, the same process may be achieved through other corporate structuring options. An advisor must, therefore, find the legal structure to achieve the object notwithstanding the prohibited conversion but within the scope of the law. For example, even though unlimited companies cannot be converted into a limited liability company, the same result can be achieved through the process of liquidating the unlimited company and transferring its assets to the limited liability company. However, this will not be applicable in relation to converting a company limited by guarantee to one limited by shares, since the Act mandate that net assets must be transferred to another company with a similar object.⁴⁶⁴

Conversion of a company Limited by shares into a company limited by guarantee

The process of conversion of a company limited by shares into a company limited by guarantee is provided under section 9 of Act 992. The section states the requirements and steps for the conversion. Section 9 of Act 992 provides as follows:

*“(1) A company limited by shares may be converted into a company limited by guarantee if,
(a) the liability on any of its shares is fully paid;*

⁴⁶¹ Section 30(2)(i) of Act 992.

⁴⁶² Ibid.

⁴⁶³ Section 302 of Act 992.

⁴⁶⁴ Section 27(3)(b)(iii) of Act 992.

- (b) all the members agree in writing to the conversion and to the voluntary surrender to the company for cancellation of the shares held by them immediately before the conversion;*
 - (c) a new constitution, appropriate to a company limited by guarantee, is adopted by the company pursuant to section 30; and*
 - (d) a member agrees or the members agree in writing to contribute to the assets of the company, in the event the company being wound up, to amount of money not less than that prescribed by subsection (3) of section 8.*
- (2) On delivery to the Registrar for registration of a statutory declaration by a director and the Company Secretary confirming that the conditions of subsection (1) have been complied with, the Registrar shall issue a new certificate of incorporation to the effect that the company is limited."*

The conditions and steps for the conversion are:

- (a) The liability on any of the issued shares of the company is fully paid. That is, all the shareholders have paid the full value of shares issued to them by the company. In other words, there must be no unpaid liability on the shares of the company. No shareholder is to owe any amount on the issued shares of the company held by the shareholder.
- (b) All the shareholders agree in writing to the conversion. In other words, unanimity is required. However, the shares of a dissenting shareholder may be bought by other shareholders who agree to the conversion to achieve unanimity.
- (c) All the shareholders must voluntarily surrender to the company for cancellation all the shares held by them immediately prior to the conversion.
- (d) A new constitution, appropriate for a company limited by guarantee, must be prepared and adopted by the members of the company. The adoption is to be done by a special resolution in accordance with section 30 of Act 992.
- (e) The members must agree in writing to contribute to the assets of the company in the event of winding up to an extent not less than the minimum total required under Act 992. That is, each member must give an undertaking to contribute a specific amount to the assets of the company in the event of winding up of the company in the future. The amount is not required to be contributed at the time of the conversion. What is required is the undertaking to contribute the amount in the event of winding up. A member who fails to give the undertaking will cease to be a member of the company limited by guarantee.
- (f) Once the above conditions are complete, the company must deliver to the Registrar for registration:
 - (i) a copy of the new constitution and the special resolution that adopted the constitution; and

- (ii) a statutory declaration sworn to by a director and the Company Secretary confirming satisfaction of the above conditions.

The Registrar must issue a new certificate of incorporation to meet the circumstances of a company limited by guarantee if satisfied that the conditions have been satisfied.⁴⁶⁵ From the date mentioned in the certificate:

- (a) the company is deemed converted into a company limited by guarantee,
- (b) the shares in the company are deemed to be validly surrendered and cancelled, and
- (c) the members of the company who have not agreed to contribute to the assets of the company in the event of the company being wound up cease to be members of the company.⁴⁶⁶

Under section 9(4) of Act 992, the company shall not change its name except in accordance with section 21(4) of the Act.⁴⁶⁷ That is, the change of name must be effected by special resolution subject to the approval of the Registrar. Section 9(5) of the Act requires the omission of words public liability company (plc) or private company limited (ltd) as the last word of the name of the company after conversion but that shall not be regarded as a change of name. Under section 9(6) of Act 992, if the Registrar is of the opinion that the name under which the company is registered will be misleading or undesirable on its conversion to a company limited by guarantee, the Registrar must direct the company under section 21(6) of Act 992 to change its name. In that case, the Registrar must not issue a new certificate until the company changes its name.⁴⁶⁸

Until a new certificate of incorporation is issued, neither the surrender of the shares of the company nor the agreement to contribute to the assets of the company in the event of the company being wound up shall take effect.⁴⁶⁹ Subsection (8) of section 9 of the Act provides that the conversion of a company, pursuant to section 9 does not:

- (a) affect the rights or obligations of the company except as mentioned in the section; or
- (b) render defective any legal proceedings by or against the company.

Converting a private company to a public company

Section 302 of Act 992 provides for the conversion of a private company into a public company. Section 302 of the Act provides that:

“(1) A private company shall be converted into a public company

⁴⁶⁵ Section 9(2) of Act 992.

⁴⁶⁶ Section 9(3) of Act 992.

⁴⁶⁷ Section 9(4) of Act 992.

⁴⁶⁸ Section 9(6) of Act 992.

⁴⁶⁹ Section 9(7) of Act 992.

- (a) if the company alters its capacity to operate as a private company, and*
- (b) where the company alters its registered constitution in a manner that is appropriate to a public company and not required in order to constitute a private company.*
- (2) Within twenty-eight days after the date of the special resolution to alter its capacity to operate as a private company or alter the registered constitution, the company shall deliver to the Registrar for registration a copy of the resolution in accordance with section 165.*
- (3) The Registrar shall publish notice of the conversion of the company in the Companies Bulletin.*
- (4) Where there is a default in complying with subsections (1) or (2), the company and an officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units."*

The subsection states four requirements necessary for the conversion of a private company into a public company:

- (a) the company must alter its capacity to operate as a private company;
- (b) the company must alter its registered constitution in a manner that is appropriate to a public company and not required in order to constitute a private company. The alteration is done by special resolution.
- (c) deliver to the Registrar within twenty-eight days of effecting the alteration by special resolution, a copy of the special resolution.
- (d) the Registrar, upon receipt of the special resolution, shall register the special resolution and publish a notice to that effect in the Companies Bulletin.

The first two conditions, alteration of capacity and alteration of the constitution by special resolution appears to be two separate conditions that must be satisfied. However, since the Act does not set out a separate capacity of a private company from that of a public company, the first requirement essentially relates to the second. The company must therefore alter the constitution to now conform to the constitution of a public company. The alteration of the constitution must be done in accordance with section 30 of Act 992. In essence, the alteration must aim at excluding restrictions and limitation imposed on a private company under section 7(5) of Act 992. A critical requirement for the alteration or amendment to the constitution under section 30 is the need for a special resolution by the company. The company is to deliver the special resolution within twenty-eight days to the Registrar for registration. The registration must be done in accordance with section 165 of the Act. The Registrar upon registration must publish notice of the registration in the Companies Bulletin to give notice of the conversion to the general public.

In addition, Act 992, under section 303(1), requires that a public company shall within 28 days after its incorporation, or after its conversion from a private company in accordance with section 302, deliver to the Registrar for registration a statement in lieu of prospectus. A copy of the statement in lieu of prospectus must also be delivered to the Securities and Exchange Commission.⁴⁷⁰ This means in addition to the constitution and the special resolution, a statement in lieu of the prospectus must be submitted to the Registrar and the Commission within 28 days.

Where a company fails to satisfy the requirements for the conversion of a private company into a public company, the company and any of its officers of the company who is in default are liable to pay administrative penalty of five hundred penalty units to the Registrar. In addition, where the converted company fails to submit the statement in lieu of prospectus to the Registrar and the Securities and Exchange Commission, the company and officers of the company who is in default is liable to pay administrative penalty of five hundred penalty units.

3.7.6 External Companies

Section 7(2)(d) of Act 992 provides that an external company is a company as defined in section 329. Section 329(2) of Act 992 provides that *“an external company is a body corporate formed outside the Republic which has an established place of business in the country”*. Subsection (3) provides that *“the expression “established place of business” means a branch, management, share, transfer, or registration office, factory, mine, or other fixed place of business, but does not include an agency unless the agent has, and habitually exercise, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills order on behalf of the body corporate”*.

From the above definition, an external company is a company incorporated outside Ghana but which has its branch, management, share, transfer or registration office, factory, mine or other place of business in Ghana. Agency is excluded unless the agent has authority to negotiate and bind the body corporate outside Ghana or maintains stock in Ghana from which the agent satisfies orders on behalf of the body corporate outside Ghana.

Section 329 of Act 992 expressly excludes body corporate outside Ghana that does not have an established place of business in Ghana but merely carries on business in Ghana through a genuine broker or general commission agents acting in their ordinary course of business. Secondly, the fact that a body corporate has a subsidiary which is incorporated, resident or carrying on business in Ghana, whether through an established place of business or otherwise, does not of itself constitute an established place of business of that body corporate.

⁴⁷⁰ Section 303(1) of Act 992.

Section 330(1) of Act 992 requires external companies to be registered within one month of establishing a place of business in Ghana by delivery to the Registrar its incorporation documents and a statement in duplicate with relevant particulars. The particulars to deliver are:

- (a) a copy of the certificate of incorporation and where applicable a copy of the constitution, charter, statutes, regulations, memorandum and articles, or any other instrument constituting or defining the constitution of the company in a language acceptable to the Registrar.
- (b) a statement duly notarized in the jurisdiction of origin of the company giving the following particulars regarding the company:
 - (i) the name;
 - (ii) the nature of business(es) or main objects of the company, if any;
 - (iii) the present and former name, address and business occupation of the local manager
 - (iv) if the company has shares, the number and nominal value of the authorised and issued shares, the amount paid up on the shares and the amount remaining payable on the shares distinguishing between the amounts paid and payable in case and the amount paid and payable otherwise in cash;
 - (v) the address in Ghana of a person in this Act referred to as the process agent, authorised by the company to accept service of process and other documents on behalf of the company;
- (c) a statement duly notarized in the jurisdiction of origin of the company giving the following particulars regarding the beneficial owners of the company
 - (i) the full name and any former or alternate name;
 - (ii) the date and place of birth;
 - (iii) the telephone number;
 - (iv) the nationality and national identity number or passport number or any other appropriate identification;
 - (v) the residential and postal address;
 - (vi) the nature of the interest including the details of any legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership; and
 - (vii) confirmation as to whether the beneficial owner is a politically exposed person; and
- (d) the particulars and copies of the charges on the property of the company that are required to be delivered for registration in accordance with section 337, or, if there are no charges, a statement in the prescribed form to that effect.

The Registrar is required to register the documents in the register of external companies and publish the particulars contained in the statement referred to in section 330(1)(b) of the Act in the Companies Bulletin.⁴⁷¹ The external company registered in Ghana bears the same name as the foreign company or body corporate. There is no separate legal personality of the registered external company in Ghana and that of the company or body corporate in its jurisdiction of incorporation. There are no

⁴⁷¹ Section 330(2) of Act 992.

separate directors, auditors, company secretary, shareholders or members, and other officers of the company or body corporate outside Ghana and the external company registered in Ghana.

In the event of any change in its incorporation or the particulars indicated above, the external company shall deliver or inform the Registrar in the required notice of the change for registration within two months of the effective date of the alteration.

The external company registered in Ghana is not separate from the body corporate in the jurisdiction of incorporation. As such, it does not have separate shareholders or members, directors, auditors or company secretary. The only additional person required to be appointed is the local manager. Section 332 of Act 992 provides an external company may appoint a person as the local manager in the statement or notice delivered to the Registrar. A person is not eligible to be appointed a local manager in Ghana unless the person is eligible to be appointed a director under the Companies Act, 2019. Section 332(3) of Act 992 provides that the acts of the local manager while carrying on the business in Ghana on behalf of that company shall bind the company unless the local manager does not have the authority so to act, and the person with whom the local manager was dealing had actual knowledge of the absence of authority, or, having regard to the position of the local manager with or relationship to the company, the person ought to have known of the absence of authority. The scope of the authority of the local manager must be filed with the Registrar.

The principal condition for use of an external company to carry on business is that there must be an existing company or body corporate outside Ghana. The use of an external company to conduct business in Ghana gives a foreign company or body corporate the opportunity to do so without necessarily incorporating a subsidiary company or new company in Ghana. The choice of use of an external company to conduct business in Ghana other than incorporation of a new company in Ghana depends on a number of factors. These may include the fact that the body corporate outside Ghana simply does not intend to have separate entities for its business. It may also be that the business to be undertaken in Ghana is of relatively short duration that it does not make business sense to incorporate another company in Ghana though legal presence is required. The business to be undertaken by the foreign company may also be just a one-off project such as building a bridge or an airport. It may be that the foreign body corporate may not wish to have a separate governance structure by appointing new directors, auditors or company secretary. The foreign company may also not be in the position to satisfy all the requirements for incorporating a company in Ghana and thus may choose to register the existing entity.

3.7.7 Other references

There are other references or terminologies used in relation to a company that are not references to types of company in the sense used above. But the references are used in respect of defining

relationships that exist between or among companies. Some of these references or terminologies are explained below.

Subsidiary company

A subsidiary company is defined under the First Schedule of the Companies Act, 2019 as:
“subsidiary” and “holding company” means a body that is the subsidiary of another and that other is its holding company if,

- (a) “that other body corporate by the exercise of a power directly or indirectly vested in it, whether by virtue of the beneficial ownership of shares or otherwise, can appoint or remove or procure the appointment or removal of all or not less than half of its directors for the time being or can prevent the appointment or removal of all or not less than half of its directors; but*
 - (i) a power exercisable in a fiduciary capacity for another person shall be treated as exercisable by that other person and not by the fiduciary;*
 - (ii) a power exercisable by virtue of shares held by way of security only for the purpose of a transaction entered into in the ordinary course of business of that other body corporate shall be disregarded; and*
 - (iii) a body corporate has a power to appoint a director of another body corporate if the appointment of that person as director of that other body corporate necessarily follows from that person’s appointment as director or other officer of that first named body corporate; or*
- (b) a subsidiary company is a subsidiary company of another if “it is a subsidiary of a body corporate which is that other’s subsidiary”.*

Generally, a subsidiary company refers to a company owned or controlled by another company or body corporate which is referred to as the parent company or holding company. The ownership refers to the parent company having an interest in the subsidiary company attributable to the acquisition of the shares of the subsidiary. ‘Control’ refers to the ability of the parent or holding company to direct the affairs of the subsidiary company. In essence, the parent or holding company has a controlling interest in the subsidiary company. Controlling interest is measured in terms of having the majority of the issued shares, interest or any arrangement that entitles the holder to majority voting rights in the subsidiary company. This definition is endorsed by the Act as it relates the controlling interest to the ability to appoint or remove all or at least half of the directors of the company. A company is thus a subsidiary of another body corporate, if the body corporate is, either

through beneficial ownership of shares or otherwise, able to appoint or remove all or half of the directors of the company. Appointment or removal of directors is done by ordinary resolution⁴⁷² which is a resolution passed by a simple majority of members present and voting⁴⁷³. A body corporate that is able to appoint or remove all or at least half of the directors of a company is a holding or parent company of that company, and the company is a subsidiary of the body corporate. In addition, where a company (Company A) is a subsidiary company of another company (Company B), then Company A is also deemed to be a subsidiary company of the parent company of Company B.

The determination of whether one company is a subsidiary company of another company is therefore dependent on the exercise of the power to appoint or remove all or at least half of the directors of the first company. This is subject to three exceptions:

- (a) where the power of appointment or removal is exercised in a fiduciary capacity, the body corporate over which the power is exercised is not to be considered the subsidiary of the fiduciary but the one on whose behalf the fiduciary exercises the power,
- (b) where the power of appointment or removal is exercised as a result of security granted over shares for a specific transaction in the ordinary course of business, the exercise of the power by the holder of security over the company, does not make the company a subsidiary company of the security holder, or
- (c) where the body corporate appoints a director or officer who automatically becomes a director of the company as a result of being a director or officer of the body corporate. An ex officio director resulting from appointment as director or officer of a body corporate is not considered the exercise of the powers of the body corporate to appoint the director of the company and hence the company is not considered to be a subsidiary company of the body corporate.

A holding company or parent company is the company that exercise the power to appoint or remove all or at least half of the directors of the subsidiary company. A wholly owned subsidiary refers to a subsidiary company whose issued shares are all held by a holding company, whether as the registered holder or not.

An important element to be aware of in defining the relationship between a parent or holding company and the subsidiary company is that the two companies are two separate legal entities. The ownership of all the issued shares of the subsidiary company by the holding company, making the subsidiary company a wholly owned subsidiary company does not change this position. As two separate legal entities, the holding company and the subsidiary company can enter into a contract or any legal relationship with each other unless such contract is expressly prohibited by law.

⁴⁷² Sections 172(2), 300 and 325, 172(5)(b), and section 176 of Act 992.

⁴⁷³ Paragraph 14 of Eighth Schedule of Act 992.

*Kuni v. State Gold Mining Corporation and Another*⁴⁷⁴ - the plaintiff, an employee of the Prestea Goldfields Ltd, a subsidiary of the State Gold Mining Corporation, sustained serious injuries when a mass of loose graphite rocks fell on him whilst working underground at the mines. He brought an action against both the State Gold Mining Corporation and the Prestea Goldfields Ltd for damages. The main issue for the determination of the court was whether it was proper for the plaintiff to sue the State Gold Mining Corporation. The court held that under the ordinary rules of law, a parent company and a subsidiary company, even a hundred per cent subsidiary, were distinct legal entities. However, there was no rule of law that said that a company could not, and should not, act as an agent of its holder. From the facts, it was clear that the Prestea Goldfields Ltd were the agents of the State Gold Mining Corporation and carried on its business. On the determination of when a subsidiary company can be considered an agent of a holding company, Sarkodee J. stated @ pg. 209 as follows:

“In this regard I think all the circumstances must be taken into account the following being particularly relevant:

- (1) Are the profits treated as those of the parent company?*
- (2) Are the persons conducting the business appointed by the parent company?*
- (3) Is the parent company the head and brain of the enterprise?*
- (4) Does the parent company govern the business and decide what should be done and what capital should be employed?*
- (5) Are the profits made by its skill and direction?*
- (6) Is the parent company in effectual control?*

*From the evidence of the plaintiff's third witness, the personnel manager of Prestea Goldfields Ltd., and that of the plaintiff's fourth witness, the Chief Inspector of Mines, there is no doubt that all these questions ought to be answered in the affirmative... The next question to consider is whether the State Gold Mining Corporation works the mines through their agent Prestea Goldfields Ltd. A company is said to be the subsidiary of another if that other (the holding company) is a member of it and controls the composition of its board of directors, or if the holding company holds more than half its "equity share capital": see the Companies Code, 1963 (Act 179), Sched. I, s. 2. Under the ordinary rules of law a parent company and a subsidiary company, even a hundred per cent subsidiary, are distinct legal entities. However, it seems there is no rule of law which says that a company cannot and should not act as the agent of its holders. No problem arises where there is an express agreement as in *Southern (Inspector of Taxes) v. Watson* [1940] 3 All E.R. 439, C.A. where after the business had been converted into a private company the agreement provided that the company should fulfil existing contracts as agents of the seller. Where there is no such agreement it is a question of fact in each case*

⁴⁷⁴ [1978] GLR 205.

whether the subsidiary company is carrying on the parent company's business or its own... The profits of Prestea Goldfields are treated as profits of the State Gold Mining Corporation. It is the State Gold Mining Corporation which appoints the persons who conduct the business of Prestea Goldfields Ltd. and who are in effective and constant control. These persons are the general manager, the mines manager and the chief engineer of Prestea Goldfields Ltd. To enable it to stamp its control on the Prestea Goldfields Ltd., the State Gold Mining Corporation by its manager appoints other senior employees who conduct the day to day affairs of the subsidiary company, the Prestea Goldfields Ltd. Some of the members of the State Gold Mining Corporation constitute the board of directors of Prestea Goldfields Ltd., commonly called the local board. Besides, the Mining Regulations, 1970 (L.I. 665), make the working of mine the responsibility of the manager who is also responsible for the safety and proper discipline of the men employed above and below ground. It is clear therefore that Prestea Goldfields Ltd. carries on the business of the State Gold Mining Corporation."

*Adams and Others v. Cape Industries PLC. And Another*⁴⁷⁵ - the plaintiff, Jimmy Wayne Adams, commenced an action against Cape Industries Plc., an English Company and its wholly owned subsidiary, Capasco Ltd., seeking to enforce a default judgment which had been awarded to him in the United States of America. The defendants included one of Cape's subsidiaries, NAAC, which was based in Illinois. The Court of Appeal held that the judgement could not be enforced against the English parent company, Cape Industries because Cape Industries and its subsidiaries should not be treated as a single economic unit. Scott J stated @ pg. 475 to 476 as follows:

"Mr. Morison argued that, on the facts of this case, NAAC should be treated as Cape's alter ego in Illinois or, alternatively, that the corporate veil distinguishing NAAC from Cape should be lifted. There is no reasonable basis, in my view, for regarding NAAC as the alter ego of Cape. NAAC was an Illinois corporation, carrying on business in the United States from which it earned profits and on which it paid United States taxes. Its debtors were its debtors, not Cape's debtors. Its creditors were its creditors, not Cape's creditors. Cape was not taxed in the United Kingdom or in the United States on NAAC's profits. The return to NAAC's shareholders took the form of an annual dividend passed by a resolution of NAAC's board of directors. The corporate forms applicable to NAAC as a separate legal entity were observed. NAAC made its own warehousing arrangements for the storage of its own asbestos. It had its own pension scheme for its own employees. The expression "alter ego" when used to describe the relationship between a company and its shareholders is not a term of art and can bear a flexible meaning. But I do not think it is in the least apt to describe the relationship between N.A.A.C.

⁴⁷⁵ [1984 A. No. 2597] - [1990] Ch. 433.

and Cape. The question whether the corporate veil should be lifted is more difficult. It is, I think, one which raises an issue of general importance. Is a parent company to be treated, for jurisdiction purposes, as resident in a country in which its wholly owned subsidiary is resident and carries on business? Should the answer be dependent on whether the subsidiary's business is associated with and, in a group sense, a part of the business of the parent company...The question in the present case is not whether the economic reality of the activities of the Cape group justifies the conclusion that Cape, the parent, was trading in the United States. Perhaps it was. But trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader... The trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract... The fundamental question is whether the United States court was entitled, on territorial grounds, to take jurisdiction over Cape. Cape was entitled, if it wished, to organise its group activities so as to avoid being present in the United States of America. The group traded in the United States through subsidiaries, Egnep, Casap, NAAC and Capasco. Each discharged a function relevant to the group business in the United States, but NAAC was the only one with a United States office. If Cape had been an individual, it would not, in my view, have been arguable that in trading in such a fashion Cape had subjected itself to the territorial jurisdiction of the United States' courts. Why should Cape's corporate character justify any different conclusion?"

Associated company

Act 992 defines associated company in the First Schedule as *“associated company” where used in the Act to describe the relationship of one body corporate to another means that the body corporate so described is the subsidiary or holding company of that other, or a subsidiary of that other's holding company, or a holding company of that other's subsidiary*”. An associated company refers to company related to another company either as a subsidiary company or a holding company.

Non-Ghanaian company

The First Schedule of Act 992 provides that *“non-Ghanaian” means an association incorporated or to be incorporated outside the Republic*”. Section 343 of the Act provides for the application of the provisions relating to an invitation to the public by a public company in Ghana to a general invitation to acquire shares or debentures of a non-Ghanaian company. Subsection (1) of section 343 of the Act thus provides that *“For purposes of this section and of section 295 [which deals with meaning of “invitations to the public”] the expression “non-Ghanaian company” means an association incorporated or to be incorporated outside the Republic which is not an external*

company as defined in section 329." A non-Ghanaian company, therefore, refers to a company incorporated outside Ghana that has no "*established place of business*" in Ghana. In other words, this is a foreign company that has no established place of business in Ghana.

4.0 CONSTITUTION OF A COMPANY

4.1 Introduction

Every association or organization must have rules that regulate the association or organisation. The rules must at a minimum establish a governance system for the association or organisation by indicating who can act for or exercise powers on behalf of the association or organisation. Those rules are referred to as the constitution of the organisation or association. Ghana has a Constitution that establishes the tripartite system of government based on concepts including rule of law, separation of power with checks and balances. The tripartite system allocates state powers among the executive, legislature and judiciary. The Constitution provides for the supremacy of the Constitution and at the same time establishes it as a basic law providing for the rights of persons. In a similar vein, every company, as an artificial person, is required to have a constitution.

Even though company law in the narrow sense regulates companies in Ghana, the Companies Act, 2019 (Act 992) requires every company in Ghana to have a constitution that complements the law in regulating the affairs of the company. The constitution may be drafted and submitted by the promoters or the company when incorporated⁴⁷⁶, or an applicable default constitution as provided in the Second, Third or Fourth Schedules of Act 992 will apply to the company⁴⁷⁷. In other words, every company must have a constitution whether adopted or applicable by default. Act 992, under the Second, Third and Fourth Schedules, provides for default constitution applicable to different types of companies where no registered constitution is provided by the company. Under the repealed Companies Act, 1963, the constitution was referred to as the Regulations of the company and it is the first document submitted for the incorporation of the company.⁴⁷⁸ It was the duty of the promoter to draft and submit the Regulations for the incorporation of the company. The submission of the Regulations was a mandatory requirement for the incorporation of the company under the repealed Act 179. This constitution is no longer a mandatory requirement under Act 992.

The constitution of the company is a fundamental document or charter of the company. To the extent permitted by Act 992, the constitution contains the rules that regulate the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company. It is the document that sets up the details of the governance system applicable to the company as an artificial person. The governance system must however be in accordance with the Act. The constitution of the company provides for the organs that can act on behalf of the company and allocate corporate powers to the various organs.

⁴⁷⁶ Sections 23 and 24 of Act 992.

⁴⁷⁷ Section 25 of Act 992.

⁴⁷⁸ Section 14 of Companies Act, 1963 (Act 179).

It, thus, has rules that regulate the internal administration and management of the company. It is also deemed to be a contract binding on the company, each director and each shareholder, and therefore the breach of any obligation imposed on each of them will entitle the injured party to remedies for breach of contract.⁴⁷⁹ The constitution is the document that now plays the role of the memorandum of association, which governs the relationship between the company and outsiders, and the article of association which provides for internal matters of the company.

Under Act 992, the submission of the constitution is no longer a mandatory requirement for incorporation of the company. Section 13 of Act 992 requires submission of application to the Registrar. However, Act 992 makes it optional for a company to have a registered constitution or have the default constitution as provided in the schedules to the Act applicable to the company. Even though optional, the importance of the constitution in regulating the affairs of the company must not be downplayed. Through the constitution, the promoters have within their control the power to fashion out rules that apply to the internal matters of the company to the extent permitted by Act 992. In essence, the promoters can through the constitution amend the law applicable to the particular company to be set up. However, the ability to amend the sections of the Act is only permitted when the section itself permits so. In reading the provisions, the term “unless otherwise stated in the constitution” or words to that effect is a pointer that through the constitution, sections under the Act can be amended in relation to the particular company. The amendment of the sections through the constitution is only permitted where a company chooses to have a registered constitution. The default constitution is drafted to be consistent with the provisions of the Act.

The general position however is that Act 992 takes precedent over the constitution of a company.⁴⁸⁰ However, where permitted by the Act, the regulations in the constitution will take precedent over the provision of the Act. The provision of the Act itself must permit the priority of the terms of the constitution on a particular matter for the constitution to take precedent in the event of inconsistency. As indicated, the amendment of a section of the Act must be permitted expressly by the Act to have effect. Where not stated or the section expressly indicated that “notwithstanding anything stated in the constitution” or words to that effect, an amendment of the section by contrary position stated in the constitution will generally not have any effect. In addition, the constitution may deal with matters that the Act is silent on or has not dealt with.

4.2 Registered constitution versus default constitution

Section 23 of Act 992 provides:

“(1) A company has the option to have a registered constitution.

⁴⁷⁹ Section 29(1) of Act 992.

⁴⁸⁰ In re Peveril Gold Mines Ltd [1898] 1 Ch. 122.

- (2) Where a company opts to have a registered constitution, the document that represents the constitution shall be:**
- (a) signed by one or more subscribers or the Company Secretary, and**
 - (b) delivered to the Registrar by the subscriber or an authorised representative before incorporation; or**
 - (c) delivered to the Registrar by the Company Secretary, director or an authorised representative after incorporation."**

Where the company chooses the option of delivering a registered constitution to the Registrar in accordance with section 23 of Act 992, section 24 provides for the effect of the registered constitution. The effect of the registered constitution delivered to the Registrar is to govern the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company. It should however be noted that to the extent the registered constitution does not modify the relevant provisions of the default constitution provided in the schedules of Act 992, the provisions of the default constitution to the extent not modified will continue to regulate the rights, powers, duties and obligations of the company and its constituents. In essence, where a company does not intend to be affected by any provision in the default constitution, that provision must be expressly altered, amended or expressly stated to be inapplicable in the registered constitution of the company.

Section 24 of Act 992 provides:

- "(1) Where a private company has delivered to the Registrar its document intended to be the registered constitution, the right, powers, duties and obligations of the company, the Board, each director and each shareholder of the company shall have effect as provided in the Second Schedule, unless restricted, limited or modified by the registered constitution.**
- (2) Where a public company has duly delivered the registered constitution of the company, the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company shall have effect as provided in the Third Schedule, unless they are restricted, limited or modified in accordance with this Act.**
- (3) Where a company limited by guarantee has duly delivered the registered constitution of the company, the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company shall have effect as provided in the Fourth Schedule, unless they are restricted, limited or modified by the registered constitution of the company duly delivered in accordance with this Act."**

For a company that does not intend to have a registered constitution, the applicable default constitution as provided in Second, Third and Fourth Schedules of Act 992 depending on the type of company. The company however has the liberty to submit a registered constitution to restrict, limit or modify the default constitution.

Section 25 of Act 992 provides as follows:

- “(1) Where a private company does not have a registered constitution, the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company shall be as provided in the Second Schedule and be deemed accordingly to be the constitution of that company, unless they are restricted, limited or modified by a registered constitution of the company duly delivered after incorporation in accordance with this Act.*
- (2) Where a public company does not have a registered constitution, the rights, powers, duties and obligations of the company, the Board, each director and each shareholder of the company shall be as provided in the Third Schedule, and be deemed accordingly to be the constitution of that company, unless they are restricted, limited or modified by the registered constitution of the company duly delivered after incorporation in accordance with this Act.*
- (3) Where a company limited by guarantee does not have a registered constitution, the rights, powers, duties and obligations of the company, the Board, each director and each member of the company shall be as provided in the Fourth Schedule and be deemed accordingly to be the constitution of that company, unless they are restricted, limited or modified by the registered constitution of the company duly delivered after incorporation in accordance with this Act.”*

4.3 Content of constitution of companies

The Second, Third and Fourth Schedules of Act 992 provide for the default constitution that may be adapted by promoters or a company as the constitution of the company, or applicable as the constitution of the company in the event no registered constitution is delivered to the Registrar. Section 26 of Act 992 requires some mandatory provisions in the constitution of a company depending on the type of company. In the drafting of a constitution to be registered, the promoter or company must ensure that the mandatory contents are provided in the constitution. The default constitution in the Schedules contained the mandatory requirements and import other requirements from the application for incorporation provided pursuant to section 13 of Act 992. Sections 26 and 27 of Act 992, read together, provide for the following as mandatory content of constitution of a company:

- (i) the name of the company with the last words of the name as required under section 21 of Act 992;

- (ii) the name of the first directors of the company;
- (iii) statement that the powers of the directors are limited in accordance with section 189 of Act 992;
- (iv) statement that the company has the powers of a natural person of full capacity;
- (v) if the company is one with limited liability whether by shares or guarantee, a statement that the liability of the members of the company is limited;
- (vi) for a company with shares, the number of shares with which the company is registered;
- (vii) for a private company limited by shares, a statement that a call is made at the time when the resolution of the directors authorizing the call is passed and may be required to be paid by instalments; and
- (viii) for a company limited by guarantee, a statement that:
 - (a) each member of the company undertakes to contribute to the assets of the company in the event of winding up of the company while the person is a member or within one year after that person ceases to be a member, for payment of the debts and liabilities of the company and the cost of winding up.
 - (b) income and property of the company shall be applied solely toward the promotion of objects of the company and no portion of the income or property shall not be paid or transferred directly or indirectly to the member of the company by way of dividend, bonus or profit except remuneration for services rendered (members and directors are however prohibited from appointment into salaried position) or payment of out-of-pocket expenses.
 - (c) upon winding up or dissolution of the company, the net assets of the company shall not be distributed among the members but shall be transferred to any other company limited by liability having an object similar to the object of the company or applied to a charitable object. The company and objects to be determined by ordinary resolution of the members in a general meeting before the dissolution of the company.

A critical omission by the Companies Act, 2019 from the mandatory content required under a similar provision in the now repealed Companies Act, 1963 is the requirement for the statement of the authorised business or object of the company. Statement of the authorised business or object is no longer mandatory and the promoters of the company have the discretion to decide whether to state the authorised business or object or not to do so.

As previously indicated, the duty to ensure the above contents are in the constitution is only applicable where the company intends to have a registered constitution. A company that does not intend to have a registered constitution need not submit a constitution. The applicable default constitution as provided in the Schedules will be applicable. In addition, information required for the mandatory content are inferred from the application for incorporation required under section 13 of Act 992.

Section 26(5) of Act 992 provides:

- “(5) In the case of a company that does not have a registered constitution, the company shall be deemed to have as part of the constitution under section 25 the matters with respect to the*
- (a) name of the company,*
 - (b) names of its first directors,*
 - (c) number of shares with which the company is registered, and*
 - (d) number of shares subscribed by each shareholder on incorporation of the company and the consideration to be respectively paid for those shares as are respectively stated in the application for incorporation under section 13.”*

However, a company without a registered constitution may at a later date choose to have a registered constitution in which case it must submit a registered constitution that must have the mandatory content. In addition, the company must submit a special resolution of the company indicating an intention to have a registered constitution.⁴⁸¹

In addition to the mandatory content as stated above, the constitution of the company may have other lawful provisions. Section 26(4) of Act 992 provides that:

- “(4) A registered constitution may contain any other lawful provisions relating to the structure and administration of the company.”*

In *DuPaul Wood Treatment v. Asare*⁴⁸², her Lordship Sophia Akuffo JSC stated @ pg 697 in relation to the content of the regulations as follows:

“... the regulations of a company incorporated in Ghana, must have certain prescribed form and contents as well as recommended provisions and may be changed in a certain prescribed manner (cf sections 16 – 22). In the genesis of a company with shares incorporated under the Code, there are three significant characteristics that, in my view, may be likened to its genetic markers (DNA). These are the names of the first directors of the company (sections 16(2)(d) and 181(2)); the number of shares of no par value with which the company is to be registered (sections 16(4) and 40(1)); and the signature and names of the subscribers to the regulations (as well as the number of shares each is taking and the amount of the consideration payable in cash in respect of such shares) duly attested by at least one witness. These are pieces of information that must appear in the regulations in order to be registrable. Thus, for example, in section 18(1) and (2) it is stipulated that:

⁴⁸¹ Section 26(2) of Act 992.

⁴⁸² [2005-2006] SCGLR 667.

“(1) The regulations of any company registered after the commencement of this Code shall be signed by one, or more subscribers in the presence of, and shall be attested by, one witness at the least.

(2) In the case of Regulations of a company with shares, the subscriber, or each subscriber if more than one, shall write opposite to his name the number of shares he takes and the cash price payable therefor, and shall take at least one share...”

4.4 Form and subscription to constitution

Section 27 of Act 992 provides for the form that a constitution of a company must take. The section referred to Schedules of Act 992 which have templates or default constitutions to be adapted depending on the type of company to be incorporated. Second Schedule of Act 992 provides for the constitution for a private company limited by shares, Third Schedule prescribed the constitution for a public company limited by shares, and Fourth Schedule provides for the constitution of a company limited by guarantee. Section 27(2) of Act 992 provides for mandatory matters that must be contained in a registered constitution where a company chooses to have a registered constitution other than the default constitution. In addition, section 27(4) provides that the registered constitution of a company must be printed, type-written, hand-written or be in any other legible form acceptable to the Registrar.

Section 28 of Act 992 also provides for subscription to the constitution of the company by persons referred to as subscribers. Subscription to the constitution of a company entails the signing of the constitution by one or more subscribers in the presence of and attested to by a witness. In other words, to subscribe to a constitution means signing of the constitution by the subscriber in the presence of a witness who must attest to the fact that he was present when the signing was done by the subscriber. The person subscribing to the constitution of a company with shares must have taken at least one share in the company. Section 33 Act 992 provides that subscribers are members of the company and upon incorporation shall have their particulars entered in the name of the register of members. The section further provides that in respect of a company with shares, each member is a shareholder and must hold at least one share.

The subscribers are the first persons who indicate their intention to become members of the company when incorporated. They are the founding or original members of the company. Act 992 defines subscribers in the First Schedule as persons who apply for incorporation of a company. By subscribing to the constitution, section 33 of Act 992 provides that the subscribers must be recognised as members upon the incorporation of the company. By subscribing to the constitution or application for incorporation, subscribers give an indication to become members of the company when the company is incorporated. The subscribers must, therefore, after incorporation have their names entered in the register of members as members of the company. Prior to incorporation, the persons

are subscribers to the constitution since they signed the constitution. They are not members of the company as the company is not in existence. A person cannot be a member of a non-existing entity. The subscribers transform into members or shareholders only upon the incorporation of the company and not before.

In *DuPaul Wood Treatment v. Asare*⁴⁸³, her Lordship Sophia Akuffo JSC stated @ pg. 698 in relation to the effect of subscription to the regulations as follows:

“Furthermore, by virtue of section 30 of the Code, subscribing to the regulations of a company confers a special legal status on the subscriber, making him or her a member of the company from the moment of its incorporation.”

*Adehyeman Gardens Ltd v. Assibey*⁴⁸⁴ - Sophia A.B. Akuffo, JSC commenting on the issue of the effect of subscribing to the Regulations (constitution) of a company stated @ pg. 1026 as follows:

“Section 21 of the Code shows that the Regulations of a company is no mean document. ... Once registered, the Regulations have (inter alia) the effect of a contract under seal between:-

- i. the company and its members*
- ii. the company and its officers*
- iii. the members and the officers of the company*
- iv. the members of the company inter se and*
- v. the officers of the company inter se*

As a subscriber, therefore, the Respondent's shareholding, as well as the consideration payable by him therefore, is contractual. He does not need to be issued with a certificate for his membership to take legal effect. Consequently, there is, no doubt whatsoever that, since the Respondent is a subscriber to the Regulations of the company (as evidenced by Exhibit 1), he, pursuant to section 30(1), became a member of the Company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5).”

4.5 Effects of constitution of the company

Once a company adopts a registered constitution or in case it registered without a registered constitution, the applicable default constitution that applies to the company has a number of legal

⁴⁸³ [2005-2006] SCGLR 667.

⁴⁸⁴ [2003-2004] 2 SCGLR 1016.

effects provided under section 29 of Act 992. Three legal effects are provided under Act 992. These are:

- (1) Constitution becomes a contract under seal binding on the company, members or shareholders, and directors and officers of the company.

Section 29(1) of Act 992 provides that:

- “(1) Subject to this Act, the constitution has the effect of a contract under seal*
(a) between the company and each member or officer; and
(b) between the members or officers themselves by which they agree to
observe and perform the functions contained in the constitution as
amended from time to time, in so far as they relate to the company,
the members or the officers.”

Upon incorporation of the company, the constitution of the company, whether a registered constitution or a default constitution, becomes a contract under seal between:

- (a) the company and each member
- (b) the company and each officer
- (c) the member and the officers of the company
- (d) the members of the company inter se; and
- (e) the officers of the company inter se.

The obligations of the company, members and officers as stated in the constitution of the company become contractual obligations that the company, members and officers agree to observe and perform. The Act provides that the constitution becomes a contract under seal to avoid the requirement of whether or not a valid consideration has been provided by the company, members or officers. The constitution becomes a contract binding on the company, each of the members and officers. By reason of this, a member has the right to enforce the observance of the terms of the constitution by virtue of the contractual effect given to the constitution.

*Adehyeman Gardens Ltd v. Assibey*⁴⁸⁵ - Sophia A.B. Akuffo, JSC commenting on the issue of the effect of subscribing to the Regulations (constitution) of a company stated @ pg 1026 as follows:

“Section 21 of the Code shows that the Regulations of a company is no mean document. ... Once registered, the Regulations have (inter alia) the effect of a contract under seal between:-

- i. the company and its members*
- ii. the company and its officers*
- iii. the members and the officers of the company*

⁴⁸⁵ [2003-2004] 2 SCGLR 1016.

*iv. the members of the company inter se and
v. the officers of the company inter se
As a subscriber, therefore, the Respondent's shareholding, as well as the
consideration payable by him, therefore, is contractual."*

The above was re-echoed in *DuPaul Wood Treatment v. Asare*⁴⁸⁶, by Sophia Akuffo JSC @ pg. 697 when she stated:

"Under section 21, once registered, the regulations have the effect of a contract under seal. Hence as was pointed out in the judgement of this court in Adehyeman Gardens v. Assibey [2003-2004] 2 SCGLR 1016 at 1026: ..."

*Rayfield v. Hands*⁴⁸⁷ - the articles of association of a private limited company which was incorporated in 1941 provided by article 11 that 'Every member who intends to transfer shares shall inform the directors who will take said shares equally between them at a fair value...'. The qualification of directors was the holding of one share in the company. In April 1955, the plaintiff, a member of the company, informed the directors for the time being of his intention to transfer his shares, but the directors refused to purchase them. It was held that the directors were bound in contract to purchase plaintiff's shares at a fair value (to be ascertained by an inquiry, if necessary) for the following reasons: (1) having regard to Companies Act 1948 s 20(1), article 11 constituted an enforceable contract between the directors (as members of the company) and the other members of the company on which plaintiff was entitled to rely without joining the company as a party; (2) the use of the word 'will' in article 11 did not import an option or choice on the part of the directors by contrast to the word 'shall' used earlier in the same article. Vaisey J stated @ pg. 198-199 that:

"The next and most difficult point taken by the defendants, as to which it would appear that there is not very clear judicial authority, is that art 11, as part of the company's articles of association, does not do what it looks like doing, that is to create a contractual relationship between the plaintiff as shareholder and vendor and the defendants as directors and purchasers. This depends on the Companies Act, 1948, s 20(1), which reads as follows:

"Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

This sub-section re-enacted corresponding provisions in the earlier Companies Acts, but it seems that these provisions are for the purposes of the present case substantially identical with the sub-section which I have just read. In the

⁴⁸⁶ [2005-2006] SCGLR 667.

⁴⁸⁷ [1960] 2 All ER 194 (Ch. D).

circumstances, I was referred to what the textbooks have to say on the subject, and I think I ought to summarize their statements... Now the question arises at the outset whether the terms of art 11 relate to the rights of members inter se (that being the expression found in so many of the cases), or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that in my judgment the relationship here is between the plaintiff as a member and the defendants not as directors but as members... I am of opinion therefore that this is in words a contract or quasi-contract between members, and not between members and directors... On the whole, if the proper way to construe the articles of association of a company is as a "commercial" or "business" document to which the maxim "validate if possible" applies, I think that the plaintiff in this action ought to succeed. Not one of the judges in Dean v. Prince showed any signs of shock or surprise in the assumption there made of a contract between directors being formed by the terms of a company's articles. I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership."

*Adehyeman Gardens Ltd v. Assibey*⁴⁸⁸ - the Company was incorporated in April 1991 as a limited liability company with 1,000,000 shares of no par value. The Regulations of the Company shows that the subscribers to the Company were the 2nd Appellant, who subscribed to 600,000 shares for which the consideration payable in cash was ₵600,000.00 and Nana Osei Afriyie and the Respondent, each of whom subscribed to 200,000 shares for which the consideration payable in cash, in each case, was ₵200,000.00. Sometime after the Company commenced its operations, problems developed between the 2nd Appellant and the Respondent. Whilst the Respondent claimed that he was a fully paid-up member of the Company and entitled to participate in the day to day running of the Company, the 2nd Appellant insisted that the Respondent had not paid for any of his shares. Subsequently, the solicitors for the Company informed the Respondent that he (the Respondent) was only a 'nominal shareholder' of the Company. The letter also purported to offer to the Respondent twenty percent shares in the Company, in consideration of which he must pay an unspecified sum of money that he was to ascertain by contacting the office of the Managing Director within fourteen days, failing which the shares would be offered to someone else. This letter was immediately followed by another communication from the 2nd Appellant referring to the solicitors' letter and informing the Respondent that 'As a nominal shareholder', he had not paid for his shares and, in order to become a fully-fledged shareholder, he must pay a stated amount being twenty percent of the current net

⁴⁸⁸ [2003-2004] 2 SCGLR 1016.

value of the company's assets. The issue for determination by the court was whether or not the Respondent cannot be described as a member of the company because he had not fully paid up for his shares. Sophia A.B. Akuffo, JSC on the issue of the effect of subscribing to the Regulation (Constitution) of a company stated as follows:

"Section 21 of the Code shows that the Regulations of a company is no mean document. It is the registration of the Regulations that brings the company into existence as a body corporate (see section 14 (d) of the Code). Once registered, the Regulations have (inter alia) the effect of a contract under seal between:-

- the company and its members*
- the company and its officers*
- the members and the officers of the company*
- the members of the company inter se and*
- the officers of the company inter se*

As a subscriber, therefore, the Respondent's shareholding, as well as the consideration payable by him therefore, is contractual. He does not need to be issued with a certificate for his membership to take legal effect. Consequently, there is, no doubt whatsoever that, since the Respondent is a subscriber to the Regulations of the company (as evidenced by Exhibit 1), he, pursuant to section 30(1), became a member of the Company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5). By the terms of the Code, until all of his shares are forfeited for non-payment of a validly made call (or until the occurrence of any of the other said eventualities), a subscriber remains a fully-fledged member and shareholder of the company, even if he has not paid a pesewa for his shares. The Code does not prescribe any mode for forfeiture of shares and rather leaves this to be spelt out in the Regulations of the company... There is nothing on the record to show that there was any agreement made at any time between the 1st Appellant and the Respondent whereby the Respondent became liable to pay for his shares on any fixed date. As a result, it is only by a formal call that any amount may become due on any of his shares. However, the record is totally devoid of any evidence, whether in the form of minutes of a director's meeting, or in the form of a signed resolution, that the Company went through, or even made any pretence of going through, the processes prescribed by its Regulations, before purporting to forfeit the Respondent's shares... Consequently, even though the Respondent had not paid for his shares nor been issued with any share certificate, in law, he has never ceased to be a member of the company and he remains a shareholder thereof. The Court of

Appeal was, therefore, right in granting the Respondent the reliefs that it did and did not commit any errors whatsoever."

Wood v. Odessa Waterworks Co.⁴⁸⁹ - a waterworks company constituted under the Companies Act, 1862, having applied the profits which had been earned to the construction of productive works instead of paying a dividend to the shareholders, passed a resolution proposing to give to the shareholders debenture bonds bearing interest, and redeemable at par, by an annual drawing, extending over thirty years. The articles of association empowered the directors, with the sanction of the company, to declare dividend "to be paid" to the shareholders. The claimant, a shareholder opposed to this motion, applied for an injunction to prevent the dividends being paid out as proposed by the resolution. The court had to decide whether the memorandum and articles could constitute a contract not just among the company and its shareholders but also among the shareholders. The court held that the articles of association constitute a contract between the shareholders and that what was proposed to be done by the passing of the resolution was, upon the true construction of the articles, not in accordance with them. Consequently, the court held that there must be an injunction to restrain the directors from acting on the resolution. Stirling J stated @ pg. 642 & 646 as follows:

"The question, simply, is whether it is within the power of a majority of the shareholders to insist against the will of a minority that the profits which have been actually earned shall be divided, not by the payment of cash, but by the issue of debenture-bonds of the company bearing interest at £5 per cent... Now the rights of the shareholders in respect of a division of the profits of the company are governed by the provisions in the articles of association. By sect. 16 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the articles of association "bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act. Sect. 50 of the Act provides the means for altering the regulations of the company contained in the articles of association by passing a special resolution, but no such resolution has in this case been passed or attempted to be passed; and the question is, whether this is a matter as to which the majority of the shareholders can bind those shareholders who dissent. The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other; and the question which I have just stated must, in my opinion, be answered in the negative if there be in the articles a contract between the shareholders as to a division of profits, and the provisions of that contract have not been followed... It was said

⁴⁸⁹ (1889) 42 Ch D 636.

that nothing could be more reasonable than that this company should be able to pay dividends in the manner proposed, or by the division in specie of assets of the company, e.g., fully paid-up shares in another company held by the Defendant company. With those considerations, however, I have nothing to do. They might properly have been weighed by the framers of the articles of association: they may possibly be fit to be submitted to the shareholders of this company, if and when they are invited to consider the propriety of altering the regulations of the company under sect. 50 of the Companies Act, 1862. What I have to determine is, whether that which is proposed to be done is in accordance with the articles of association as they stand, and, in my judgment, it is not, and therefore the Plaintiff is entitled to an injunction so far as relates to the payment of dividends until the hearing of the action, or further order, and the costs of the motion will be costs in the action."

Section 29(1) of Act 992 does not state that the constitution binds third parties, neither does the constitution as a contract bind members and officers if it does not relate to them as members or officers. The constitution of the company does not constitute a contract between the company and an external person who is not a member or officer. Further, an external person who is given rights under the constitution of the company in his capacity as an outsider cannot sue in that capacity, whether he is also a member of the company or not.

*Eley v. Positive Government Security Life Assurance Co Ltd*⁴⁹⁰ - the articles of association of the company contained a clause in which it was stated that the plaintiff should be a solicitor to the company and should not be removed from his office, unless for misconduct. The articles were signed by seven members of the company and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff acted as solicitor to the company for some time, but ultimately the company ceased to employ him and employed other solicitors. The plaintiff brought an action against the company for breach of contract in not employing him as a solicitor to transact their legal business on the terms of the articles. It was held that the articles of association were a matter between the shareholder inter se, or the shareholders and the directors, and did not create any contract between the plaintiff and the company. Lord Cairns L.C. stated @ pg. 90 that:

"I wish to say, in the first place, that in my opinion a contract of the kind suggested to exist in this case ought not to receive any particular favour from the Court. The statement is that Baylis was endeavouring to form a joint stock insurance company upon a new principle, and applied to the plaintiff to make advances to meet the expenses of getting up the company, and it was arranged between them that in the event of the company being formed the plaintiff should be appointed permanent solicitor to the company. That is to say, a bargain is made between a professional man and Baylis which, so far as the case is concerned, does not appear to have been

⁴⁹⁰ (1876) 1 Ex D 88 CA.

communicated to those who were invited to join the company, that if the former will advance money for the formation of the company, he shall be appointed permanent solicitor, and the company shall be obliged to employ him as their professional adviser. When the articles are prepared, they are so by the plaintiff, and in them he inserts a clause which no doubt informs those who signed the articles of the arrangement, but does not appear to have been brought to the notice of those who joined from receiving circulars. This, I repeat, is not a proceeding which the Court would encourage in any way... Articles of association, as is well known, follow the memorandum, which states the objects of the company, while the articles state the arrangement between the members. They are an agreement inter socios, and in that view, if the introductory words are applied to Art. 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is reg inter alios acta, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against the company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff... It is said, this, though not an agreement in itself, is at all events a statement of what had been agreed upon; it must have been intended to be brought to the plaintiff's knowledge, he has accepted and acted upon it, and therefore it is evidence of another agreement on which he can rely."

Hickman v. Kent Romney Marsh Sheep-Breeders' Association⁴⁹¹ - Article 49 of the articles of association provided that differences between the association and any of its members relating to any of the affairs of the association must be referred to the decision of an arbitrator. Later, the plaintiff issued a writ against the association and its secretary claiming injunctions and declarations in respect of matters which related to the affairs of the association and for certain other reliefs, which in substance was to enforce his rights under the articles. On an application by the defendants for a stay of the action pursuant to section 4 of the Arbitration Act, 1889, and to refer the matters in dispute to arbitration in accordance with the terms of article 49, the court had to decide on the issue of whether a person who is not a member of the company has rights to sue on the contract provided by what is now section 33 of CA 2006. It was held that (i) article 49 must be treated as a statutory agreement between the members and the association as well as between themselves inter se, and it constituted a submission to arbitration within the Arbitration Act, 1889; (ii) the application for membership by the plaintiff and its acceptance by the association constituted a contract between the plaintiff and the association by which the plaintiff agreed in writing to conform to the regulations of the association, one of which regulations was that all differences between the association and a member should be

⁴⁹¹ [1915] Ch.708.

submitted to arbitration, and that contract also constituted a submission to arbitration; therefore, on both those grounds, a stay of the action would be granted. Astbury J stated @ pgs. 910 to 911 that:

"By art 49, disputes between the association and any of its members are to be referred to arbitration. This is a common form of article in private companies, and, the objects of the association being what they are, it and its members might be seriously prejudiced by a public trial of their disputes. If this summons fails, as the plaintiff contends that it should, these arbitration clauses in articles are of very little, if any, value... It is laid down in textbooks of the highest authority that the articles are not a contract between the members and the company, but a contract with the other members. The articles are a contract only as between the members inter se in respect of their rights as shareholders. The exact nature of this covenant - that is, the covenant referred to in s 14 - has given rise to considerable discussion and is even now very difficult to define; but it is now settled that it is not equivalent to a contract between the company, on the one part, and the members, on the other, on which either a member can sue the company or the company can sue a member... In the present case the plaintiff's action is, in substance, to enforce rights as a member under the articles against the company. The 49th article is a general article applying to all the members as such, and, apart from technicalities, it would seem reasonable that the plaintiff ought not to be allowed, in the absence of any evidence filed by him, to proceed with an action to enforce his rights under the articles which in itself is a breach of his obligation contained therein to submit his disputes with the company to arbitration, and, if the case falls within the Act, I see no reason for exercising my discretion under s 4 in his favour. In my judgment, art 49, for the reasons above referred to, creates rights and obligations enforceable as between the plaintiff and the company respectively..."

(2) Power of appointment and removal of officers granted under the constitution

The second effect of the constitution of the company is stated in section 29(2) of Act 992. The section states that *"(2) Where the constitution empowers a person to appoint or remove a director or any other officer of the company, that power is enforceable by that person although that person is not a member or officer of the company."*

Any person can be given the powers to appoint or remove directors or any other officers of the company. For the person to be able to enforce that power, the power must have been conferred on the person by the constitution of the company. Once it is so stated in the constitution, the person can enforce the power even though the person, other than the exercise of the power, has no relationship or nothing to do with the company. The power may be given to debenture holders when the company borrows money. The debenture holder may insist on maintaining the directors so may

request for the grant of such power through the constitution of the company. Once, granted, the person may be able to enforce the contract. The power can also be conferred on an employee union to appoint some of the directors. Since the person on whom the power is conferred does not need to be associated with the company, promoters can in the constitution confer the power on unrelated persons such as a chief of the community, a religious leader or reputable persons.

(3) Representative action to enforce rights under the constitution

Section 29(3) of Act 992 provides that *“(3) In an action by a member or an officer to enforce an obligation owed under the constitution to that member or officer and any other member or officer, that member or officer shall, if any other member or officer is affected by the alleged breach of the obligation, sue in a representative capacity on behalf of that member or officer and all other members or officers who may be affected other than any who are defendants and the provisions of section 205 shall apply.”* Subsection (1) of section 29 of Act 992 provides that the constitution becomes a contract under seal among the company, members and officers inter se. Failure to undertake an obligation or comply with the terms in the constitution amount to a breach of contract. The breach may affect members or officers. Section 29(3) of the Act requires that where a member is taking action to enforce rights conferred on that member and other members, a breach of which has affected that member and the others, the action must be instituted by the particular member on his own behalf and on behalf of all the affected members. That is, the action must be instituted in a representative capacity. The same position is applicable to officers of the company.

Such a representative action is governed by section 205 of Act 992, which provides that the member instituting the action does not require the consent of the other members to bring the representative action; has the sole conduct of the action, bear the cost of the action if damages and costs are awarded against him; favourable judgment obtained by the member is for the benefit of all the affected member; other members can apply to be joined as co-plaintiffs or as defendants if they do not support the action of the member instituting the representative action. Representative action is to avoid multiple actions by members arising from breach of a term of a constitution of a company.

The three effects of the constitution of a company provided in section 29 of the Act and discussed above are mandatory. The person applying for the incorporation of the company or the member of the company upon incorporation cannot vary this effect. Section 29(4) of Act 992 provides that the registered constitution of a company is void to the extent that it contravenes or is inconsistent with the requirements of the Act including requirements of section 29. Unless exempted under the Stamp Duty Act, 2005 (Act 689), contracts are required to be stamped upon payment of the applicable stamp duty. However, a registered constitution, even though a contract, is not required to be stamped as other contracts.⁴⁹²

⁴⁹² Section 29(5) of Act 992.

4.6 Adoption, amendment and revocation of constitution

Section 30 of Act 992 permits adoption, amendment or revocation of the constitution of the company from time to time. A company that does not have a registered constitution but regulated by the default constitution may subsequently choose to adopt a registered constitution. The adoption must be done by shareholders or members of the company by a special resolution.⁴⁹³ Shareholders or members may also by special resolution amend or revoke the constitution of the company in accordance with Act 992.⁴⁹⁴ The constitution of the company upon incorporation becomes a public document. The constitution may be relied on by a person who transacts business with the company. Frequent amendments may make it difficult to rely on the document. At the same time, amendment or alteration must be possible since it may be necessary in some instances. The Act balances the two positions of avoiding frequent amendment or revocation and making it possible to amend or revoke the constitution when necessary. The Act, per section 30, achieves this by setting the minimum requirement for adoption, amendment or revocation as a special resolution of the shareholders or members.⁴⁹⁵ A special resolution is a resolution passed by three-quarters or seventy-five majority of members present and voting at a general meeting.⁴⁹⁶ In addition, the Act requires that a special resolution must not be passed at a general meeting unless notice of the special resolution has been given and the terms of the special resolution are set out in the notice.⁴⁹⁷

For the amendment or revocation, the special resolution is the minimum or basic requirement. There may be other conditions that must be satisfied to amend or revoke specific terms in the constitution of the company. Section 30 of Act 992 provides examples of matters that there are additional requirements that must be complied with upon passing the special resolution.

- (a) Amendment of the name of the company requires the consent of the Registrar under section 21 of Act 992 in addition to the special resolution. Section 30(2) of Act 992 provides that:

“(2) For the purposes of subsection (1)(b),

- (a) the name of the company shall not be changed except with the consent of the Registrar in accordance with section 21 of the Act.”*

In *Cowries Finance v. Pako Bay Seafood Ltd*⁴⁹⁸ – on the issue of change of name, Akoto-Bamfo J. stated @ pg. 521 that:

“Section 15(3) of Act 179 provides that: “A company may, by special resolution and with the approval of the Registrar signified in writing change its name.” Exhibit CA

⁴⁹³ Section 30(1)(a) of Act 992.

⁴⁹⁴ Section 30(1)(b) of Act 992.

⁴⁹⁵ Section 30 of Act 992.

⁴⁹⁶ Eighth Schedule, paragraph 14 of Act 992.

⁴⁹⁷ Paragraph 2(a)(iii) of Eighth Schedule of Act 992.

⁴⁹⁸ [1999-2000] 1 GLR 514.

7 was signed by G Lomotey on behalf of the Registrar of Companies. If the registrar did not give his approval, certainly his signature would not have appeared on the document.”

- (b) Alteration of the number of shares of the company must be done in compliances with sections 9, 59 to 65, 78 to 82, 219 or 239 of the Act.⁴⁹⁹
- (c) The authorised business or object of the company must only be amended in accordance with sections 15 or 239 of the Act. Section 15 of the Act provides that the certificate of incorporation of the company is conclusive evidence of the incorporation of the company. Section 239 of Act 992 provides for arrangement or compromise with the approval of the court.⁵⁰⁰
- (d) In the event shares are divided into classes, variation of the rights attached to a class must be done in accordance with section 50 of the Act which deals with the requirements for variation or class right, or in accordance with section 239 of Act 992 which deals with variation under an arrangement or compromise with the approval of the court.⁵⁰¹
- (e) Where a provision restricts or excludes amendment of all or any of the provisions of the constitution or imposes conditions for such amendment, amendment of the provision imposing the restriction, exclusion or condition can only be amended with the approval of the court in an arrangement or compromise supervised by the court.⁵⁰²

Other sector specific legislation may impose additional conditions in addition to those under the Companies Act, 2019 for the amendment of the constitution of a company operating in the sector. For example, under the Bank & Specialised Deposit-Taking Institution Act, 2016 (Act 930), for the amendment of the constitution and name of a company carrying on a deposit-taking business or other instruments of a company operating as a bank or specialised deposit-taking institution, the company is required to furnish the Bank of Ghana with the particulars of the amendment prior to effecting the amendment.⁵⁰³

Even though amendment of the constitution of the company is permitted, there are also restrictions on effecting amendment. These include:

- (a) An amendment cannot be made that conflicts with an order made by the court under section 219 which deals with remedies available for acts of oppression, acts in disregard to the proper interest of members and debenture holders, acts that are unfairly prejudicial or discriminatory to the members of debenture holders as a member, debenture holder or officer of the company.⁵⁰⁴

⁴⁹⁹ Section 30(2)(b) of Act 992.

⁵⁰⁰ Section 30(2)(c) of Act 992.

⁵⁰¹ Section 30(2)(d) of Act 992.

⁵⁰² Section 30(2)(f) of Act 992.

⁵⁰³ Section 27 of Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930).

⁵⁰⁴ Section 30(d) of Act 992.

- (b) The constitution as amended must comply with the Act and contain the mandatory statements required under section 26 of the Act.⁵⁰⁵
- (c) The liability of a member cannot be increased or can members be required to take additional shares or additional restriction imposed on the right of the member to transfer shares held through amendment of the constitution unless a member agrees in writing to the amendment.⁵⁰⁶ That is unless a member of a company cannot by amendment of its constitution to require a member to:
 - (i) take more shares than the number held by that member on the date on which the amendment is made;
 - (ii) in any way increase liability of that member as at the date of the amendment to pay money to the company; or
 - (iii) abide by additional restrictions on the right to transfer shares held by that member at the date of the amendment;
- (d) An amendment shall not be made that has the effect of converting an unlimited company to a limited company; or a company limited by guarantee to a company limited by shares.⁵⁰⁷
- (e) An amendment can be restrained or revoked by the Court on the grounds that it is an illegal or irregular activity under section 218 or amount to oppression under section 219.⁵⁰⁸

In *DuPaul Wood Treatment v. Asare*⁵⁰⁹, her Lordship Sophia Akuffo JSC stated @ pgs. 697 to 698 in relation to the content of the regulations and its amendment as follows:

“... the regulations of a company incorporated in Ghana, must have certain prescribed form and contents as well as recommended provisions and may be changed in a certain prescribed manner (cf sections 16 – 22). In the genesis of a company with shares incorporated under the Code, there are three significant characteristics that, in my view, may be likened to its genetic markers (DNA). These are the names of the first directors of the company (sections 16(2)(d) and 181(2)): the number of shares of no par value with which the company is to be registered (sections 16(4) and 40(1)); and the signature and names of the subscribers to the regulations (as well as the number of shares each is taking and the amount of the consideration payable in cash in respect of such shares) duly attested by at least one witness. These are pieces of information that must appear in the regulations in order to be registrable. Thus, for example, in section 18(1) and (2) it is stipulated that:

⁵⁰⁵ Section 30(2)(g) of Act 992.

⁵⁰⁶ Section 30(2)(h) of Act 992.

⁵⁰⁷ Section 30(2)(i) of Act 992.

⁵⁰⁸ Section 30(2)(j) of Act 992.

⁵⁰⁹ [2005-2006] SCGLR 667.

- “(1) The regulations of any company registered after the commencement of this Code shall be signed by one, or more subscribers in the presence of, and shall be attested by, one witness at the least.*
- (2) In the case of Regulations of a company with shares, the subscriber, or each subscriber if more than one, shall write opposite to his name the number of shares he takes and the cash price payable therefor, and shall take at least one share...*

Since these characteristics are sine quo non to the formation of a Ghanaian company limited by shares, how can they possibly be replaceable or even alterable after the company has come into legal existence? The very fact that the company has been registered necessarily means that, as at the date stated on its certificate of incorporation, it has these essential markers: (a) a certain number of named persons are its first directors; (b) a certain number of shares of no par value of which (i) some or all have been issued to the named subscriber or subscribers to the regulations in specified proportion(s); and (ii) the said subscriber has undertaken to pay a certain amount in cash, or in-kind (as may have been previously agreed in writing). These are incontrovertible facts regarding the essential nature of the company at birth and cannot be altered by the registration of a new set of regulations.”

Data-Bah JSC stated @ pg. 680 on when an amendment of the constitution will take effect as follows:

“Furthermore, the document [new regulations] could not have legal effect until registered at the Companies’ Registry and therefore there is need to establish whether there was evidence that it was so registered. ... The regulations had to be made legally effective first before powers conferred by them could be exercised to make new appointments of directors.”

The Registrar has the power to require the company which has numerous amendments done to its registered constitution to consolidate the constitution as one document and submit the consolidated constitution to the Registrar.⁵¹⁰ The consolidated constitution and a certificate signed by the director or a company secretary authorised by the Board must be delivered to the Registrar within 28 days.⁵¹¹ The requirement must be satisfied by the Board of Directors. Section 32 of Act 992 requires that a copy of the registered constitution must be made available to members upon request and payment of the fee prescribed by the company

⁵¹⁰ Section 31 of Act 992.

⁵¹¹ Ibid.

4.7 Shareholders' Agreement

The constitution of a company in some instances are supplemented by formal shareholders' agreement which generally is in writing and executed by the shareholders. Shareholders' agreement is an agreement between or among shareholders to regulate the relationship among the shareholders in relation to how the company is to be administered and governed. Shareholders' agreement, therefore, regulates the relationship of the shareholders of a company. A shareholders' agreement operates on the principles of law of contract and not the Companies Act, 2019. The shareholders, thus, have the freedom to determine the terms that must govern their relationship under the concept of freedom to contract. For it to be effective, it must be binding on all shareholders who must voluntarily agree to be bound by it. The shareholders' agreement is, therefore, mostly used for private companies where the numbers are limited. In addition, the company may be made a party to the shareholders' agreement and therefore bound by the terms of the agreement. It has, however, been held that a company cannot contract out of the statutory requirement.⁵¹² However, given that the company is a person, the terms of the shareholders' agreement will be binding on the company as a contract even though acting on the statutory powers will breach the terms of the contract.⁵¹³

Section 29(1) of Act 992 provides that the constitution is deemed to be a contract under seal among the company, shareholders and officers. Where shareholders elect to enter into a shareholders' agreement, the shareholders will have two separate contracts governing their relationship and binding on the shareholders. The main difference between the constitution and formal shareholders' agreement is that, while a constitution is a creature of statute, a shareholders' agreement is enforceable in accordance with normal contractual principles. Section 26(4) of Act 992 permits the company to add to the constitution anything that is not consistent with the requirement stated in section 26 on the content. This permission extends to shareholders' agreement, provided it does not contain any term inconsistent with requirements of sections 26 and 27 and the Act generally.

There are a number of reasons why the shareholders may wish to supplement (or supersede) the constitution of the company in this way:

- (a) A company's constitution is normally available for public inspection, whereas the terms of a formal shareholders' agreement, as a private contract may not be available and normally subject to terms of confidentiality.
- (b) A related advantage is that of privacy that the use of shareholders' agreement offers to the shareholders which is missing from the use of a constitution of a company. The shareholders can, therefore, include terms in the shareholders' agreement which may include trade secrets and business ideas, which cannot be stated in the constitution of the company.

⁵¹² Russell v. Northern Bank Development Corp Ltd [1992] 1 W.L.R. 588 HL.

⁵¹³ Southern Foundries (1926) Ltd v. Shirlaw [1940] A.C. 701 HL.

- (c) Contractual arrangements are generally cheaper and less formal to form, administer, revise or terminate. Unlike the constitution, where an amended constitution will take effect only when registered with the Registrar of companies, no such requirements apply to the shareholders' agreement.
- (d) The shareholders might wish to provide for disputes to be resolved by arbitration, or in the court of a foreign country (meaning a country other than the country in which the company is incorporated). Constitutions are a creation of Act 992 and must necessarily be governed by the laws of Ghana.
- (e) Company law may not provide sufficient protection for minority shareholders, who may seek to better protect their position by using a shareholders' agreement with minority protection terms for specific shareholders.
- (f) A correlation to the above is that a shareholders' agreement may provide mechanisms for removing minority shareholders which preserve the company as a going concern.
- (g) Shareholders' agreement may embody special relations and obligations that may be unconnected to the administration of the company. For instance, it may spell out that members are to provide additional capital under specified conditions to the company, or that a member with special expertise to provide that expertise to the company as a strategic investor.

The shareholders' agreement in comparison to the constitution of a company has some limitations. The shareholders' agreement as a contract is binding on only parties to the agreement under the principle of privity of contract. It does not automatically bind a new shareholder who acquires shares from the company or an existing shareholder. However, the transfer of shares to the new shareholder may be on condition that the shareholder consent to be bound to the shareholders' agreement through the execution of a 'Deed of Adherence'. Without the voluntary consent exhibited through the execution of a deed of adherence, a shareholders' agreement will not be binding on a new shareholder.

Secondly, unlike a constitution of a company that can be amended by a special majority, a shareholders' agreement as a contract can only be amended if all the parties to the agreement so agree by signing the amendment agreement. However, the terms of the agreement may provide mechanisms for amendment which may include the power of a special majority to amend the agreement. An effective shareholders' agreement requires all shareholders of the company to be bound by the agreement. The shareholders' agreement is, therefore, mostly useful for a small number of shareholders. Thus, mostly used by shareholders of a private company. The advantage of a constitution over the shareholders' agreement is that once a company is registered, the constitution of the company creates a binding contract for all shareholders, notwithstanding that the shareholders acquired the shares after the incorporation of the company or adoption of the constitution.

4.7.1 Terms of shareholders' agreement

The terms of a shareholders' agreement vary depending on the objectives of the shareholders. In general, a shareholders' agreement may cover issues already provided for in the constitution of the company, in addition to other matters of importance to the shareholders. Shareholders' agreement may cover the following:

- objectives of the parties in entering into the shareholders' agreement;
- the business of the company and how changes to the business may be effected;
- shareholdings – indication of the number, types and percentage of shares held by each shareholder;
- terms of acquisition of additional shares;
- share capital contribution – amount to be paid for shares acquired and the period and manner of payment;
- shareholders' loan – responsibility placed on the shareholders to provide loan capital if required and terms under which loans will be provided;
- additional finance – terms under which the company can raise additional funds from external sources;
- other obligations of shareholders – additional responsibilities may be imposed on shareholders and the terms of discharge of those obligations. For example, a strategic investor may be under obligation to provide technical or management expertise to the business of the company; or obligation on shareholders to leverage contacts to secure business for the company;
- Governance: provisions on governance including:
 - (a) allocation of powers among shareholders, board of directors, managing director and management,
 - (b) composition and appointment of directors of the company,
 - (c) powers of directors,
 - (d) appointment and powers of managing director,
 - (e) composition and responsibility of management team,
 - (f) terms of appointment of directors and management,
 - (g) terms, grounds and procedure of removal/termination of directors and management personnel,
 - (h) reserved matters for shareholders' decisions,
 - (i) decision making of shareholders,
 - (j) meetings of shareholders and directors, and
 - (k) reporting requirements of management personnel and directors;
- share purchase options – terms of issue of additional shares; sale of shares by existing shareholders; right of first refusal or pre-emption right of shareholders; consent requirements;
- drag along and tag along rights of shareholders;

- terms of entry into a major transaction or corporate restructuring including mergers and acquisitions;
- distributions and dividend policy;
- lock-in period;
- financial reporting, accounting matters, appointment of auditors, auditing requirements and provision of financial reports;
- warranties;
- restrictive covenants;
- resolution of conflict between shareholders' agreement and the constitution of the company
- terms of termination of the shareholders' agreement;
- governing law and dispute resolution mechanism;
- unlawful fetter of company's statutory powers;
- Miscellaneous and boilerplate clauses
 - (a) confidentiality
 - (b) warranty
 - (c) no partnership and agency
 - (d) waiver
 - (e) variation
 - (f) notice
 - (g) severability
 - (h) entire agreement
 - (i) assignment
 - (j) counterparts
 - (k) survival after termination
 - (l) further assurances
 - (m) exclusion of third party right; and
- Deed of Adherence form.

As noted above, the terms may vary from one agreement to another and need not include all or any of the above. The parties under the concept of freedom to contract reserve the right to determine the terms of their agreement. This is subject to mandatory provisions of the Companies Act, 2019 and other enactments. The parties cannot, therefore, contract out of mandatory provisions of applicable law.

4.7.2 Priority between the constitution and shareholders' agreement

As stated, the shareholders' agreement supplements the constitution of the company. Act 992, in section 26(4), permits the registered constitution to have other lawful provisions in addition to the mandatory terms required under the Act. By extension, shareholders are permitted to have

additional terms under the contract that supplement the constitution of the company. As the constitution cannot alter mandatory terms of the Act unless so permitted by the Act, the shareholders cannot by a shareholders' agreement contract out of the mandatory terms of the Companies Act or any other statute as that will make the applicable provision unlawful and unenforceable.

*In re Peveril Gold Mines Ltd*⁵¹⁴ - in this case, a motion was brought on behalf of two of the shareholders of the company to stay proceedings upon a petition for the compulsory winding-up of the company. The petition had been presented by a shareholder holding 5,000 fully paid shares. One of the two shareholders held 20 shares, on which 16s. 6d. per share had been paid, and the other held 13,600 fully paid shares. All the shares were of the nominal value of £1 each. It was conceded for the purposes of the motion that the petitioner was a contributory who would be entitled to petition, but for clause 164 of the articles of association, which provided: "No petition shall be presented or proceeded with by a member to wind up the company, except and unless (a) by consent in writing of not less than two of the then board, or (b) in pursuance or by permission of a resolution passed by a majority at a general meeting of the company, or (c) the petitioner or petitioners shall hold, or together hold, not less than one-fifth of the then issued capital of the company, upon which all calls shall have been paid. It was admitted that the petitioner had not complied with any one of the conditions mentioned in the clause. Byrne J. held that although section 82 of the Companies Act, 1862, laid it down that a contributory "may" present a petition, it conferred a right upon every shareholder just as much as if the terms of the section had been that every contributory should have "the right to present a petition." That the terms of the section were intended to confer a right of which a contributory could not be deprived, either entirely or in a modified way, by the terms of the articles of association. That the memorandum and the articles of association embody the contract between the different members of the company, but those documents must not conflict with the provisions of the Acts regulating the incorporation of joint stock companies. That if the articles are to be regarded as part of the terms of the contract between the company and the person applying for shares, the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or so desired to become a shareholder. On appeal to the Court of Appeal, the decision by Byrne J. was affirmed by Lindley M. R. stated @ pg. 131:

"Anyone who is familiar with the Companies Acts knows perfectly well that these registered limited companies are [p.375] incorporated on certain conditions; they continue to exist on certain conditions; and they are liable to be dissolved on certain conditions. The important sections of the Act of 1862, with regard to dissolution, are ss. 79 and 82. Sect. 79 states the circumstances under which such a company may be dissolved by the Court, and s. 82 states the persons who may petition for a dissolution. Any article contrary to these sections—any article which says that the

⁵¹⁴ [1898] 1 Ch. 122 CA.

company is formed on the condition that its life shall not be terminated when any of the circumstances mentioned in s. 79 exist, or which limits the right of a contributory under s. 82 to petition for a winding-up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid."

Chitty L.J. stated @ pg. 132:

"In my opinion, this condition is annexed to the incorporation of a company with limited liability—that the company may be wound up under the circumstances, and at the instance of the persons, prescribed by the Act, and the articles of association cannot validly provide that the shareholders, who are entitled under s. 82 to petition for a winding-up, shall not do so except on certain conditions."

Where there is a conflict between some of the provisions in the shareholders' agreement and the constitution of the company, the shareholders' agreement will prevail provided that such provisions are not contrary to the law.

*In Re Timber and Transport Kumasi - Krusevac Co. Ltd: Zastava v. Bonsu & Another*⁵¹⁵ - shareholders in forming a company entered into an agreement that has a clause stating that the agreement should remain irrevocable for ten years and no member or director of the company formed could present a petition or make an application to the court seeking the winding up or the liquidation or in any way seek or attempt to bring the existence of the company to an end. They petitioned before the expiration of ten years petitioned for the official winding up of the company. At the hearing of the petition, the respondent raised a preliminary objection as to whether having regard to the clause of the agreement, the petition was competent. The preliminary objection was upheld. The court indicated that while the regulations cannot conflict with the statute and a company cannot restrict the right of shareholders contrary to the statute, as between the shareholders, an agreement entered will be enforceable. Amua-Sekyi J. after examining and agreeing with the decision in *In re Peveril Gold Mines, Ltd.*⁵¹⁶ Proceeded and stated @ pgs. 375 to 376 that:

"In the earlier case of Welton v. Saffery [1897] A.C. 299 the House of Lords had agreed that what may not be made a regulation of the company binding upon all present and future members of the company may be made the subject of a private bargain between individual members among themselves. In the words of Lord Davey at p. 331:

"Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal

⁵¹⁵ [1980] GLR 370.

⁵¹⁶ [1898] 1 Ch. 122 CA.

obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders."

Shareholders may also have informal agreement on specific matters which do not come within the context of constitution of a company or shareholders' agreement. This is discussed in the chapter on membership of a company.

5.0 PROMOTERS

5.1 Introduction

A company does not just spring into being spontaneously. It requires decisions and actions to be taken prior to incorporation. In other words, incorporation of a company requires pre-incorporation decisions and actions that must be logically and carefully thought through as they will affect the company post-incorporation. These pre-incorporation decisions and actions are not only dictated by the Companies Act, 2019 but other legal and business considerations. The person responsible for taking these pre-incorporation decisions and actions aimed at bringing into being a company is referred to as a promoter of the company. The use of a promoter in business in relation to a company refers to a person who promotes the formation of a company and sets it going in relation to a particular business or object. That is, a promoter takes steps required to bring a company into being and sets it going.

Section 10 of Act 992 defines who a promoter is, states the duties of a promoter, describes the relationship between a promoter and a company and prescribes when the relationship is terminated. Subsection (1) of section 10 of the Act defines a promoter and subsection (2) excludes certain persons who otherwise fit the definition from being considered a promoter. Section 10(1) and (2) of Act 992 states:

“(1) A person who is or has been engaged or interested in the formation of a company is a promoter of that company.

(2) A person acting in a professional capacity for persons engaged in procuring the formation of a company is not a promoter.”

A promoter is thus any person who has or is engaged or interested in the formation of a company. However, where the person is engaged or interested in the formation of the company in the discharge of his or her professional duties to another person who is engaged or interested in the formation of a company, that first person is not a promoter. A person acting in a professional capacity to another person interested or engaged in the formation of a company is not a promoter. The critical factor in this exemption is that the person acting in a professional capacity must have a relationship with another to provide professional services to that other person. The other person must be interested or engaged in the formation of a company and must have engaged the person acting in a professional capacity to provide his or her professional services. A lawyer, accountant or business consultant providing a professional service to a person interested or engaged in the formation of a company is not a promoter. The relationship between the lawyer and the person interested or engaged in the formation of a company is a contractual relationship subject to the terms agreed.

The above should not be construed to exclude all instances where a person is providing professional services from being considered a promoter. A lawyer who decides to set up a company to provide legal services may be considered a promoter of that company. The critical pointer as to whether a person providing a professional service is or not a promoter is whether that person has been engaged by another person who is interested or engaged in the formation of a company.

5.2 Acts of a promoter

Section 10(1) of Act 992 requires that for a person to be a promoter, the person must be interested or engaged in the formation of a company. One must, therefore, establish 'interest' or 'engagement' in the formation of a company to determine whether a person is a promoter. The determination of whether a person has an interest or is engaged in the formation of a company must be determined based on facts. The question would be: what is or was the person doing in relation to the formation of a company? Whether or not a person is interested or engaged in the formation of a company is, therefore, a question of fact and not a question of law. There must be facts to establish that the person is or was interested or engaged in the formation of a company. What did he do in relation to the formation of a company?

The acts of persons that will be construed by the law as being engaged or interested in the formation of a company are largely dependent on requirements for incorporation of a company. In addition, the acts also depend on business considerations. A person must be making decisions or taking steps required for the formation of a company to be considered a promoter. Incorporation of a company requires decisions on the type of company, business or object of the company, name of the company, determination of qualification of directors and appointment of directors, determination on locations of operation, capital requirements, preparation of constitution of the company, completion of the application for incorporation, payment of incorporation fees and others. These are not only requirements of law but also business considerations. A person taking these decisions and steps for the incorporation of a company will qualify as a promoter of a company. However, if engaged by another in a professional capacity, that person acting in a professional capacity will not be a promoter. The promoter may also enter into contracts, generally termed pre-incorporation contracts, on behalf of the yet to be formed company with the aim of transferring the contract to the company or binding the company to the contract when incorporated.

*Whaley Bridge Calico Printing Co v. Green*⁵¹⁷ - in or about May 1876, the defendant Green purchased certain calico printing works and premises situate at Whaley Bridge, near Buxton, for the sum of 15,000l. The defendant John Smith was the manager in Mr. Green's employment at the time, and various negotiations took place between Green and Smith as to the working of the premises for Green himself, and as to their resale to some company. Ultimately, on the 13th of October, 1876, the

⁵¹⁷ (1879) QBD 109.

plaintiff company was incorporated for the purpose of purchasing and working these works, and on the 2nd of February, 1877, the premises were conveyed to the company by Smith and Green for the sum of 20,000l. Green had previously purported to sell the premises to Smith for 20,000l. by a contract of the 19th of September, which the jury found was a sham contract, and which (if a sham contract) was obviously intended to be used for the negotiations with the company. The issue to be determined by the court was whether Green was a promoter of the company from the 29th of August. Bowen J held that Green was a promoter. He stated @ pg. 112 that:

“The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence... A man who carries about an advertising board in one sense promotes a company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties. In the present instance, Green and Smith agreed to, and did bring out the present company for the purpose of purchasing the chemical works and premises on their own terms”.

Similarly, in the case of *Weavers Mills Ltd v. Balkis Ammal & Others*⁵¹⁸, Veeraswami J. defined a promoter as:

“A ‘Promoter’ therefore, is a compendious term given to a person who undertakes, does and goes through all the necessary and incidental preliminaries, keeping in view the objects, to bring into existence an incorporated company. This process leading to the genesis of a company may include a variety of things, not the least of them, I think, being some of the steps taken by a promoter to ensure commencement, within a reasonable time, of the business, for the carrying on of which the company is formed. He makes purchase of moveable and immoveable assets, enters into contracts involving rights and obligations and applies to authorities for a variety of things, all on behalf of the company to be formed”.

*Twycross v. Grant*⁵¹⁹ - in this case, Grant formed a company for the purposes of acquiring a number of concessions to build railways. After incorporating a company, a prospectus was issued inviting the purchase of shares. The company subsequently collapsed. Twycross brought an action to recover from the promoters of the public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them breached section 38 of the Companies Act, 1867 as it omitted to disclose certain contracts, which ought to have been specified. Further, it was argued that the prospectus failed to disclose that Grant has entered into a contract with another company, Clark & Punchard, under which the company paid money to Grant and took over the contract to build the railways. In order to determine whether Twycross could recover, it must be

⁵¹⁸ (1969) 2 MLJ 509.

⁵¹⁹ (1877) 2 CPD 469.

established that Grant was a promoter and had breached his duties to disclose the contract in the prospectus according to the section. It was established that Grant framed the scheme for the formation of the company; determined the qualification of directors; provided their appointment; was involved in the preparation of the prospectus that advertised the sale of the shares in the company; and paid for the printing of the prospectus and their advertising. Based on these facts, Cockburn CJ stated @ pg. 541:

"A promoter, I apprehend, is one who undertakes to form a company with reference to a certain project and takes certain steps to accomplish that purpose. That the defendants were the promoters of the company from the beginning there can be no doubt. They framed the scheme. They not only provisionally formed the company but were, in fact, to the end, its creators. They found the directors and qualified them; they prepared the prospectus, they paid for printing and advertising, and the expenses incidental to bringing the undertaking before the world. ... All of the things I just referred to were done with a view to the formation of the company, and so long as the work of formation continues, those who carry on that work must, I think, retain the character of promoters."

*Erlanger v. New Sombrero Phosphate Co*⁵²⁰ - in this case, a syndicate was headed by Erlanger, a Paris banker. The syndicate acquired a lease on an island in the West Indies for £55,000 with the right to mine its phosphate deposit. Erlanger and the syndicate formed New Sombrero Phosphate Co and named its first directors. Of these first directors, one of them, the Lord Mayor of London, was independent of the syndicate; and the remaining directors were under the control of Erlanger. The lease was sold through a nominee of New Sombrero Phosphate Co for £110,000. This purchase price was then purportedly ratified by the directors without inquiry eight days after the incorporation of New Sombrero Phosphate Co. Shares were also floated to the public and many members of the public subscribed for the shares. The real circumstances of the sale and purchase were however never disclosed to the public and indeed were not discovered till eight months later when the phosphate shipment proved to be a failure. The shareholders then removed the original directors and elected a new board of directors. The new board of directors brought proceedings to rescind the sale to it by the nominee company. The House of Lords ruled that the promoters owed fiduciary duties towards the company including the duty to disclose all material facts relating to the contract to an independent board of directors, which may then choose to agree with the terms. Failing full disclosure of all material facts by the promoters to an independent board of directors of the company, a contract entered into between the latter and the company was voidable at the company's option. Lord Cairns LC stated @ pg. 279:

"...the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference

⁵²⁰ [1874-80] All ER Rep 271; (1878) 3 AC 1218.

to the company which they propose to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property themselves, the promoters, it is in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of the property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells to the company through a medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person..."

Lord O'Hagan stated @ pg. 282 that:

"...for reasons given by my noble and learned friends, I think that the promoters in this case failed to remember the exigencies of their fiduciary position when they appointed directors who were in no way independent of themselves, and who did not sustain the interests of the company with ordinary care and intelligence... The promoters who so forgot their duty to the company they formed as to give it a directorate without independence of position, or vigilance and caution in caring for its interests, which were accordingly subordinated to their own, misused their power, and must take the consequences. This does not necessarily imply the imputation of evil purpose or conscious fraud, and I make no such imputation. The fiduciary obligation may be violated, though there may be no intention to do injustice. If the protection proper and needful for a person standing at disadvantage in relation to his guardian, or his solicitor, or a company so largely in the power of the promoters, be withheld, the guardian, the solicitor, or the promoter cannot sustain a transaction equitably invalidated by the want of it, merely because he is not impeachable with indirect or improper motives."

Lord Gordon stated @ pg. 287:

"...having acquired the property, they resolved to form a company for the working of the produce of the island, and to make over their purchase to that company. They became promoters of the company, and prepared the necessary documents for its

formation, and issued a prospectus to the public with the view of inducing the public to take up its shares. In doing this the syndicate changed the position it originally held, and put itself in a fiduciary relation to the company which it was engaged in forming."

Per Section 10(3) of Act 992, the fiduciary relationship between the promoter and the company subsists until two conditions are satisfied. That is the formation of the company is complete and secondly, the working capital is raised. The completion of the formation of a company is evidenced by the issue of the certificate of incorporation. The issue of the certificate of incorporation does not terminate the relationship. The company must have completed raising its working capital. Working capital is the amount required for the company to pay its short-term liabilities. In order to terminate the fiduciary relationship between the company and the promoter, the company must have raised the amounts required to satisfy its short-term expenses and liabilities.

5.3 Statutory duties imposed on promoters

The general duties imposed under common law as fiduciary duties are imposed on a promoter in relation to the company unless such duties are inconsistent with the provisions of the Act.⁵²¹ In addition to the common law fiduciary duties, the Act expressly states a number of duties of the promoter. These duties also exist under common law and have been given statutory backing under the Companies Act, 2019 making them statutory duties. A promoter is, therefore, bound to obey these statutory duties while acting for or towards a company he is promoting. In addition to the general fiduciary duties, the three express statutory duties imposed on promoters are:

(a) Duty to act in good faith

Section 10(3)(b) of Act 992 provides that *"(3) The promoter shall until the formation of a company is complete and the working capital of the company has been raised, (b) observe utmost good faith towards the company in a transaction with the company or on behalf of the company"*. The duty of good faith is imposed on a promoter until the relationship between the promoter and the company is terminated. The relationship is terminated when the formation of the company is complete and the working capital is raised. A promoter must observe utmost good faith in his dealings with the company either in acting on behalf of the company or entering into a transaction with the company. A promoter acts in good faith when he acts with honesty in his dealings with the company. This is reflected in the Latin phrase, acting *bona fide*. In other words, the promoter must act fairly taking into account the interest of the company. Good faith in business transactions requires acting honestly, sincerely and fairly with all the parties involved in the transaction. A promoter must, therefore, in acting for or with the company, act with the utmost honesty, sincerity and fairness in the interest of

⁵²¹ Section 5 read together with section 10(3)(a) of Act 992.

the company. A promoter breaches this duty when it is established that there was no fair dealing in acting on behalf of the company. That is, the promoter acted in bad faith. This is reflected in the Latin phrase, acting *mala fide*. A promoter acts in bad faith when he acts dishonestly or in disregard of the interest of the company in his dealings with the company. If the company incurs a loss as a result of the promoter acting in bad faith, the promoter must compensate the company for the loss suffered by the company. Section 10(3) of Act 992 provides that the promoter must *"compensate the company for any loss suffered by the company by reason of the failure of the promoter to observe utmost good faith"*.

(b) Duty to account

Section 10(4) of Act 992 provides that *"A promoter that acquires a property or information in circumstances in which it was the duty of the promoter as a fiduciary to acquire it on behalf of the company shall account to the company for the property or information and for the profit which the promoter may have made from the use of the property or information."* A promoter is accountable, as a result of his fiduciary position, to the company for property and information received by the promoter on behalf of the company. Where a promoter obtains any benefit as a result of the use of the property or information, the promoter is also under a duty to account to the company for such benefit or profit received. A promoter cannot, therefore, make a secret profit.

*Gluckstein v. Barnes*⁵²² - in this case, a syndicate was formed to raise funds, buy a property and resell it to a company or some other purchaser. The scheme required that the fund was to be in the names of trustees who were to promote and register a company to which they should resell the property, and who if a company should be formed were to be directors. The trustees bought up some of the mortgages upon the property for sums below the amount which the mortgage was afterwards realised, and thereby made a profit for the syndicate of £20,000. They bought the property for £140,000, formed a limited company and resold the property for £180,000 to the company, of which they were the first and at that time the only directors. They issued a prospectus inviting applications for shares and disclosing the two prices of £140,000 and £180,000 but not the profit of £20,000. That some profit had been made by buying up the charges might have been discovered by a close examination of a contract which was referred to in the company's memorandum and articles of association and the prospectus. Shares were issued and the company afterwards went into liquidation, Barnes being the liquidator sought to recover the undisclosed secret profit. The court had to determine whether the liquidator could do so. It was held that the profits should have been disclosed and the appellant was bound to account to the liquidator. Earl of Halsbury LC stated @ pgs. 246 to 247 as follows:

"My Lords, I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the

⁵²² [1900] AC 240.

Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this profit. I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed by the plainest dictates of common honesty as well as by well-settled principles of common law... Then it is said there is the alternative suggested upon the agreement that the syndicate might sell to a company or to some other purchaser. In the first place, I do not believe they ever intended to sell to anybody else than a company. An individual purchaser might ask inconvenient questions, and if they or any one of them had stated as an inducement to an individual purchaser that 140,000l was given for the property, when in fact 20,000l less had been given, it is a great error to suppose that the law is not strong enough to reach such a statement; but as I say, I do not believe it was ever intended to get an individual purchaser, even if such an intention would have had any operation. When they did afterwards sell to a company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders. My Lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees. They were there by the terms of the agreement to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and so far from protecting them, were to obtain from them the money, the produce of their nefarious plans..."

*Attorney General of Hong Kong v. Reid and Others*⁵²³ - Reid was employed as a Hong Kong Deputy Crown Prosecutor and then Acting Director of Public Prosecutions. It was established that in that position, Reid stood in a fiduciary relationship with the Hong Kong government. He took bribes to obstruct prosecution of some criminals and used the money to buy land in New Zealand. The Hong Kong government argued the land was held in trust for them. Commenting on the duty not to make a secret profit by a person in a fiduciary position, Lord Templeman stated @ pg. 552 as follows:

"A secret benefit, which may or may not constitute a bribe, is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which consists

⁵²³ [1993] 3 LRC 548.

of a bribe. In addition a person who provides the bribe and the fiduciary who accepts the bribe may each be guilty of a criminal offence. In the present case Mr. Reid was clearly guilty of a criminal offence... When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty"

*In re Darby; Ex Parte Brougham*⁵²⁴, Phillimore J. giving the facts, holding and reasoning stated:

*"Now this case certainly does seem to me to be an advance upon the previous decisions. Darby and Gyde (who are two fraudulent persons, both of whom have been convicted of fraud in the present case, and of several previous crimes) registered in Guernsey a company called the City of London Investment Corporation, of which they were the proprietors. It was merely an alias for themselves just as much as if they had announced in the Gazette that they were in future going to call themselves "Rothschild & Co." It was merely a name under which they carried on business, and I am quite clear in my own mind that that was their object, and that, whenever they represented that some business was being done by or through the corporation and concealed the fact that it was being done by or through Darby and Gyde, they were by that mere fact probably perpetrating a fraud. I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves. Having registered that corporation, and being minded to perpetrate a very great fraud, they, as such corporation, agreed to buy a trivial interest in a Welsh slate quarry for a small sum in cash and a consideration in shares, and then as such corporation purported to sell this interest to the Welsh Slate Quarries, Limited, and thereby they made a very large profit. It is said that they concealed that profit, and also that they concealed from the Welsh Slate Quarries, Limited, the fact that they were themselves the real vendors and promoters, and therefore it is contended that the liquidator is entitled to recover the profit from them... In *In re British Seamless Paper Box Co.* it was apparently considered that there was no fraud, but only an irregularity which was known to*

⁵²⁴ [1911] 1 KB 95 @ 102 to 103.

everybody who at the time could have had any interest, and which was sanctioned and ratified. That case and to a certain extent Gluckstein v. Barnes and the old case of Society of Practical Knowledge v. Abbott seem to me to be the cases by which I must steer in deciding this case, and I come to the conclusion that Gyde and Darby did not protect themselves and did not disclose the profit which they obtained. Had they called a general meeting of the shareholders and disclosed the profit and received authority from the shareholders to keep it, it might perhaps have stood. But they did not do so, and therefore they cannot keep this profit. I agree that the case runs on fine lines and that it is to a certain extent novel, but on the whole, I think that the right decision is to allow the appeal with the limitation which has been agreed upon."

The duty to account invariably relates to the duty to disclose. The promoter must account by full disclosure to the company of the property and information acquired on behalf of the company. The disclosure must also be full disclosure of any profit made from the use of the property or information of the company. The requirement of full disclosure is discussed below. The duty to account is not discharged unless there is full disclosure on all the property and information acquired by the promoter on behalf of the company, as well as any profit or benefit received by the promoter in acting as a promoter of the company.

(c) Duty to disclose interest in transaction

A promoter has a duty to disclose all information relating to a transaction entered into on behalf of and with the company. The duty of disclosure is more strictly enforced in relation to a transaction between the promoter and a company. Section 10(5) of Act 992 provides that:

"(5) A transaction between a promoter and the company may be rescinded by the company unless, after full disclosure of the material facts known to the promoter, the transaction has been entered into or ratified on behalf of the company

- (a) by the board of directors of the company, if all the directors of the company are independent of the promoter; or*
- (b) by all the members of the company; or*
- (c) by the company at a general meeting at which neither the promoter nor the holders of the shares in which the promoter is beneficially interested have voted on the resolution to enter into or ratify that transaction".*

Disclosure requires providing all material facts known to the promoter to the company through the principal organs of the company – that is an independent board of directors of the company; all the

members of the company; or members in a general meeting who then vote on the matter. An independent board refers to a board composed of directors who can exercise independent judgement and are not within the direction, influence or control of the promoter. Where the disclosure is made to the members in a general meeting, the Act requires that promoters, who are members of the company, are not to vote on the matter. In addition, shareholders who hold shares that the promoters are beneficially interested in are not required to vote on a resolution to enter into or ratify the transaction. All these are to ensure that the decision taken on the matter is not influenced by the promoter. However, where members are acting without a general meeting, a unanimous approval is required on the matter. Promoters who are members are therefore not excluded in such unanimous decisions.

Where the company intends to raise money through an invitation to the public to acquire shares in the company, the Act requires disclosure in the prospectus.⁵²⁵ The Act requires a company to provide a prospectus prior to inviting the public to acquire the shares of the company.⁵²⁶ Failure to make the disclosure in the prospectus will render the transaction voidable at the option of the company.⁵²⁷

In *Gluckstein v. Barnes*⁵²⁸, Lord Macnaghten indicated this when he stated @ pg. 250 that:

"In the second place, he says, that if he was in a fiduciary position he did in fact make a proper disclosure. With all deference to the learned counsel for the appellant, that seems to me to be absurd. "Disclosure" is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all."

Section 10(5) of Act 992 gives the company the right to rescind the transaction at any time unless the company resolves to enter into or ratifies the transaction after full disclosure of all material facts known to the promoter. The contract is therefore a voidable one that can be rescinded or set aside at any time at the option of the company. The right of the company to rescind is only extinguished not when the company resolves to enter into or to ratify the transaction, but when the company does so after full disclosure of material facts known to the promoter through an independent board of directors, or unanimous decision of members, or at a general meeting where the promoter or shareholders with shares that the promoter is beneficially interested in abstained from voting on that resolution.

⁵²⁵ Section 305(1) of Act 992; See Tenth Schedule of Act 992.

⁵²⁶ Section 304(1)(b) of Act 992.

⁵²⁷ Section 314 of Act 992.

⁵²⁸ [1900] AC 240.

In *Erlanger v. New Sombrero Phosphate Co.*⁵²⁹, Lord Cairns LC stated @ pg. 279:

“...the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they propose to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property themselves, the promoters, it is in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of the property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells to the company through a medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person...”

Lord Penzance stated @ pg. 277 that:

“Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement, I invite your Lordships to draw two conclusions - first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that, with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing, they used that power and opportunity for the furtherance of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were bound, according to the principles constantly acted upon in the courts of equity, if they wished to make a valid contract of sale to the company, to nominate independent directors, and fully disclose the material facts. The obligation rests upon them to show they have not made use of the position

⁵²⁹ [1874-80] All ER Rep 271; (1878) 3 AC 1218.

which they occupied to benefit themselves, but I find no proof in the present case that they have discharged that obligation. There is no proof that either Sir Thomas Dakin or Admiral Macdonald was aware of the price at which the property had just been bought under the authority of the Court of Chancery, nor indeed that they even knew that the real vendors were also the promoters of the company. There is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body, capable of acting impartially in defence of the company's interests."

Lagunas Nitrate Co v. Lagunas Syndicate⁵³⁰ - in this case, a syndicate acquired a piece of land with plants and nitrate deposit in Chile, which became Lagunas Nitrate Works. The land and plant were acquired for the sum of £110,000. After working the mines for a while, the syndicate formed a company, Lagunas Nitrate Co. for the purposes of selling the land and plant to the company. The land and plant were sold to the company for an amount of £850,000. The members of the syndicate were all the members of the company and constituted the board of directors of the company. All these facts were disclosed in the memorandum and article of associations of the company. In raising money from the public through the issue of shares, the facts as stated were disclosed in the prospectus. Shareholders who purchased shares pursuant to the public invitation brought an action in the name of the company to rescind the contract for the purchase of the land on the ground it was overvalued, there was no full disclosure as the board of directors were not independent, and there were misrepresentations in the contract and prospectus. The court held that there was full disclosure and the contract could not be set aside. The majority indicated that: (1) That the company was not entitled to rescission or damages, because at the date of the contract, the company had, by its memorandum and articles, notice that its directors were also the vendors or agents of the vendor syndicate, and the mere fact that its directors did not constitute an independent board was not a sufficient ground for setting aside the contract; (2) there had been no misrepresentation made to, or any material fact concealed from, any of the persons who were members of the company at the date of the contract, those persons being the directors themselves; (3) although the contract and prospectus were, on the evidence, misleading in certain particulars which would have entitled the company at the time to repudiate the contract, yet through the subsequent alteration of the property consequent on its being worked by the company, the position of the parties had been so changed that they could not be restored to their original position; and (4) the defendants, the directors, had not been guilty of such negligence or breach of trust as to render them liable in damages in law for the loss occasioned to the company, or in equity to make good the loss.

⁵³⁰ (1899) 2 Ch 392.

5.4 Remedies for breach of duties

A promoter who fails to declare and account to the company for any property, information or profit acquired on behalf of the company but keeps it for his personal use commits a breach of his duty to account. A transaction entered into by a promoter on behalf or with the company without full disclosure of material facts known to the promoter also commits a breach of his duty to disclose. A promoter who acts in bad faith also breaches his duty to act in good faith. The Act provides a number of remedies to deal with breach of the duties of the promoter. The company is entitled to seek any of these remedies depending on the nature of the breach.

(a) Recovery of secret profit or property

The company is entitled to recover the property and profit acquired or made by the promoter in breach of his duty to account to the company, and in the case of information, the company is entitled to restrain the promoter from using it for his personal benefit. Section 10(4) Act 992 also impliedly gives the company the right to recover property or secret profit which the promoter is obliged to account for.

In *Gluckstein v. Barnes*⁵³¹, where the syndicate failed to disclose the profit of £20,000 made on the mortgage on the property, the court held that the profit is recoverable. Earl of Halsbury LC stated @ pgs. 246-247 that:

“My Lords, I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this profit. I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed by the plainest dictates of common honesty as well as by well-settled principles of common law.... Then it is said there is the alternative suggested upon the agreement that the syndicate might sell to a company or to some other purchaser. In the first place, I do not believe they ever intended to sell to anybody else than a company. An individual purchaser might ask inconvenient questions, and if they or any one of them had stated as an inducement to an individual purchaser that 140,000l was given for the property, when in fact 20,000l less had been given, it is a great error to suppose that the law is not strong enough to reach such a statement; but as I say, I do not believe it was ever intended to get an individual purchaser, even if such an intention would have had any operation. When they did afterwards sell to a

⁵³¹ [1900] AC 240.

company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders."

In *Attorney General of Hong Kong v. Reid and Others*⁵³² - Lord Templeman stated @ pg. 552 that:

"A secret benefit, which may or may not constitute a bribe, is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which consists of a bribe. In addition a person who provides the bribe and the fiduciary who accepts the bribe may each be guilty of a criminal offence. In the present case Mr. Reid was clearly guilty of a criminal offence. In the present case Mr. Reid was clearly guilty of a criminal offence... When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty."

(b) Compensation

If the company suffers any loss as a result of the failure of the promoter to account to it as required or due to a breach of duty to act with utmost good faith towards the company, the company is entitled to sue the promoter for damages to compensate it for the loss suffered. Section 10(3)(c) of Act 992 provides that:

"(3) The promoter shall, until the formation of a company is complete and the working capital of the company has been raised, (c) compensate the company for any loss suffered by the company by reason of the failure of the promoter to observe good faith."

*In re Leeds and Hanley Theatres of Varieties, Limited*⁵³³ - in this case, promoters of a company purchased a property for the purpose of selling it to the company when formed. The property was conveyed to a trustee for the promoters nominated by them and was afterwards by the direction of the promoters, conveyed by him to a trustee for the company, who was also nominated by the

⁵³² [1993] 3 LRC 548.

⁵³³ [1902] 2 Ch. 809.

promoters, they receiving from the company an increased price on the sale. The promoters also nominated the first directors of the company and provided the qualification of some of them. The prospectus of the company, which was issued for the purpose of inducing the public to subscribe for its shares, was prepared with the knowledge and privity of the promoters, so that, as the Court held, they were responsible for it. It did not disclose the fact that the promoters were the real vendors of the property to the company, but, on the contrary, represented the promoters' trustee as the vendor. The company afterwards went into liquidation. Upon a summons by the liquidator to compel the promoters to account for the profit which they had obtained on the resale of the property, the court held that the prospectus was a fraudulent one, and that for their breach of duty by this non-disclosure the promoters were liable in damages to the company, and that the true measure of the damages was the profit which the promoters had obtained upon the purchase and resale of the property. Wright J. stated @ pg. 815:

"Further, I think that the respondents are liable on the ground that they imposed on the company directors of the respondents' own selecting, and through these directors caused the company to agree to pay an excessive price, without any disclosure that the directors were of their own selection, and without any disclosure to the company of the facts necessary to enable a judgment to be formed upon the question of price. An independent board informed of the facts would certainly not have adopted the purchase. The respondents made it impossible for the company to obtain independent advice, and imposed their own terms, concealing the material facts. They must, therefore, disgorge to their cestuis que trust the benefit which they have extorted from them by taking an undue advantage of their position and influence... There has been a fraudulent breach of duty which gives a right at law at any rate to nominal damages, and there is evidence of substantial damage".

(c) Rescission of contract

The promoter may also enter into contracts, generally termed pre-incorporation contracts, on behalf of the yet to be formed company with the aim of transferring the contract to the company or binding the company to the contract when it is incorporated. Such a contract must be ratified to be binding on the company.⁵³⁴ In addition, a contract entered into by a promoter with the company in breach of his duty to disclose is a voidable contract, even where the contract is ratified. The company has the right to rescind the contract. The right is conferred under section 10(5) of Act 992. The section provides "(5) A transaction between a promoter and the company may be rescinded by the company unless, after full disclosure of the material facts known to the promoter, the transaction has been entered into or ratified on behalf of the company, ..." Per the section, a company has the right to rescind the transaction at any time unless the company resolves to enter into or ratifies the transaction after full disclosure of material facts known to the promoter. The contract is therefore a

⁵³⁴ Section 11 of Act 992.

voidable one that can be rescinded or set aside at any time at the option of the company. The right of the company to rescind is only extinguished not when the company resolves to ratify the transaction, but when the company does so after full disclosure of material facts known to the promoter through an independent board of directors, or a unanimous decision of members, or at a general meeting where the promoter or shareholders with shares that the promoter is beneficially interested in abstained from voting on that resolution.

*Erlanger and others v. New Sombrero Phosphate Co*⁵³⁵ - Lord Gordon stated on a company's right to rescission and whether it has lost that right through laches and acquiescence @ pg. 287:

"I have no doubt that the syndicate, which was formed for the purchase of the interest of the Old Sombrero Co in the island in question and by which the rights of the old company were purchased, acquired the property for its own behalf, and not in trust for the company which was afterwards formed. The property when purchased belonged absolutely to the members of the syndicate, who were entitled to deal with it in any way they thought proper. Having acquired the property, they resolved to form a company for the working of the produce of the island, and to make over their purchase to that company. They became promoters of the company, and prepared the necessary documents for its formation, and issued a prospectus to the public with the view of inducing the public to take up its shares. In doing this the syndicate changed the position it originally held, and put itself in a fiduciary relation to the company which it was engaged in forming. It thus became incumbent on the promoters, not only to make a full disclosure of the position they as owners of the property which they proposed to sell to the company held in regard to that property, but also to make arrangements, by the appointment of competent officials and otherwise, for enabling the company to form an independent judgment as to the propriety of purchasing the property of the promoters, and of the value of that property, and the price to be paid for it. I agree with your Lordships in thinking that the promoters failed in their duty in this respect, and that the company was not put in a position for forming an intelligent and independent judgment as to the contract between the promoters and the company, and that if the contract had been challenged by the company in proper time it might have been set aside. The only questions of difficulty in this case are whether the contract has been challenged in due time or whether there has been such laches on the part of the company so as to prevent their now demanding the rescission of the contract, and whether the terms on which the Court of Appeal has set aside the contract were fair and equitable. After very careful consideration, I am of opinion that the company has not lost its right of challenge. The onus lay on the appellants of showing that there had been such laches on the part of the company as to deprive it of the right to set aside the

⁵³⁵ [1874-80] All ER 271.

contract. I think that the appellants have failed to show that there has been such laches on the part of the company. Therefore, I am of opinion that the judgment appealed against is right, and should be affirmed."

Section 10(6) of Act 992 provides that a period of limitation shall not apply to proceedings brought by the company to enforce any of its rights under section 10 of the Act. Therefore, the company can commence an action against the promoter at any time. Subsection (7) however gives the court the power to relieve a promoter in whole or in part and on the terms that it thinks fit from liability if in all the circumstances, including lapse of time, the court thinks it equitable to do so.

5.5 Remuneration of promoters

The Companies Act, 2019 is silent on whether promoters must be remunerated. Strictly, there is no automatic right conferred on a promoter to be remunerated for work done unless there is a valid contract between the promoter and the company. Such a contract under which the promoted is remunerated must be a valid contract. Since the contract may be entered into before the company is incorporated, the contract is a pre-incorporation contract and will not be binding on the company until ratified by the company. In addition, section 10(5) of the Act is applicable. That is, the company has the right to rescind the contract unless the company, after full disclosure of material facts known to the promoter, enters into or ratifies the contract through any of its principal organs. Once ratified, the contract will be binding and the promoter will be entitled to claim the agreed payment under the contract.

It has, however, been held that the promoter is entitled to recover reasonable expenses incurred in the incorporation of the company. Worthington & Davies, stated as follows:

"...In practice, however, recovery of preliminary expenses and registration fees does not normally present any difficulty. The directors will normally be empowered to pay them and will do so. It may well be, however, that the promoter will not be content merely to recover his expenses; certainly a professional promoter will expect to be handsomely remunerated. Nor is this unreasonable. As Lord Hatherley said (in *Touche v Metropolitan Ry Warehousing Co* (1871) L.R. 6 Ch. App. 671 at 676), "The services of a promoter are very peculiar; great skill, energy and ingenuity may be employed in constructing a plan and in bringing it out to the best advantages". Hence it is perfectly proper for the promoter to be rewarded, provided, as we have seen, that there is full disclosure to the company of the rewards to be obtained."⁵³⁶

⁵³⁶ Sarah Worthington & Paul L. Davies: Principles of Modern Company Law. Sweet & Maxwell, 10th edition (2016) @ pg. 110.

*Touche v. Metropolitan Ry Warehousing Co*⁵³⁷ - the Plaintiffs had incurred labour and expense in organizing a scheme for certain Exhibition Rooms. In doing so, the plaintiffs had entered into negotiations with, and sent the plans to, some of the promoters of a certain Company, and offered to accept £2000 for remuneration. The Company was formed and by the Articles of Agreement, it was recited that the Plaintiffs had incurred labour and expense in organizing the Exhibition Rooms and that it had been arranged with one of the promoters that he should pay them £2000 when and as soon as the Company should be in a position to commence business. It was agreed that no expense should be incurred until 10,000 shares had been subscribed, and at least £2 a share paid thereon, and that if the Company was not in a position to carry on the undertaking before a certain day, then neither the promoters nor the officers of the Company should have any claim upon the funds of the Company. It was also provided that when the shares were subscribed for and paid up on the stated amount, the directors should pay the sum of £2000. Copies of the Articles of Association were sent to the Plaintiffs. The shares in the Company were subscribed for and the deposits were paid, but the Company was unable to obtain a site, and never actually commenced business. The court held that on the evidence, the Company had adopted the agreement as to the payment of £2000 to the Plaintiffs through the promoter. Further, the court held that the performance of the agreement was not contingent on the actual commencement of business by the Company. Lord Hatherley LC stated @ pg. 678 as follows:

"I think that I am not bound to assess the value of the services of the Plaintiffs. The services of a promoter are very peculiar; great skill, energy, and ingenuity may be employed in constructing a plan and in bringing it out to the best advantage. It was argued that the Plaintiffs had done nothing at all for the Company in particular, and that the Plaintiffs might have sold their scheme to another Company, and that, therefore, there was no connection between the Plaintiffs and the Company. But that is not so. When this scheme had been once used by the Company it would be far less available to the Plaintiffs... As to whether the time has come when the money is to be paid, it has been argued that the Company has never been in a position to commence business within the meaning of Arts. 1 and 2. But the deposit-money has been paid, and I must hold that the Company was in a position to commence business. Otherwise there might be the preposterous result that a Company might enter into large contracts for land and building, and have work done, and then be able to say that they had never been in a position to commence business, and would therefore repay the shareholders, leaving nothing for the creditors, merely because the shop had not been actually opened. The true meaning of the articles must be, that the Company would not be bound by any contracts until the money was in hand, but their liability was by no means dependent on their getting the land. It has been argued that they were never able to buy the land, and that no time was fixed; but it would be absurd to say that the officers of the

⁵³⁷ (1871) L.R. 6 Ch. App. 671 at 676).

Company were not to be paid because the Company had not begun their business, and the creditors are in the same position".

Payment to promoters may take varied forms and may not necessarily be monetary. The company may issue shares of the company to the promoter. This may come under the general description of 'sweat equity' where services rendered to the company is capitalised as a consideration in-kind for the shares. This will be subject to rules under the Companies Act, 2019 on the payment for shares.⁵³⁸ It should also be noted that promoters may be subscribers at the time of incorporation, though they need not be subscribers. A promoter that is a subscriber must be eighteen years and above. Section 12 of Act 992 also provides that a person who applies for incorporation of a company under the Act must be eighteen years and above. In view of this, it may be generally asserted that a promoter must be eighteen years and above. However, once the age of majority for the general purpose of contracting remains twenty-one under common law, any contract that the promoter seeks to enforce against the company is likely to raise the issue of capacity to contract, which are subject to rules of common law.

⁵³⁸ Section 45 of Act 992.

6.0 PRE-INCORPORATION CONTRACTS

6.1 Introduction

Even though it is unlawful to carry on business as a company prior to incorporation, there are many instances where a business opportunity requires the use of a company at a time when the company is not in existence. In addition, transactions may be entered into on behalf of or in the name of the company before the incorporation of the company. Further, acts or contracts may be required for incorporation which needs to be done or entered into prior to the incorporation of the contract. Any of these instances relate to pre-incorporation acts, transactions or contracts. Pre-incorporation in relation to incorporation of a company refers to any period before the incorporation of a company. Since the incorporation of a company is signified by the issue of a certificate of incorporation, pre-incorporation refers to any period before or prior to the date indicated on the certificate of incorporation. Any act done, or transaction or contract entered into before the date of incorporation indicated on the certificate of incorporation is a pre-incorporation act, transaction or contract. Such acts, transactions or contracts are entered into by the promoters of the company either in the name of the company or on behalf of the company with the intention that the act, transaction or contract will be binding on the company when the company is incorporated.

6.2 Pre-incorporation contract under common law

Under the general principle of contracts under common law, a contract is not binding on a person who is not a party to the contract. In view of that, pre-incorporation contracts encounter challenges as a company, not in existence at the time of the contract, cannot be a party to the contract. The company cannot, therefore, be bound by the contract for two reasons. First, the company lacks contractual capacity at the time of the contract. Second, the doctrine of privity of contract dictates that a contract cannot be binding on a third party, a person not a party to the contract.⁵³⁹ Even though the doctrine of privity of contract has been modified under the Contracts Act, 1960 (Act 25) to permit a third party beneficiary to enforce a benefit conferred on the third party under the contract,⁵⁴⁰ obligations cannot be enforced against the third party. Since the company is not in existence at the time of the contract, the company is not a party to the contract. Under the doctrine of privity of contract, the contract cannot be binding on the company even after incorporation unless the company voluntarily enters into the contract after its incorporation.

*Kelner v. Baxter*⁵⁴¹ - in this case, John Kelner offered to sell wine to the defendants, Baxter, Calisher and Dales, who were acting as promoters of a company yet to be formed. The defendants wrote back

⁵³⁹ *Tweedle v. Atkinson* (1861) 1 B&S 393; (1861) 121 ER 762.

⁵⁴⁰ Section 5 of the Contract Act, 1962 (Act 25).

⁵⁴¹ (1866) LR 2 CP 174.

accepting the terms of the offer. The acceptance letter was signed in their names but indicating that they were acting on behalf of the proposed company, Graveyard Royal Alexandra Hotel Company Ltd. The goods were delivered to the promoters and consumed. The company upon incorporation, acting through its directors, wrote to ratify the agreement between the plaintiff and defendants. However, the company failed to pay the agreed price for the wine. Kelner sued the promoters to recover the amount. The court held that the plaintiff could recover the amount from the promoters as the contract was binding on the promoters and not the company. Commenting on the binding effect of the contract Erle CJ stated:

"This rule must be discharged. The action was for goods sold and delivered upon a written contract for sale. The words of the agreement were "Kelner to Baxter, Calisher, and Dales. I propose to sell stock, etc. for £900." The defendants as members of the projected company accepted this offer, and signed their names. The difficulty arises because the plaintiff addressed this proposal to the defendants on behalf of the company, and the question to be decided is whether there is anything on the face of the agreement to limit the personal liability of the defendants. If the company had been in existence at the time the agreement was signed, the defendants might have pledged its responsibility; but the document becomes wholly inoperative, if not binding on the parties themselves. The company was at that time a nonentity; and when it afterwards came into existence, it was a new creature just acquiring rights and liberties. The proposal to form a company does not create that company. Two consenting parties are necessary to a contract, therefore the mere ratification of the purchase by the company subsequently did not make a new contract. The cellar containing the stock sold to the defendants was given up by the plaintiff on the day the agreement was signed, and the plaintiff parted with that stock without doubt on the strength of the defendant's liability. When a clear intention is expressed in writing, no evidence can be admitted to prove that the intention was exactly the reverse of what has been written."

Under the common law principle of privity of contract, a pre-incorporation contract was, therefore, held not to be binding on the company. In addition, it was held that the promoters could not be deemed to be acting as agents for the yet to be incorporated company, thereby binding the yet to be formed company to a contract as a principal.

In *Kelner v. Baxter*⁵⁴², Erle CJ stated that:

"I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the

⁵⁴² (1866) LR 2 CP 174 @ 183.

defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February.

*Newborne v. Sensolid (Great Britain) Ltd*⁵⁴³ - the plaintiff, Leopold Newborne, was the promoter and prospective director of a limited company, Leopold Newborne (London) Ltd, which at the material time had not been registered. The proposed company purportedly entered into a contract for the supply of goods (tins of ham) to the defendants. The contract was signed: "Leopold Newborne (London), Ltd" and the plaintiff's name, "Leopold Newborne", was written underneath. The defendants later failed to accept delivery of the goods. Leopold Newborne (London) Limited not having been incorporated, the plaintiff brought an action in his own name for breach of the contract against the defendants for refusing to take delivery of the goods supplied. The court of first instance dismissed the action for damages for breach of contract on the ground that the contract, being entered into in the name of a limited company which at the material time was non-existent, could not be the subject of proceedings by the plaintiff, who had signed it on behalf of the company. The court dismissed the appeal and held that the contract was made, not with the plaintiff, whether as agent or as principal, but with a limited company which at the date of the making of the contract was non-existent, and, therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract. Lord Goddard CJ, in explaining this case in relation to the decision in *Kelner v. Baxter* stated @ pg. 710:

⁵⁴³ [1953] 1 All ER 708.

“That decision [in Kelner v. Baxter] seems to me to stop far short of holding that every time an alleged company purports to contract – when there is no company in existence – everybody who is signing for the company is making himself liable. The Company makes contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company’s contract is authenticated by the signature of one of the directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but to be selling the company’s goods. The only person here who had any contract here was the company, and Mr. Newborne’s signature merely confirmed the company’s signature. The document is signed ‘Yours faithfully, Leopold Newborne (London) Ltd.’ and then the signature underneath is the signature of the person authorised on behalf of the company. In my opinion, unfortunately though it may be, as the company was not in existence when the contract was signed there never was a contract, and Mr. Newborne cannot come forward and say: ‘Well, it was my contract.’ The fact is, he made a contract which did not exist. It seems to me, therefore, that the defendants can avail themselves of the defence which they pleaded and the appeal must be dismissed.”

Hollman v. Pullin⁵⁴⁴ - the defendant agreed to work as a medical officer for a medical association. One of the terms of the agreement being that on leaving the service of the association, he could not practice as a Medical Practitioner within a certain area. The plaintiff signed the agreement on behalf of the association which at the time he signed the document, had not yet been formed. When the defendant later left the association’s employment and entered into practice within the prohibited area, the plaintiff sued for an injunction. It was held per Vaughn William dismissing the action:

“It must not be assumed that the question admits of the same solution whether the supposed agent who without any real principal induced another to accept a contract might find it difficult upon the facts to escape personal liabilities as himself the contractor, and yet if he himself were endeavouring to sue on the same contract he might find the difficulty reversed when he endeavours to enforce it against one who denied that he ever entered into relation with him personally.”

Black v. Smallwood⁵⁴⁵ - the plaintiffs contracted to sell their land to a company called Western Suburbs Holdings Pty. Ltd. The defendants signed the contract on behalf of the company as directors. At the time that the contract was signed Western Suburbs Holdings Pty. Ltd. had not been incorporated and was not incorporated until more than six weeks later. The plaintiffs brought a suit for specific performance against the defendants, who denied that any contract had been made

⁵⁴⁴ (1884) Cab & EI 254.

⁵⁴⁵ [1966] 117 CLR 52.

between the plaintiffs and themselves. The Court held that a non-existent company was incapable of having agents and consequently neither the company nor the signatories who are Smallwood and Cooper were liable for the contract. Willes J. reasoned that:

"... construing this document ut res magis valeat quam pereat, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company" would operate no more than if a person should contract for a quantity of corn "on behalf of my horse".

Byles J. concurring stated:

"... persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal."

The decision in the case of *Kelner v. Baxter* goes as far as to suggest that the unilateral ratification of the contract by the company after the incorporation will not transfer the contract from the promoters to the incorporated company. For the contract to be binding, it has been held that the company after incorporation must have entered into a new contract in similar terms with the other party.

*Natal Land Co & Colonization Ltd v. Pauline Colliery and Development Syndicate Ltd*⁵⁴⁶ - in this case, the appellants are an incorporated joint stock company, having their head office in London. Prior to and in the month of December 1897, a Mr. Rycroft was their general manager in Natal under a power of attorney dated October 26, 1888, by the terms of which he was empowered to sell and lease the company's lands in the Colony and to make contracts for these purposes. On December 9, 1897, Rycroft, on behalf of the appellants, made a contract with a Mrs. de Carrey in respect of the coal mining rights of land belonging to the appellants. By an agreement dated December 22, 1897, and expressed to be made between William Louch, in his capacity as a provisional director of the Pauline Colliery and Developing Syndicate about to be registered under the laws of South African Republic, of the one part and Mrs. de Carrey of the other part, Mrs. de Carrey sold and purported to assign to Louch all her interest in lands in consideration of 300l cash and 10,000 shares in the syndicate. Mr. Rycroft was not informed of this agreement or of the assignment purported to be made by Mrs. de Carrey and did not in fact know of it until December 17, 1898. The respondent company was not incorporated until January 22, 1898, on which date it was registered as a joint stock company with limited liability. The 100l payable under the agreement was paid to Rycroft by the unincorporated syndicate before the incorporation of the respondent company. On 31st January, the appellant's company stopped the agreement by a telegram and claimed there was no contract between appellants and respondents. On May 30, 1899, the respondents commenced the present action against the appellants for specific performance of the agreement contained in the seven letters dated November 30 to December 9, 1897, or in the alternative for damages. In their declaration, the

⁵⁴⁶ [1904] AC 120 PC.

respondents alleged that on December 22, 1897, they acquired all the interest of Mrs. de Carrey in the agreement but did not allege any other assignment to them or title to the benefit of the agreement. The court had to decide whether the company after incorporation can ratify a contract purportedly entered into on its behalf. The court of first instance held for the respondents and decreed specific performance and the appellants appealed. In reversing the decision of the court of first instance, Lord Davey stated pg. @ 127 that:

“their Lordships do not think it necessary to say whether the agreement was or was not voidable on the grounds alleged, or on other grounds appearing in the correspondence, because they are clearly of opinion that there was no contract between the appellants and the respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from Kelner v. Baxter downwards. But the facts may shew that a new contract was made with the company after its incorporation on the terms of the old contract. The circumstances relied on for that purpose in the present case are not, in the opinion of their Lordships, necessarily referable to, and do not necessarily imply, a new contract with the respondents. But a conclusive reason which negatives any new contract is that Rycroft, by whose agency the new contract must be supposed to have been made, had no power or authority after January 31, 1898, to make such a contract on behalf of the appellants, and his want of authority was known to the solicitors acting for the respondents. He was not either the actual or the ostensible agent for that purpose of the appellants. Their Lordships will, therefore, humbly advise His Majesty that the judgment of May 29, 1902, ought to be reversed, and that instead thereof judgment ought to be given for the defendants in the action with costs.”

It was also held that the terms of the contract must be construed to determine the intention of the parties to determine whether the contract was binding on the one who made the contract.

*Summergreene v. Parker*⁵⁴⁷ - in this case, Parker, an estate agent, sued Summergreene for commission for effecting the sale of the defendant's business carried on by her under the name "The Dyeing King." The proceeding was before Maxwell J, and in answer to a question submitted to them, the jury found that the defendant promised the plaintiff £500 commission if he undertook a sale of her business. This was predicated on the existence of two documents which were purported to have been signed on behalf of The Dyeing King by Parker. The issue arose as to whether the letters

⁵⁴⁷ (1950) 80 CLR 304.

resulted in a sale of Summergreene's business by Parker. It was held that Parker clearly did not undertake a sale of a business because the company never came into existence. Fullager J stated @ pg. 323 that:

"I do not myself think that Kelner v Baxter (1866) LR 2 CP 174 or any of the cases cited affords any assistance in the present case. Where A, purporting to act as agent for a non-existent principal, purports to make a binding contract with B, and the circumstances are such that B would suppose that a binding contract had been made, there must be a strong presumption that A has meant to bind himself personally. Where, as in Kelner v Baxter (1866) LR 2 CP 174, the consideration on B's part has been fully executed in reliance on the existence of a contract binding on somebody, the presumption could, I should imagine, only be rebutted in very exceptional circumstances. But the fundamental question in every case must be what the parties intended or must be fairly understood to have intended. If they have expressed themselves in writing, the writing must be construed by the court."

The Common Law position on pre-incorporation contracts can thus be summed up as:

- (a) a yet to be formed company has no legal existence prior to its formation,
- (b) such a "company" is not capable of entering into a contract prior to incorporation for lack of capacity,
- (c) the "company" cannot act through an agent prior to incorporation as the principal must be in existence at the time the agent purports to act on its behalf,
- (d) from the above, any person who purports to enter into a contract on behalf of the company is personally liable if the contract is entered into in his name,
- (e) if the contract is entered into in the name of the company, the purported contract with such "company" is not valid as the company is not in existence at the time of the contract, and
- (f) the company cannot purport to adopt or ratify a contract entered into on its behalf at a time when such company was not in existence.

6.3 Pre-incorporation contract under Ghanaian law

Act 992 has conclusively provided under section 11, the effect of a pre-incorporation contract on a company upon the incorporation of the company. Section 11 of Act 992 provides:

- "(1) A contract or any other transaction purporting to be entered into by a company before the formation of the company, or by a person on behalf of the company before its formation, may be ratified by the company within eighteen months after the formation of the company.*
- (2) On ratification under subsection (1), the company becomes bound by, and entitled to the benefit of that contract or that transaction as if it has been in*

existence at the date of that contract or other transaction and had been a party to the contract or the other transaction.

- (3) Before the ratification by a company, the person who purported to act in the name or on behalf of the company is, in the absence of express agreement to the contrary, personally bound by the contract or the other transaction and is entitled to the benefit of the contract or the other transaction."**

The position under Act 992 is akin to the position under common law with the only addition being that the company has the right to ratify a pre-incorporation contract or transaction supposedly entered into by the company or by a person on behalf of the company before the formation of the company. Act 992, therefore, clothes the company with the legal right to ratify pre-incorporation contracts. The company is not bound or obliged to ratify the contract. It has the discretion to choose to ratify or not to ratify the contract. If it chooses not to ratify the contract, the contract will not be binding on the company. Subsection (1) of section 11 of the Act provides for a new requirement that was not under the repealed Companies Act, 1963 (Act 179). The section requires the ratification to be done within eighteen months after the formation of the company. It stands to reason that if a company fails to ratify a pre-incorporation contract within the eighteen months, the company cannot ratify the contract so as to have the effect prescribed under section 11 of Act 992. However, if one is to accept the general principle of freedom to contract, the company can enter into a new contract on the same terms and expressly give it a retrospective effect to achieve the same effect. Since Act 992 does not prescribe the effect of either ratifying after the eighteen months, the use of alternative structure to achieve the same effect as ratification, for example entering into a new contract based on the same terms and giving it a retrospective effect, must be upheld by the court based on the concept of freedom to contract once the company entered into the contract voluntarily through its recognised organs.

Until the ratification, the pre-incorporation contract is not binding on the company and cannot be enforced against the company. The pre-incorporation contract will bind the person who entered into the contract in the name of or on behalf of the company.⁵⁴⁸ Such a person is however permitted under subsection (3) of section 11 of Act 992 to escape liability by indicating expressly in the contract a disclaimer of personal liability. Unless so indicated, the contract will be binding and enforceable against the person who entered into the contract on behalf of the company.

In the event the company opts to ratify the contract as provided in subsection (1) of section 11 of the Act, subsection (2) gives the contract a retrospective effect once ratified by the company. In effect, on ratification, the contract will be deemed binding on the company not from the date of ratification but the date of the contract. The company is therefore bound to perform obligations due from the date of the contract and entitled to enjoy the benefits of the contract from the date of the contract.

⁵⁴⁸ Section 11(3) of Act 992.

For that purpose, the company is deemed to have been in existence at the date of the contract and to be a party to the contract from the date of the contract.⁵⁴⁹

6.4 Ratification of pre-incorporation contracts

Section 11 of Act 992 permits a company to ratify a pre-incorporation contract thereby binding the company to the contract from the date of the contract. Ratification of pre-incorporation contracts must be done by a resolution of the company. Since the Companies Act, 2019 prescribed that a company must act through its recognised organs, the ratification must be done by the recognised organs. Such recognised organs under section 144(1) of Act 992 are the members of the company in a general meeting or acting unanimously if not in a meeting, and the board of directors, or persons appointed by the board of directors or members. Notwithstanding the generality of sections 144(1) of Act 992, case law has established that ratification must be done by the principal organs of the company which are the board of directors or members of a company, whether acting in a meeting or acting unanimously.⁵⁵⁰ In addition, since pre-incorporation contracts are mostly entered into by promoters, the provisions of section 10 of the Act, particularly section 10(5) of the Act, on disclosures to be made by the promoter and the manner of disclosure are applicable to such contracts. Therefore, in the event the pre-incorporation contract is entered into between the promoter and the company, the ratification is only binding where there is full disclosure of material facts known to the promoter. The ratification must be done by the board of directors of the company provided all the directors are independent of the promoter. The ratification may also be done by all the members acting unanimously or by the members in a general meeting provided the promoter, who has shares, or shareholders, who hold shares in which promoter is beneficially interested, abstain from voting on the resolution to ratify the pre-incorporation contract.⁵⁵¹

*Jadbranska Slobodna Plovidra, Split v. Oysa Ltd*⁵⁵² - the claimant's company was registered under the laws of Yugoslavia whilst the respondent company was a limited liability company registered under the laws of Ghana. The respondent company entered into an agreement to charter the claimant's vessel. At the time of the agreement, the respondent company was not in existence. When the respondent company was subsequently incorporated and the board of directors met, Horst Tessendorf was appointed chairman with the authority to negotiate for loans or overdrafts. There was no mention of an intention to charter a ship. The respondent company later repudiated the charterparty. A dispute arose between the parties. In the course of discussion to settle the dispute, the respondent company's managing director wrote a letter to the claimants asking them to submit

⁵⁴⁹ Section 11(2) of Act 992.

⁵⁵⁰ It should be noted that even for the Board of Directors, approval of the members may be required where the contract or transaction falls into a category where the powers of the Board of Directors are limited under the Companies Act or the constitution of the company.

⁵⁵¹ Section 10(5) of Act 992.

⁵⁵² [1979] GLR 129.

a statement of account and indicating that the respondent company would settle what was due. The respondent company failed to pay and when sued, argued that the pre-incorporation contract was not binding on the company. Counsel for the claimants argued that per section 13 of Act 179, ratification was possible and that a letter sent to the claimant by the Managing Director of the respondent company asking for a statement of account amounted to ratification. It was held that there was no ratification and the respondent company was not bound by the contract. Amua-Sekyi J stated @ pg.137 that:

“Although this disposes of the application, I think I should add that even if the law applicable were Ghana law I would have held that there has been no ratification and therefore the charterparty is unenforceable against the respondents. The evidence offered by the claimants to show that the respondents ratified the charterparty entered into on their behalf on 29 August 1975, is the letter dated 28 January 1976. It seems to me that although section 13 was enacted to obviate the hardship and inconvenience which sometimes arises by a strict application of the English rules, the burden which lies on a claimant to prove ratification is a very heavy one... It seems to me that it is necessary that there be a clear and unequivocal act on the part of the company if ratification is to be inferred. Such an act may be a resolution of the company in general meeting adopting the contract, or a resolution to the same effect passed by a meeting of the board of directors and confirmed by the company in general meeting. I do not think that a letter signed by the managing director would be sufficient unless there is evidence that he was communicating a decision to ratify taken by the company in general meeting or by the board of directors which has been confirmed by the company in general meeting. In this case it has not been suggested that the respondents have either at a meeting of the board of directors or in general meeting agreed to ratify the charterparty entered into on their behalf on 29 August 1975. The letter signed by the respondents, managing director merely called for a statement of account, and although it is reasonable to infer that the account related to the charterparty, the letter did not bind the company to pay whatever sum the claimants alleged to be due. No doubt, it would have been open to the respondents to admit or falsify. The conclusion I have come to, then, is that even if Ghana law applies it has not been shown that after coming into existence the respondents ratified the charterparty Ahlman-Transport KG entered into on their behalf on the authority of Tessororf. The award which is based on the charterparty is therefore unenforceable as against the respondents. The application is accordingly dismissed.”⁵⁵³

⁵⁵³ Emphasis mine.

*Panagiotopoulos v. Plastico Ltd. and Plastico Ltd v. Panagiotopoulos (Consolidated)*⁵⁵⁴ – an action was commenced by the plaintiff against the defendant company to enforce certain obligations under a pre-incorporation contract entered into by the promoters of the company with the plaintiff. The plaintiff together with two others agreed to form the defendant company. Before incorporation, the plaintiff bore all the pre-incorporation expenses including purchasing land, plant and machinery with his own money. However, right before incorporation, the plaintiff changed his mind and purported to sell his interest in the venture to the yet to be formed company. A contract was executed that same day to that effect with the plaintiff being the vendor and the company as the purchaser, at a fee. The purchase price was to be paid in instalments and the assets were mortgaged to the plaintiff until final payment. The defendant company defaulted in paying the full purchase price after the company was finally incorporated. The company on incorporation had entered into possession of the properties and started paying the instalments. The company has also written to the plaintiff stating that they (company) are beneficiaries of the properties. After paying ten instalments of the purchase price, the company defaulted. The plaintiff issued a writ claiming the balance due on the purchase price. The company in its defence to the action denied that the contract was binding on the company on the basis that it was concluded before the company came into existence. The court had to determine whether the company was bound by the terms of the contract by looking at the validity of the pre-incorporation contract. It was held that the company is not bound by a contract purporting to be entered on their behalf by the promoters or other persons before incorporation unless the company after incorporation enters into a new contract to the effect of the previous agreement and such a contract may be inferred from the acts of the company. Apaloo JSC stated @ pgs. 183 to 184 that:

“It is now necessary to return to the question of law debated in this case. As I said, the company’s reply to the plaintiff’s claim for the balance of the purchase price was that since the contract of sale was concluded before the company was incorporated, they were not liable on it. In this, the law seems to be on their side. At pp. 425-426, paras. 824-825 of Vol. 6 of Halsbury’s Laws of England (3rd ed.), the law is stated as follows:

“A company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation. The company cannot, after incorporation, ratify or adopt any such contract because there is in such cases no agency and the contract is that of the parties making it ... In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement. This new contract may, however, be inferred from the acts of the company when incorporated ...”

There is no evidence that the company have since incorporation, entered into a new express contract with the plaintiff to the effect of the agreement evidenced by exhibit

⁵⁵⁴ [1965] GLR 176.

B. Accordingly, if the plaintiff should succeed in this action, he must show that the acts of the company since its incorporation are such that such a contract must be implied. The acts to which the plaintiff points are two, namely, first that the company are in the beneficial enjoyment of the factory and the machinery and secondly have so far made the payments due under the original contract. That prima facie would seem to lend colour to the suggestion that as the company acted on the contract entered into between the plaintiff and the promoters, it ought to be inferred that there was a contract entered into between the company and the plaintiff on the same terms as the contract evidenced by exhibit B. But it was decided by the English Court of Appeal in Re Northumberland Avenue Hotel Co. that if the acts from which the inference is sought to be drawn were done in the mistaken belief that the pre-incorporation agreement was binding on the company, then such an inference cannot properly be drawn. In other words, the acts would have been explained otherwise than on the basis of a new contract by the company. I have already found that not only the plaintiff, but the company as well, were under honest but erroneous impression that the contract of 1 March 1963 (exhibit B), was binding on the company. It seems to me reasonable to infer that the acts done by them and on which the plaintiff relies were done on the faith of that belief. Accordingly, the Northumberland Avenue Hotel Co. case precludes me from holding that a new contract between the plaintiff and the company can be implied from the acts on which the plaintiff relies. If that is right, the plaintiff's claim against the company for the balance of the purchase price of the machinery and spares and the claim for specific performance must fail."

Under section 11(3) of Act 992, until ratified by the company, the pre-incorporation contract is binding on the person who purported to enter into the contract on behalf of the company, unless there is an express disclaimer of personal liability.

*Phonogram Ltd v. Lane*⁵⁵⁵ - in 1973 there was a group of 'pop' artists. They included two gentlemen called Brian Chatton and John McBurnie. The suggestion was that they should perform under the name 'Cheap Mean and Nasty'. A company was going to be formed to run the group. It was to be called 'Fragile Management Ltd'. Before the company was formed, negotiations took place for the financing of the group. It was to be financed by one of the subsidiaries of a big organisation called the Hemdale Group. It was eventually arranged that money should be provided by Phonogram Ltd. The agreed amount was £12,000, and the first instalment was to be £6,000. The first instalment of £6,000 was paid but the new company was never formed. The group never performed under it. The £6,000 was not paid when it was due to be repaid. Phonogram Ltd then tried to discover who was liable to repay the money. Mr Roland Rennie was the man who had negotiated on behalf of

⁵⁵⁵ [1981] 3 All ER 182.

Phonogram. Mr Brian Lane was the man who had negotiated on behalf of the new company which was to be formed. The plaintiffs issued a writ against the defendant claiming repayment of the £6,000 from him. The issue was whether, on the true construction of the contract, Mr Lane made himself personally liable. By his defence, the defendant denied that he was personally liable to repay that sum. It was held that the defendant was personally liable to repay the £6,000 by virtue of s 9(2) of the 1972 Act, and the appeal would be dismissed. Oliver LJ. Stated that:

“Although at common law the contractual liability of an agent depended on the real intent revealed by the contract, namely on whether the agent intended himself to be a party to the contract and not on the narrow distinction between a signature ‘for and on behalf of’ a company and a signature in the name of the company, any distinctions depending on the form of the signature which might have been raised at common law have been rendered irrelevant by s 9(2) of the 1972 Act in any case where a contract is either with a company or with the agent of a company.”

Lord Denning MR. stated at @ pg. 186 that:

“... even so Phonogram Ltd say that the law of England has been much altered by s 9(2) of the European Communities Act 1972. It says: ‘Where a contract purports to be made by a company, or by a person as agent for a company, at a time when the company has not been formed, then subject to any agreement to the contrary the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it, and he shall be personally liable on the contract accordingly.’ That seems to me to cover this very case. The contract purports to be made on behalf of Fragile Management Ltd, at a time when the company had not been formed. It purports to be made by Mr. Lane on behalf of the company. So he is to be personally liable for it.”

The position under Ghanaian law requires evidence that the company upon incorporation has ratified the pre-incorporation contract or transaction through any of its principal organs – board of directors or members of the company in a general meeting or acting unanimously without a meeting. Once ratification is established, the pre-incorporation contract is binding on the company from the date of the contract, and not the date of ratification. In the event the company takes action that may be construed as ratification, it is important that the party seeking to hold the company liable establishes the ratification. It is, however, left to be determined if the party can rely on the presumption of regularity in asserting ratification of the company. In which case, the plaintiff in the case of *Jadbranska Slobodna Plovidra, Split v. Oysa Ltd* plead that they are not aware of the internal rules of the company on ratification. This may be different in the *Panagiotopoulos case* as the plaintiff may be deemed to be aware of the internal rules as he took the initial step to incorporate the company. It is suggested that the presumption should not be used by plaintiffs in instances where a company is to be bound by pre-incorporation contracts that the company was not a party and which

sick to impose liability on the company after incorporation. The essence of the presumption is to protect innocent third parties who deal with a company. In this case, the person did not deal with the company but someone who purports to act for a company not in existence at the time of such dealing. A higher threshold of diligence should be required of such a person seeking to hold a company liable to a pre-incorporation contract to ensure the ratification is properly done.

7.0 PRESUMPTION OF REGULARITY

7.1 Introduction

Natural persons are presumed to have legal capacity unless the law limits or restricts such capacity as in the case of minors. The opposite is the case in terms of artificial entities. Companies are artificial persons created and recognised by law which confers legal personality and capacity on the company. Therefore, unlike natural persons that there is no need for the law to state expressly the capacity, for companies, the law must prescribe the capacity of the company. Where the law limits the capacity of minors, the general position of the law is that a contract entered into by the minor will not be binding on the minor for lack of capacity irrespective of the knowledge of the other party as to the lack of capacity of the minor.⁵⁵⁶ The question here is whether acts engaged in by the company outside the capacity conferred on the company by the law also should have the same effect. In effect, do third parties assume the risk of finding out the legal capacity of a company to determine what the company can do or cannot do before entering into a transaction with the company?

Related to the above is the question as to whether a third party must ensure the company complies with its constitution in order for a contract entered into with the company to be binding on the company? The constitution of the company provides for the internal rules of the company including who can act for and on behalf of the company. In the event of a breach of the internal rules, will the contract be binding on the company and enforceable by the third party? This question is answered by the doctrine of presumption of regularity, also referred to as the internal or indoor management rule.

7.2 Common law position

Presumption of regularity provides that a person dealing with a company is entitled to presume that the internal rules of the company or the constitution have been complied with. In other words, the person is not under obligation to investigate the capacity of the company or whether the company complies with its constitution in entering into transactions with the company. In effect, persons entering into or engaging with companies are entitled to assume that the company has the capacity to engage in the transaction it is engaging in and the company is in compliance with its constitution. Since the law does not impose obligations on the person to investigate the capacity of the company or the compliance by the company with its constitution, the person does not carry the risk in the event of lack of capacity or breach of the constitution by the company. For that reason, a contract or transaction entered into between a company and a third party in breach of its constitution or internal rules of the company cannot be invalidated to the detriment of the third party on the ground that the constitution of the company has not been complied with.

⁵⁵⁶ Nash v. Inman (1908) 2 KB 1.

The third party is to make a presumption that the transaction or contract is regular and in compliance with the constitution of the company. Hence the doctrine is referred to as the presumption of regularity. It is also referred to as the internal or indoor management rule. Presumption of regularity or the internal management rule, therefore, provides that where a person enters into a transaction with the company, the person is entitled to assume compliance with the internal rules of the company, and the breach of the internal rules by the company cannot be a ground for invalidating the transaction between the person and the company.

The development by common law of the presumption of regularity was to abolish the doctrine of constructive notice where one is deemed to have knowledge of the constitution or articles of associations of the company which was submitted to the Registrar for the formation of the company since it becomes a public document. This was the decision in the case of *Royal British Bank v. Turquand*⁵⁵⁷. The concept of presumption of regularity or the internal management is, therefore, sometimes referred to as the "Rule in Turquand's Case". The origin of the rules was, therefore, to mitigate the harshness of the constructive notice doctrine.

*Royal British Bank v. Turquand*⁵⁵⁸ - Mr Turquand was the official manager (liquidator) of the insolvent Cameron's Coalbrook Steam, Coal and Swansea and Loughor Railway Company. It was incorporated under the Joint Stock Companies Act 1844. By the deed of settlement of the joint-stock company, the directors were authorised to borrow, under the common seal of the company, such sums as should from time to time, by a resolution passed at a general meeting of the company be authorised to be borrowed, not to exceed a certain sum. At a general meeting, the directors were authorised to borrow such sums and at such interest for such periods as they might deem expedient, in accordance with the provisions of the deed of settlement and the Act of Parliament. The company had given a bond for £2,000 to the Royal, which secured the company's drawings on its current account. The bond was under the company's seal, signed by two directors and the secretary. When the company was sued, it alleged that under the registered deed of settlement (the articles of association), directors only had the power to borrow up to an amount authorised by a company resolution. That the resolution did not specify how much the directors could borrow and therefore the amount borrowed was in breach of the deed of settlement and not binding on the company. The Court of Exchequer Chamber ruled that the bond was valid and the company were liable to repay the amount. That whether the resolution was or was not sufficient authority to the directors to borrow should not affect the validity. The court was of the view that even though parties dealing with joint-stock companies are bound to take notice of any limitation of the authority of the directors in the deed of settlement, where the directors, as in this case, have the power to borrow, the lenders of the money have a right to presume that the company which put forward their directors as authorised to borrow have taken every step required to empower them to do so. That the

⁵⁵⁷ (1856) 6 E&B 327.

⁵⁵⁸ (1856) 6 E&B 327.

constructive notice of the bank must be in relation to the deed of registration (article of association) and the bank could not be deemed to know which ordinary resolutions were passed, because these were not registrable. Jervis CJ in giving the judgment of the Court stated @ pgs. 331 and 332 that:

"I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that Court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the Company, be authorised to be borrowed: and the replication shews a resolution, passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special Non est factum, does not raise any objection to this advance as against the Company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

There is a good reason for this common law position. It will be quite burdensome for a person to walk into the offices or commercial centre where a company is engaged in a business and demand to read the constitution of the company prior to engaging in business with the company. It will be absurd to walk into a shop and demand to review the constitution of the company prior to shopping for goods so that one is sure the items being sold and the manner of entering into the contract of sale is consistent with the constitution. The common law rule on presumption of regularity is therefore for business convenience or efficacy. In other words, a party entering into a transaction or contract with a company should not be burdened to meticulously examine the internal rules of the company to determine that the company has the capacity to enter into the transaction or contract and in entering into the contract or transaction, has complied with such rules. That is, to find out whether the transaction to be carried out falls within the authorised business of the company or is being

carried out in a manner stated in the constitution, or person acting on behalf of the company is so authorised in the constitution to act.

7.3 Position under the Companies Act

As indicated earlier, the common law doctrine of presumption of regularity is to defeat the doctrine of constructive notice which imputes knowledge of the company's constitution to the general public. The Companies Act, 2019 (Act 992) in section 149 expressly restates the abolishment of the constructive notice doctrine by providing that *"Except as provided in section 121 regarding particulars in the register of particulars of charges, a person shall not be deemed to have knowledge of any particulars, documents, or the contents of documents by reason only that those particulars or documents are registered by the Registrar or referred to in any particulars or documents so registered."*

In *Turquand's* case, the court stated that the bank must be deemed to know the content of the deed of settlement (article of association or the constitution). This is no longer the position under the Act. There is no constructive notice of the content of the constitution of the company. Section 121 of Act 992 expressly indicated that a person is not deemed to have knowledge of the content of a document except particulars of charges by reason only that the document is registered with the Registrar. The section, therefore, overrules the position of the court in *Turquand's* case in relation to constructive notice in relation to the constitution of the company.

The common law doctrine of presumption of regularity in relation to the entitlement of persons dealing with the company to presume the internal rules have been complied with have now been given statutory backing under Act 992 even in relation to the constitution, notwithstanding its registration with the Registrar.

Section 150 of Act 992 provides that:

"(1) A person having dealings with a company or with any other person who derives title under the company is entitled to assume that,

- (a) the company has been duly incorporated under this Act;*
- (b) that a person described in the particulars filed with the Registrar pursuant to sections 13 and 216 as a director, managing director or Company Secretary, or represented by the company, acting through its members in general meeting, board of directors, or managing director, as an officer or agent of the company, has been duly appointed and has authority to exercise the powers and perform the functions customarily exercised or performed by a director, managing director, or Company Secretary of a company carrying*

on business of the type carried on by the company or customarily exercised or performed by an officer or agent of the type concerned;

(c) *that the Company Secretary, and any other officer or agent of the company having authority to issue documents or certified copies of documents on behalf of the company has authority to warrant the genuineness of the documents or the accuracy of the copies so issued;*

(d) *that a document has been duly authenticated by the company if it*

(i) bears what purports to be the seal of the company attested by what purports to be the signature of two persons who, in accordance with paragraph (b), can be assumed to be a director and the secretary of the company; or

(ii) is certified by what purports to be the signatures of two directors and the Company Secretary of the company

and the company and those deriving title under the document are estopped from denying the truth of that assumption."

Act 992, therefore, entitles a person who deals with a company or deals with a person who is the director, managing director or the Company Secretary, to assume that the company is duly incorporated and such person is duly appointed and can duly exercise powers and perform functions customarily exercised or performed in that position. Upon the assumption of the due incorporation of the company, a person is therefore entitled to engage in any transaction with the incorporated company as permitted by Act 992.

Further, Act 992 entitles persons dealing with a company to rely on documents issued by the Company Secretary or the company if the genuineness of the document is warranted by the Company Secretary, or it is authenticated by the seal of the company as attested to by a director and the Company Secretary; or certified by the signature of two directors and the Company Secretary.

Since Act 992 entitles persons dealing with the company to assume, such persons do not bear the risk in the event the company is not duly incorporated, the persons acting in the capacity of director, managing director or the Company Secretary are not duly appointed or have their powers limited or prohibited from engaging in specific acts once it is customary for them to do so. In addition, the company cannot deny authenticity or genuineness of documents relied on if the requirements under section 150 of the Act are satisfied. In short, the company is estopped from denying the truth of the matters under section 150 of the Act that the person is permitted to make assumption on. The company cannot, therefore, use the fact that the company was not duly incorporated, or has no capacity to undertake the specific act, or the fact that its directors, managing director or the Company

Secretary has not been duly appointed or lack capacity to undertake the specific act, as a basis to invalidate the act, contract or transaction entered into with the third party.

Boohene Foods Ltd v. National Savings and Credit Bank and Another⁵⁵⁹ - the second defendant-company offered to buy rice from the plaintiffs by presenting a post-dated cheque in payment thereof. The plaintiffs declined to sell the rice against that post-dated cheque. The second defendant subsequently presented the same cheque but with the endorsement "payment guaranteed" written at the back and bearing the signature and official stamp of the accountant of the Tema branch of the first defendant bank. On the basis of that guarantee, the cheque was accepted by the plaintiffs and the rice was supplied to the second defendant. When the cheque was presented for payment, the first defendant-bank dishonoured it. The plaintiffs, therefore, sued the first defendants for, inter alia, the recovery of the value of the rice together with interest from the date it became due up to the date of judgment. The first defendants repudiated liability on the grounds inter alia that: (i) the accountant had no mandate to commit the bank to the tune of ₵5 million; (ii) since the accountant knew that he had no mandate to commit the bank up to ₵5 million and furthermore his action was not in accordance with the written instructions of the bank, what he did was unauthorised and fraudulent and could therefore not bind the bank; and (iii) since the plaintiffs had notice, actual or constructive, of the irregularity of the mandate, the bank could not be bound. The court found, inter alia, that (a) no notice had been given to customers about the bank's own peculiar form of guarantees which they furnish to their customers; and (b) the accountant had been held out conspicuously by the first defendants as one of their signatories and a high-ranking officer with authority to deal with members of the public on all banking matters on their behalf. That the customer is entitled to presume that the internal regulations have been complied with. The bank was therefore liable to the customer to honour the cheque. Brobbey J stated @ pgs. 187 and 188 that:

"On the facts and evidence so far led in the case, I find that no notice whatsoever, be it express or constructive, was given by the bank to its customers that the branch accountant had a limit in his dealings with the business of the bank or that the manager had to be contacted in transactions beyond certain amounts. The law permits the customer to proceed, in the absence of notice, that the internal regulations of the company have been complied with. I hold the view that the bank held out the accountant as an officer with authority to act on behalf of the bank. If the accountant exceeded his limit, or mandate, or acted fraudulently, or without authority as he did in the instant case, he still acted on behalf of the first defendant-bank. Logically, it is only fair to hold, as I do hold, that the bank which placed him where he was working in the bank as the bank's branch accountant should bear responsibility for the actions of its own employees. I certainly would have held otherwise if there were evidence that notice—even constructive or implied notice—was given to the customer by the bank. In the absence of such notice, the bank

⁵⁵⁹ [1992] 1 GLR 175.

cannot escape liability for the actions of its employees on grounds of mistake, fraud or express prohibition. I find it particularly intriguing that the bank which employed a person as its official and put him forward as such, clothed him with authority to act for it in its normal business, did permit him to act for it in its operations can proceed to dismiss the official when the bank finds that official dishonest in respect of a specific transaction but muster the moral conviction to turn round and attempt to saddle someone else with responsibility for that dishonesty. One can presume that a bank will probe the background of its officers before putting them in responsible positions like branch accountants to act for it and if it turns out that the bank erred in the evaluation of the integrity of its employees, it is the bank and no one else who should accept liability for that misplaced trust or selection. It cannot be right that the bank can simply rid itself of the services of the employee whose status was created by it and expect others, like the bank's customers, to take responsibility for its mistakes, trust or errors of judgment in the selection of its employees or misplaced confidence or trust in its own workers."

*Barclays Bank (D.C.O.) Ltd. v. Perseverance Transport Services Ltd*⁵⁶⁰ - the defendant-company, a limited liability company, sought a loan from the plaintiff-bank. The bank asked it to produce its authority to borrow. Accordingly, one of its officers produced to the bank what purports to be a resolution of its directors at a meeting held on the 15th December, 1953. It purports to have been signed by the chairman of the board of directors and the secretary. It had the seal of the company affixed to it. Relying on this document the bank advanced to the company various sums of money. In 1954, the bank asked for security for the repayment of the various sums of money lent. The company executed in favour of the bank a memorandum whereby it created an equitable charge over certain of its properties. In July 1955, the company informed the bank that it had arranged with the Industrial Development Corporation (I.D.C.) to pay on its behalf the outstanding debt in exchange for a transfer to the said I.D.C. of the security in the hands of the bank. The bank agreed to this arrangement, but in September 1956, the I.D.C. refused to make the payment. The present action was commenced by the bank for a declaration that the memorandum created in a favour of the bank mortgagees on the lands, and for an order to have the mortgage enforced by sale or foreclosure. It was contended on behalf of the defendant-company that the borrowing was ultra vires the company and the loan irrecoverable because there is no evidence that it was sanctioned by a general meeting of the shareholders. It was held that by the rule in *Royal British Bank v. Turquand* (1856) 6 EL. & BL. 327, the bank was entitled to assume that the resolution produced to it was a resolution of the general meeting of the company empowering it to borrow. The bank did not have to go behind that resolution to investigate the internal workings of the company and to check up whether a general meeting was held or not. Apaloo J stated @ pg. 669 that:

⁵⁶⁰ [1961] GLR 665.

"In my opinion, in so far as the defendant-company sought to say that the meeting of the 15th December, 1953, was not a meeting of the general company, the rule in Turquand's case furnishes a complete answer. The defendant-company knew or ought to be deemed to know that it could not borrow beyond its issued capital without the sanction of a general meeting of its shareholders. It produced to the plaintiff-bank a resolution as authority for borrowing such excess. In my judgment, the plaintiff-bank were entitled to assume that such a meeting was in fact held. In his second edition of the Principles of Company Law, Professor Gower dealing with the rule in Turquand's case observed at page 143 as follows: "The rule was manifestly based on business convenience, for business could not be carried on if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officials with whom he dealt had actual authority". This seems to me good sense and I respectfully agree with it."

*Oxyair Ltd & Darko v. Wood & Others*⁵⁶¹ - the 2nd Defendant, acting as the managing director and officer of the 1st Defendant procured the assistance of the Plaintiffs in the execution of the objects of the company. The 2nd defendant entered into an oral agreement with the Plaintiffs that 40 per cent of the shares in the 1st defendant company would be allocated to them. Plaintiff sued the 1st and 2nd Defendants when the 2nd Defendant failed to honour the promise on the allocation of shares. 1st Defendant alleged that the 2nd Defendant acted ultra vires and that the company was not bound by his offer to the Plaintiffs. The plaintiff invoked the principle in Turquand's case to support his claim. Date-Bah JSC stated at pg. 1064 as follows:

"This claimed that the rule in Turquand's Case had been wrongly invoked on the facts of this case. This rule was formulated in Royal British Bank v Turquand (1856) 6 E & B 327 and has been codified and amended in sections 139 to 143 of our Companies Code 1963. The part of this codification which is relevant to the facts of this case is section 139, which is in the following terms:

"Any act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefor to the same extent as if it were a natural person:

Provided that

- (a) the company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing director, as the case may be, had no power to act in the matter or*

⁵⁶¹ [2005-2006] SCGLR 1057.

- had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of power or of the irregularity,*
- (b) *if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection therewith merely because the business in question was not among the businesses authorised by the company's Regulations."*

On the facts of this case, the second defendant admitted that he was the managing-director of the first defendant. Accordingly he was, in law, one of the organs of the company, able to bind the company in terms of the provision set out above. The plaintiffs' case was that, by the second defendant's act of offering them 40% equity in the first defendant, he had bound the first defendant as well as himself. The following passage from the first plaintiff's cross-examination illustrates the plaintiffs' case. (See p. 212 of the Record).

There was evidence on record which the trial judge could reasonably choose to believe which would support his conclusion that the second defendant acted both on his own behalf and on behalf of the company of which he was managing-director. In terms of section 139 of the Companies Code 1963, unless the defendants were able to establish that the plaintiffs had actual knowledge, before the conclusion of the oral contract, of any defect in the second defendant's authority to bind his company or that he had acted in an irregular manner, then the company was bound. In this connection, it should be noted that section 141 of the Companies Code 1963 effects a change in the pre-existing common law rule. The common law rule was that a party dealing with a company was deemed to have constructive notice of the contents of all the companies' public documents filed at the Companies Registry. Section 141 abolishes this rule. It provides as follows:

"Except as mentioned in section 118 of this Code, regarding particulars in the register of particulars of charges, a person shall not be deemed to have knowledge of any particulars, documents, or the contents of documents merely because such particulars or documents are registered by the Registrar or referred to in any particulars or documents so registered."

This provision implies that at the time that the plaintiffs entered into their parol contract with the defendants they had no constructive notice of the contents of the Regulations of the company. Accordingly, any restrictions on the authority of the managing-director contained in the Regulations do not affect the validity of the

contract entered into by him, unless the plaintiffs' actual knowledge of such restriction is proved. Furthermore, section 142(a) restates the effect of the rule in *Turquand's Case* by affirming that:

"Any person having dealings with a company or with someone deriving title under the company shall be entitled to make the following assumptions and the company and those deriving title under it shall be estopped from denying their truth: -

(a) That the company's Regulations have been duly complied with."

Thus, an outsider, such as the plaintiffs were when they entered into the oral agreement with the second defendant, is entitled to assume that all the internal rules of the company have been complied with. This is what is referred to in the marginal note of section 142 as the presumption of regularity.

The rule in *Turquand's Case* was invoked by the Court of Appeal in this case because the defendants argued before that court that, assuming that the second defendant had entered into the agreement alleged, he had not complied with the first defendant company's Regulations, in entering into the said agreement. As Quaye JA put the argument, at p. 434 of the Record: "The contention of the appellants was that the 2nd defendant and or the plaintiffs acted *ultra vires* the regulations of the company." He accordingly countered the argument by invoking the rule in *Turquand's Case* thus (at p. 435 of the Record):

"I have earlier on in this judgment hinted that the 2nd defendant was deemed to have acted legally. The conduct of the 2nd defendant vis a vis the plaintiffs and the 1st defendant falls squarely into the rules and can be illustrated by the case of Royal British Bank vrs Turquand..."

I am satisfied that the rule was correctly invoked on the facts of this case.

Regarding the form of the contract on which the plaintiffs are suing, it is pertinent to point out that section 144 of the Companies Code 1963 provides as follows:

"Contracts on behalf of any company may be made, varied or discharged as follows:

... contract which, if made between individuals would be valid although made by parol only and not reduced to writing or which could be varied or discharged by parol, may be made, varied or discharged, as the case may be, by parol on behalf of the company."

A parol contract is thus perfectly enforceable against a company in the same way as it would be enforceable against a natural person. The argument made by the defendants in their Statement of Case before this Court that an allotment of shares and an offer of shares should be in writing is not sound in law. No requirement as to form impeded the valid formation of the contract sued on."

Given the legal principles outlined above, I have no hesitation in supporting the Court of Appeal's application of the rule in Turquand's Case to the present case.

Quaye JA was right in holding (at p.436 of the Record) that:

"The evidence in the instant case falls short of establishing that the 2nd defendant was not managing director of the company or that his promise of shares or representation to the plaintiffs upon which the plaintiffs acted and set up the company, practically brought it into being, and otherwise lifted it from a mere intention supported by a certificate of incorporation, was different from or contrary to, what a managing director of a private company limited by share would ordinarily do."

7.4 Exceptions to the application of presumption of regularity

There are a number of exceptions to the doctrine of presumption of regularity or the internal or indoor management rule. Two exceptions are discussed below.

(a) Actual Knowledge

The doctrine entitles a person dealing or who intends to deal with the company to presume. One cannot be making a presumption if one knows the true situation. In line with that, actual knowledge defeats the presumption. Section 150(2) of Act 992, therefore, provides in paragraph (a) that *"a person is not entitled to make any of those assumptions if that person had actual knowledge to the contrary"*. A person dealing with a company who knows that the company has not been duly incorporated, or lacks capacity or person deriving title from the company has not been duly appointed or has the power to engage in the intended transaction cannot, therefore, make an assumption to the contrary. The actual knowledge of the fact negates the entitlement to make an assumption to the contrary.

*Transvaal Lands Co. Ltd v. New Belgium (Transvaal Land and Development Co. Ltd)*⁵⁶² – three directors constitute a board of the plaintiff company. The board passed a resolution for the company to purchase the shares of another company, Lydenberg Company. Two directors have shares in Lydenberg Company. This was not however disclosed at the board meeting at which the resolution approving the transaction was passed, even though one director abstained from voting after disclosing he is a director of the company. An article of the company requires such disclosure. It was held that directors of a company who acted in breach of the duties cannot assume regularity as they have knowledge of the applicable rules. The contract for the purchase of the shares was held to be voidable. Swinfen Eady LJ stated @ pg. 987:

⁵⁶² [1914-15] All ER 987.

“... with regard to the plaintiff company, this matter is regulated by art 98. This is the only provision in the plaintiff company's articles modifying what would otherwise be the rule of law applicable, and enabling a director of the plaintiff company to be interested as a member of a company with which the plaintiff company is contracting. But it requires that the director shall disclose the nature of his interest, and shall not vote in respect of any contract in which he is concerned. The provisions of this article were not observed when the resolution to purchase the Lydenberg shares was carried, as Harvey voted in favour of it, and without his vote being counted there was no quorum, whereof the defendants, the other contracting party, had full notice. The result is that the contract was voidable, and has been duly avoided, and the plaintiffs are accordingly entitled to have the purchase money repaid, but they must return the Lydenberg shares.”

*Bousiako Co. Ltd. v. Ghana Cocoa Marketing Board; Kwabo-Osekyere Construction Works Ltd. v. Ghana Cocoa Marketing Board (Consolidated)*⁵⁶³ - Osei-Hwere J stated @ pg. 841 that:

“The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity. Section 140 also provides for situations when the acts of any officer or agent of a company shall be deemed to be acts of the company. These are, for instance, when the company, acting through its board of directors, or managing director, shall have expressly or indirectly authorised such officer or agent to act in the matter or shall have represented the officer or agent as having its authority to act in the matter. In any of these events the company shall be civilly liable therefore to the same extent as if it were a natural person. The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity.”

*Commodore v. Fruit Supply (Ghana) Ltd*⁵⁶⁴ - the respondent company acting through its managing director and one Quarshie traded with the appellant. The company alleged that the appellant owed the company and instituted an action to recover the money. The appellant counterclaimed for the overpaid amount that was made through Quarshie. The company alleged the transaction with

⁵⁶³ [1982-83] GLR 824.

⁵⁶⁴ [1977] 1 GLR 241.

Quarshie was not binding on the company as Quarshie was not a director and so authorised to act. The court held that Quarshie was a *de facto* director as the company has held him out and he has performed acts as a director of the company. Under the rule in *Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327, persons who entered into a contract with a company and dealt in good faith with that company, had the right to assume that acts within the constitution and powers of that company had been duly and properly performed. Such persons were under no duty to inquire whether acts of internal management had been regularly performed. Lassey JA stated @ pg. 254 that:

"On the facts, the defendant as an outsider, had no knowledge of any irregularity within the meaning and intent of sections 139 and 140 of the Companies Code, 1963 (Act 179), so as to preclude her from relying on the rule in Royal British Bank v. Turquand (supra). It seems the matter turns mainly on the true construction of the effect of these sections. These statutory provisions are intended, I think, to modify the application of the rule in British Bank v. Turquand. Their combined effect is that if the outsider to the transaction knows or ought to know that the person held out as director by the company is acting irregularly, the company will not be civilly liable. The Turquand rule only protects outsiders to the company."

*Morris v. Kanssen and Others*⁵⁶⁵ - a company was incorporated in 1939 with a nominal capital of £100 in £1 shares. The articles of the company incorporated certain articles of Table A which provided persons acting as directors though it was afterwards discovered that there was a defect in their appointment or qualification. Kanssen and Cromie were the first directors of the company and each held one share, these being the only shares allotted. Disputes arose between Kanssen and Cromie and Cromie entered into a scheme with Strelitz to remove Kanssen from his directorship. With this object, Cromie and Strelitz falsely claimed that in February 1940, Strelitz had been appointed a director and they fabricated an entry in the minute book to this effect. In April 1940, Cromie and Strelitz ineffectively attempted to deprive Cromie of his directorship, and they purported to issue one share to Strelitz. No general meeting of the company was held in 1941, as required by its articles, and therefore, from 1 January 1942, there were no directors of the company. On 30 March 1942, Cromie and Strelitz purporting to act as directors, appointed Morris a director of the company and thereupon Cromie, Strelitz and Morris allotted 34 shares to Morris, 32 to Strelitz and 24 to Cromie. As the result of an action brought by Kanssen for inter alia rectification of the register by the removal of the names of all persons as the holders of shares except himself and Cromie as holders of one share each, an order was made that the register should be rectified accordingly. On appeal, it was contended by Morris (i) that the issue of shares to him had been validated by the Companies Act, 1929, s 143, and Table A, art 88; (ii) that, by virtue of the rule in *Turquand's* case, he was entitled to treat the shares as validly allotted. The court held that Morris was not entitled to invoke the rule in *Turquand's* case because he himself was purporting to act on behalf of the company in the unauthorised transaction. Lord Simonds stated @ pg. 953 that:

⁵⁶⁵ [1946] 1 All ER 586.

“What then is the position of the director or acting director who claims to hold the company to a transaction which the company had not, though it might have, authorised? Your Lordships have not in this case to consider what the result might be if such a director had not himself purported to act on behalf of the company in the unauthorised transaction. For here Morris was himself purporting to act on behalf of the company in a transaction in which he had no authority. Can he then say that he was entitled to assume that all was in order? My Lords, the old question comes into my mind: Quis custodiet ipsos custodes? It is the duty of directors and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty. It may be that in some cases, it may be that in this very case, a director is not blameworthy in his unauthorised act. It may be that in such a case some other remedy is open to him, either against the company or against those by whose fraud he was led into this situation, but I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a director is to know; his interest, when he invokes the rule, is to disclaim knowledge. Such a conflict can be resolved in only one way. It was urged upon your Lordships that the purported appointment of Morris as a director having taken place immediately before the unauthorised allotment of shares, he had in fact no opportunity of learning the true state of affairs, and it was pointed out that, had the proceedings at the meeting of 30 March 1942, been taken in the reverse order, first the allotment of shares, then the appointment of Morris as a director, the result would be different. And then it was said that it was so absurd that there should be a different result according to the order of proceedings, that the original conclusion could not be accepted. This argument has for me no weight or substance. Admit—as, to my mind, one must admit—that a director is not for the purpose of the rule in the same position as a stranger; then it is as immaterial how long he has been a director, as it is whether he is an idle or diligent director, or a robust or sick director. Concluding as I do that Morris is not a person who in respect of this transaction comes within the scope of the rule, I do not find it necessary to consider the further question whether in any case he would be deprived of its benefits by reason of the fact that, even regarded as an outsider, he was put upon his inquiry and did not make the inquiry that he should have made. This is a question of fact upon which different views have been, and may well be, entertained. In my opinion the appeal should be dismissed.”

The defeat of the presumption in relation by actual knowledge in relation to acts done by organs of the company is statutorily stated under section 147 of Act 992 as follows:

“(1) An act of the members in general meeting, of the board of directors, or of a managing director while carrying on in the usual way the business of the company, is the act of the company; and accordingly, the company is criminally and civilly liable for that act to the same extent as if the company were a natural person.

(2) For the purposes of subsection (1),

(a) the company does not incur civil liability to a person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing director, did not have the power to act in the manner or had acted in an irregular manner or if, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of the power or of the irregularity; or”

The above position has not been limited to only actual knowledge. A person who receives information that should put the person on notice of the likelihood that the internal rules of the company may not have been complied with in the intended transaction, that person is not entitled to rely on the presumption of regularity. The law places a duty on the person to make reasonable inquiry to ascertain if the transaction is in compliance with the internal rules of the company. Failure to discharge that duty will defeat reliance on the protection offered under the doctrine of presumption of regularity. This may be seen as a situation where a person should not benefit from his own negligence.

B. Liggett (Liverpool), Limited v. Barclays Bank, Limited⁵⁶⁶ - Liggett and Melia were the original directors of B. Liggett (Liverpool) Limited and the defendants were the bankers of the company. Both directors were joint signatories to the account of the company. However, the practice was that cheque issued was signed by Liggett and were honoured by the bank, but subsequently countersigned by Melia. Subsequently, Melia informed the bank that no cheque should be honoured unless signed by both in accordance with the original mandate on the account. A third director was appointed. A cheque issued and signed by Liggett and the third director (but not signed by Melia) was honoured by the bank. In an action by the company for money had and received. It was held that as the liabilities of the company had not been increased by reason of the payment of the cheques, the defendants were protected from liability on equitable grounds, and were entitled to stand in the place of the creditors whom they had paid and the bank was entitled to presume the cheque signed by the two directors, even without Melia, was regular. The court held that the bank cannot rely on the presumption of regularity and the instruction from Melia had put the bank on notice and under a duty to enquire as to the regularity of the cheque issued prior to honouring the check. Wright J stated @ pgs. 56 and 57 that:

⁵⁶⁶ [1923] 1 KB 48.

“The plaintiffs claim as for money had and received that they are entitled to have repaid to them the amount of those cheques on the ground that the defendant bank had no authority to pay the cheques. That is the issue. The primary defence set up by the defendant bank is one based upon an application of the well-known rule referred to as the rule in the Royal British Bank v. Turquand (1), a rule which has been applied in a great many cases to which I have been referred... I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule; and if, therefore, the answers of the jury to the questions which I put to them stand, it is clear, I think, that this defence will not avail the defendants here”.

(b) Constructive Notice

The law further seeks to defeat reliance on the presumption to protect persons who ought to know that a company has not been duly incorporated, lack of capacity on the part of the company, or that a person deriving title from the company has not been duly appointed or do not have the capacity so to act. That is, even though the person has no actual knowledge, the law imputes knowledge to the person. This is because the circumstances are such that the law deemed the lack of knowledge unreasonable. In this instance, the person does not have actual knowledge, but the law deemed a reasonable person in the position of the person ought to have known of that fact or the law deemed it reasonable to impute knowledge to the person in such circumstance. As such, the protection offered to a person under the presumption of regularity is not available to protect the persons dealing with the company in those circumstances. There are two circumstances under Act 992 that the law imputes knowledge to the person dealing with the company even though such person may not have actual knowledge. First, due to the position the person occupied in the company, the person ought to have known of the fact. Second, due to the relationship the person has with the company, the person ought to know of the fact. Section 150(2)(a) provides *“a person is not entitled to make any of those assumptions if that person ... having regard to position with, or relationship to the company, that person ought to have known the contrary”*. These will cover persons in positions that as a reasonable man in such position with the company, he ought to have known or due to his previous dealings with the company, he ought to have known.

An example may include a Company Secretary who seeks to rely on the position in relation to dealing with someone who is a *de facto* director since a Company Secretary is responsible for the

filing of change of directors with the Registrar of the company so the Company Secretary ought to have known the persons who are duly appointed as directors and those that are not.

The position is also reflected in section 147(2)(a) of Act 992 which exclude the civil liability of even where the company acts through a general meeting, board of directors or managing if due to *“the position with, or relationship to, the company, that person ought to have known of the absence of the power [to engage in the act] or of the irregularity”*.

The cases of Transvaal and Morris as discussed above illustrate this position, where directors were held could not rely on the presumption of regularity. In the Morris case, Lord Simmonds stated that:

“It is the duty of directors and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty. It may be that in some cases, it may be that in this very case, a director is not blameworthy in his unauthorised act. It may be that in such a case some other remedy is open to him, either against the company or against those by whose fraud he was led into this situation, but I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a director is to know; his interest, when he invokes the rule, is to disclaim knowledge.

*Chellaram & Sons (Ghana) Limited v. Halabi*⁵⁶⁷ - a limited company being heavily indebted to several people had insufficient funds to pay the salaries of its staff, including the plaintiff, who alleged that she was at the material time an assistant store manager. The plaintiff's husband was the managing director of the said company and the plaintiff had herself previously been a director. In July 1958, an action for debt was commenced against the company and in September 1958 having obtained judgment, the judgment-creditors attached the company's store. The plaintiff then claimed that the said store and all the goods in it were her property, that they had been conveyed to her by a deed executed on the 18th August, 1958, by the managing director of the company, and that she paid consideration of £G1160 10s being made up of £G440 arrears of salary due to her from the company and £G720 10s cash. There were no witnesses to the execution of this deed which was signed only by the plaintiff and her husband and there was no clear evidence that the plaintiff was ever in possession of the store. However, in her statement of claim, the plaintiff averred that she was an employee of the company until the 31st July, 1958. She thus had notice of the civil action against the company. It was argued on behalf of the plaintiff that even though a resolution of the board has not been passed as required, the plaintiff was entitled to presume the regularity of the transaction and rely on the indoor or internal management rule. The High Court gave judgment for the plaintiff

⁵⁶⁷ [1963] 1 GLR 214.

on the ground that the agreement of sale was not a fraudulent or fictitious one. On appeal, the Supreme Court allowed the appeal and held in relation to the reliance on the indoor management rule that the plaintiff must be deemed to have known the rules and cannot rely on the presumption given her position as a director of the company. Crabbe JSC stated @ pgs. 223 to 224 that:

"There is no evidence of any resolution by the board of directors in the manner prescribed under section 74 of the Companies Ordinance and counsel submitted that Halabi by himself alone had no power to dispose of the property of the company. To this submission counsel for respondent, Mr. Dove, replied that even if there was no quorum, a point he did not concede, the agent of the company, Halabi, had ostensible power to sell and that the plaintiff could not be presumed to know "the indoor management" of the company. She would be justified in assuming, counsel urged, that everything had been done regularly by the company. Counsel relied in support of his contention on the statement of the rule in the case of Royal British Bank v. Turquand (1856) 6 El. & Bl. 327; 119 E.R. 474

The rule is that persons dealing with a company are bound to read the public documents of the company and to see that a proposed transaction is not inconsistent therewith, but they are not bound to do more; they need not enquire into the regularity of the internal proceedings—"the indoor management"—and may assume that all is being done regularly. Thus, where the articles give the directors power to enter into certain transactions by resolution, an outsider like the plaintiff here, as her counsel contended, may take it for granted that the necessary resolution has been passed.

There are, however, certain important exceptions to this rule, one of them being that it applies only to irregularities that otherwise might affect a genuine transaction. In this case the transaction between the plaintiff and the Northern Territories Traders Ltd. reeks so strongly of fraud that I do not think the rule in Turquand's Case can avail her.

Another important exception to the rule is that a person who deals with a company and who has notice of an irregularity in its internal management in connection with the subject-matter of his dealings cannot take shelter behind the rule: see Morris v. Kanssen [1946] A.C. 459 at p. 476, H.L.; also Howard v. Patent Ivory Co. (1888) 38 Ch.D. 156 at p. 170

In this case the plaintiff occupied such a position of responsibility in the debtor-company at the time of the civil action that she cannot pretend to be unaware either of the impossibility of securing a quorum at the alleged meeting of the 22nd May, 1958, or that no resolution was passed at such a meeting. The evidence of her husband was that "At the time this action was pending my wife was an employee of the company. She was assistant manager there. I was served with writ on the

18th July, 1958. I entered appearance on the 23rd July, 1958. This store was sold when action was pending."

I have no doubt on the evidence that the plaintiff knew or was in a position to know that there was no meeting by the board of directors at which Halabi was empowered to sell the company's goods to her.

"There are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise."

See per Lord Sumner in The Zamora (No. 2).¹⁷

In my view the conveyance was not intended to operate as a real transfer of the store and the goods therein and the whole exercise was a cloak to defraud the creditor in the pending action."

The doctrine of presumption of regularity as developed under common law was to ensure business efficacy to ensure commerce is not hindered by the fact that those who deal with the company are to assume the burden of investigating the compliance by artificial persons with applicable internal rules. For that reason, the law protects persons who deal with a company in good faith. That is, a person who deals with the company in circumstances that he has no knowledge of the law cannot impute knowledge to the person on the fact assumed by that person. The scope of the facts under section 150(1) of Act 992 covers the due incorporation of the company which relate to the capacity of the company, the due appointment of directors, managing director or company secretary and the scope of their powers and functions to perform on behalf of the company, and the authenticity and genuineness of documents obtained from the company. A person who knows of the fact but seeks to ignore the fact and proceed to rely on assumption contrary to the known fact cannot be deemed to have acted in good faith. So is a person in the position to or relationship with the company who reasonably should have known of the fact but who in the circumstances did not.

Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation and Others⁵⁶⁸ - in an action where a director of a company who benefits from a guarantee issued by the company failed to disclose his

⁵⁶⁸ [1986] Ch 246.

interest at the board meeting at which the authorisation was issued, it was argued that the third party was protected under the Turquand's rule. Its exemptions were stated by the court. Browne-Wilkinson L.JJ. stated @ pg. 284 to 286 as follows:

"If, therefore, the defendants are to be allowed both to take and succeed on the Turquand's case point, this must mean that, in the circumstances subsisting in late January 1969, they were as a matter of law entitled to assume (contrary to the fact and without further inquiry) that Mr. Shenkman had duly declared his personal interest either at the board meeting of 22 January 1969 or at some previous board meeting of the plaintiff.

This contention might well have been unanswerable if the rule in Turquand's case, 6 E. & B. 327 were an absolute and unqualified rule of law, applicable in all circumstances. But, as the statement of the rule quoted above indicates, it is not. It is a rule which only applies in favour of persons dealing with the company in good faith. If such persons have notice of the relevant irregularity, they cannot rely on the rule.

Thus, in Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co. [1914] 2 Ch. 488 the plaintiff company's articles, while enabling a director to be interested as a member of another company with which the plaintiff company was contracting, required that the director should disclose the nature of his interest and should not vote in respect of any contract in respect of which he was concerned. The provisions of this article were not observed when a contract was entered into by the directors of the plaintiff company when they resolved to enter into a contract with the defendant company, which had full notice of this irregularity. The Court of Appeal held that the plaintiff company had the right to rescind the contract.

Furthermore, even if persons contracting with a company do not have actual knowledge that an irregularity has occurred, they will be precluded from relying on the rule if the circumstances were such as to put them on inquiry which they failed duly to make. As Lord Simonds in Morris v. Kanssen [1946] A.C. 459 pointed out, at p. 475:

"But the maxim has its proper limits. ... It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done."

Mr. Heyman submitted that Lord Simonds's observation was confined to the particular facts of the case before him where the party seeking to take advantage of

the rule was a director of the company and therefore under a duty to see that its transactions were effected in a regular manner: see p. 476. I do not, however, read Lord Simonds's statement of principle as confined in this manner. The decision of this court in A.L. Underwood Ltd. v. Bank of Liverpool [1924] 1 K.B. 775, which was cited in Morris v. Kanssen [1946] A.C. 459, in my opinion, illustrates that the very nature of a proposed transaction may put a person upon inquiry as to the authority of the directors of a company to effect it, even if he has no special relationship with the company. Whether in any given case the person dealing with the company is put on inquiry must depend on all the particular circumstances.

It follows, therefore, that, in my opinion, the judge was right in holding that the rule in Turquand's case, 6 E. & B. 327 is not a mere plea of law, which does not have to be pleaded. The plea asserting "entitlement to rely etc." is a plea of mixed fact and law. It may well be that, as Mr. Heyman submitted, once the point has been properly pleaded it shifts the onus of proof so that the presumption of regularity stands until rebutted: see Mahony v. East Holyford Mining Co. (1875) L.R. 7 H.L. 869. In my opinion, however, it was at very least incumbent on the defendants, if they wished to take the point, to plead in the alternative that, even if (which they denied) the resolution of 22 January 1969 had not been duly passed, they did not know of this irregularity and were entitled to rely on it as one which had been duly passed. This would have been a conventional plea by way of confession and avoidance, which would have put the plaintiff's legal advisers on notice that they had to adduce evidence, if they could, to show actual or constructive knowledge of the relevant facts on the part of Colvilles and British Steel Corporation or their legal advisers and to explore these matters, so far as possible, in cross-examination of the defendants' witnesses.

As matters stood, the plaintiff and its legal advisers had been given no such notice whatever, either by way of pleading or by way of less formal warning, that the Turquand's case point was going to be taken until 31 March 1981, after the evidence had been closed. When, on 2 April, there was full argument as to whether the amendment should be allowed, Mr. Morritt pointed out that he had not cross-examined Mr. Edwards on this line at all and that, if he had done so or if he had opened the point, the defendants might have been obliged to call Mr. Shenton and his assistant Mr. Hoare, which they did not do.

When he came to give judgment, the judge rejected as "fanciful" the possibility that, if the defence had been properly pleaded, the evidence might have taken a different course. Not only did he give the defendants leave to amend to raise the Turquand's case point, he also decided that it afforded a complete answer to the otherwise unanswerable no due authorisation point raised by the plaintiff. In so doing he made no specific finding of fact as to Colvilles' state of knowledge. But, I think that,

by necessary implication, he found as a fact that Colvilles neither knew nor ought to have known that Mr. Shenkman had failed duly to declare his personal interest. This court will always be slow to interfere with the exercise of his discretion by a trial judge in relation to the amendment of pleadings. For my part, however, with great respect to the judge, I feel no doubt that he erred in the exercise of his discretion in dealing with this point in the way in which he did. I am far from satisfied that Mr. Morrill's complaints as to the handicaps in which the course of the proceedings had placed him in relation to the adduction of evidence were "fanciful." Though, for obvious reasons, these matters were never ventilated in evidence, I suspect, for example, that cross-examination of Mr. Edwards, as a well-trained lawyer, could well have elicited admissions sufficient to indicate that Colvilles and British Steel Corporation, through their legal advisers, were sufficiently put on inquiry in the relevant sense as to whether Mr. Shenkman had duly declared his interest. If, therefore, the onus were to be regarded as falling on the plaintiff to establish that Colvilles and British Steel Corporation had actual or constructive knowledge of the breach of the articles of the plaintiff, I do not think that the plaintiff was given a fair and adequate opportunity to establish this.

If, on the other hand, this onus is to be regarded as falling on the defendants, I do not see how it can be said that they have discharged it, since they called no evidence from Mr. Edwards, or anyone else, to the effect that they believed that the requisite declaration of interest by Mr. Shenkman had been made. The certified extract of the minutes of the board meeting of the plaintiff which was supplied to Colvilles suggested quite the contrary.

Mr. Heyman submitted that the judge was the best person to judge whether the allowance of the amendment at such a late stage in the trial would truly prejudice the plaintiff. He went on to submit that, if there had been real potential prejudice of this nature, the plaintiff's counsel could, and should, have "insisted" on an immediate ruling by the judge and, if the amendment had been allowed, could have sought an adjournment as far as necessary. He submitted that it would be unjust to the defendants to disallow the amendment at this stage, when it is too late for Mr. Edwards to be recalled to give further evidence on this point. However, in the light of the course of the trial which I have described, I think that the defendants' submission that it was incumbent on the plaintiff's counsel (not counsel who was seeking to take the Turquand's case point) to "insist" on an earlier ruling was, to put it at its lowest, a bold one. By the time that the judge came to give judgment it was, in my respectful opinion, far too late to allow the Turquand's case point to be taken by amendment. If the point was to be taken at all by the defendants' counsel, some warning of this should at very latest have been given during the plaintiff's

counsel's opening at the trial, before the start, rather than after the conclusion, of the hearing of the evidence.

It follows that, in my opinion, the plaintiff's cross-appeal succeeds, and there is no defence to the no due authorisation point. Neither the debenture nor the guarantee were the deeds of the plaintiff, which is entitled wholly to disclaim them as having been made without its authority and not duly executed. I will revert to the further consequences of this conclusion when I come to the question of relief."

Where the person acts in good faith, the presumption protects that person by preventing the company from denying the assumption and using that fact to invalidate the act, contract or transaction entered with the company

7.5 Effect of Fraud on Presumption of Regularity

The general position under the Companies Act, 2019 is that the reliance on the presumption of regularity under section 150 of the Act is not affected by the fraud of the officer or agent of the company. Section 151 of Act 992 provides that *"Where, in accordance with sections 147 to 150 [section 150 deals with the presumption of regularity], a company would have been liable for the acts of an officer or agent, the company is liable although the officer or agent acted fraudulently or forged a document purporting to be sealed by, or signed on behalf of, the company."* In that respect, whilst the fraud or forgery may enable the company to take action against the officer or agent responsible, the company cannot use the fraud or forgery to invalidate the contract or transaction with the person relying on the presumption of regularity.

7.6 Forms of Contract

The company is a person with the capacity to enter, vary or discharge a contract. The form of a contract that a company may enter into, vary or discharge is not differentiated from that of a natural person. The form of the contract may be written or oral contract. The written contract may be executed, varied or discharged either under the seal of a company or signing by a person with authority to execute the company on behalf of the company. Section 152 of Act 992 which deals with the form of contracts provides:

"A contract on behalf of a company may be made, varied or discharged if the contract, if made between individuals would

- (a) by law be required to be in writing under seal, or varied or discharged by writing under seal only, or may be made, varied or discharged in writing;*
- (b) by law be required to be in writing or to be evidenced in writing by the parties to be charged therewith or could be varied or discharged*

- only by writing or written evidenced signed by the parties to be charged, may be made, evidenced, varied or discharged, in writing signed acting under the authority of the company express or implied in the name or on behalf of the company; or*
- (c) *be valid although made orally only and not reduced to writing or could be varied or discharged orally, may be made, varied or discharged, orally on behalf of the company acting or acting under the authority of the company express or implied as if it were under the seal of the company."*

Not all contracts entered into, varied or discharged by the company are to be entered into under the seal of the company to be valid. The form of a contract entered into by a company will be valid if the contract in the form in which it is entered into will be valid if entered into, varied or discharged between individuals. The seal is required for the validity of a contract only if such contract if entered into between individuals will be required to be entered into as a contract under seal. A contract required to be entered into in writing or evidenced in writing as between individuals will be required to be in writing or evidenced in writing when entered into by the company signed by a person acting under the authority of the company expressly or impliedly. An oral contract entered into, varied or discharged by the company will be valid provided the person entering into, varying or discharging such oral contract is acting on behalf of the company or under the express or implied authority of the company.

7.7 Bills of exchange

The Act also deals with bills of exchange and promissory notes that are binding on a company. Section 153 of Act 992 provides

- "(1) A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed, on behalf of a company if made, accepted or endorsed in the name of the company or if expressed to be made, accepted or endorsed on behalf or on account of the company.*
- (2) The company and the successors are bound if the company is, in accordance with sections 147 to 151, liable for the acts of those who made, accepted or endorsed in the name or on behalf or account, and a signature by a director or the Company Secretary on behalf of the company shall not be deemed to be a signature by procurator for the purposes of sections 23 of the Bills of Exchange Act, 1961 (Act 55)."*

A bill of exchange, including cheques or promissory note issued, accepted or endorsed in the name of the company or on behalf or on account of the company is deemed to be a bill of exchange or

promissory note of the company. The bill of exchange or promissory note of the company is binding on the company or its successor if the act of issuing, endorsing or accepting the bill of exchange or promissory notes is done by the organs of the company in accordance with sections 147 to 151 of the Act. That signature by a director or Company Secretary on behalf of the company is not to be seen as a signature by procuration under section 23 of Act 55. Under section 23 of Act 55 provides that: *"A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."* The signature of a director or the Company Secretary does not indicate either of them is an agent with a limited capacity for the company and that the company should be bound only if the director or the Company Secretary are acting within their actual authority.

7.8 Authentication

Section 154 of Act 992 deals with the authentication of documents and proceedings on behalf of a company. The section provides:

- "(1) A document or proceeding requiring authentication by a company may be signed on behalf of the company by an officer of the company.*
- (2) For the purposes of this section, an "officer" means a director, Company Secretary or any other person authorised by that board of directors or Managing Director of a company to sign a document on behalf of the company."*

The authentication is done by an officer signing the document or proceeding. An officer is defined to mean a director, Company Secretary or any other person authorised by a board resolution or the Managing Director to do so.

7.9 Execution of deed and use of seal of the company abroad

The Act also prescribes rules on execution of documents under seal outside the jurisdiction. Section 155 of Act 992 provides:

- "(1) A company may, by an instrument in writing executed in accordance with paragraph (d) of subsection (1) of section 150 empower a person generally or in respect of specified matter, as the attorney to execute deeds on behalf of the company in a place outside the country.*
- (2) A deed signed by that attorney on behalf of the company in respect of the instrument binds the company."*

For a deed to be binding on a company, the person who signed a deed outside the jurisdiction must be empowered to do so by an instrument executed in accordance with section 150(1)(d) of Act 992.

A company need not take its seal outside Ghana for use. The constitution of the company may authorise a copy of the seal with indication of the territory outside Ghana stated on it, to be used outside Ghana. Section 156(1) of Act 992 provides: *“(1) A company may, by the constitution of the company, authorise for use in a territory, district, or place not located in the country, an official seal which is a facsimile of the common seal of the company with the addition on the face of the seal the name of the territory, district or place where the seal is to be used.”*

The person affixing the seal must be an agent so authorised by the company. Section 152(2) of the Act provides that: *(2) The company may, by writing under the common seal of the company, authorise an agent appointed for that purpose to affix the official seal to a document to which the company is party in territory, district or place.*

The instrument to which the seal of the company is affixed must be signed by a director and countersigned by a secretary or by a second director. Section 156(3) of Act 992 provides that: *“(3) The directors may provide for the safe custody of the seal, which shall only be used by the authority of the board of directors or of a committee of the director authorised by the board of directors in that behalf, and an instrument to which the seal is affixed shall be signed by a director, and shall be countersigned by the Company Secretary or by a second director or by some other person appointed by the directors of the purpose.”* However, a person who doubles as a director and a Company Secretary cannot sign the instrument in both capacities.⁵⁶⁹

Section 156 of Act 992 further provides as follows:

- “(4) The company may exercise the powers conferred under this section with regard to having an official seal for use abroad, and the powers shall be vested in the board of directors.*
- (5) A person dealing with an agent of the company in reliance on a writing conferring the authority is entitled to assume that the authority of the agent continues during the period mentioned in the writing or, if a period is not there mentioned, until that person has actual notice of the revocation or determination of the authority.*
- (6) The person affixing the official seal shall, by writing signed personally by that person, certify on the document to which the seal is affixed, the date on which and the place at which the seal is affixed.”*

Per the above, the board of directors have the power to permit the official seal to be used outside the jurisdiction. Where an agent is so authorised to use the official seal or execute an instrument, a person dealing with the agent is entitled to assume the authority of the agent continues until the date indicated in the instrument appointing the agent and if no date is indicated until the person has

⁵⁶⁹ Section 213 of Act 992.

actual notice of revocation or termination of the authority of the agent. The person who fixed a seal of a company on a document is empowered to certify on the document the date and place at which the seal is affixed by the document signed by the person.

8.0 CAPACITY OF A COMPANY AND ULTRA VIRES RULE

8.1 Introduction

For a transaction or contract to be enforceable under the law against a person, the parties to the transaction or contract must have the capacity to engage in the transaction or enter into the contract. Generally, legal capacity refers to the authority of a person to engage in a particular act. That is, the recognition in law for a person, natural or artificial, to perform an activity that has legal consequences. For natural persons, the law assumes a person has legal capacity unless the law negates or limits such capacity. Under the law of contract, the law negates the capacity of minors to contract subject to a number of exceptions. Therefore, the general position is that contracts entered into by a minor is not binding on the minor unless the law expressly provides for the particular contract to be binding on the minor.⁵⁷⁰ The capacity of natural persons may also be affected by conditions of insanity or the influence of drugs and alcohol that affects the ability of the person to appreciate the contract.⁵⁷¹ In effect, every natural person is presumed to have capacity until it is shown the person is a minor or affected by some conditions that negate his or her capacity.

A company once incorporated becomes a person under the law. The company however is an artificial person as its personality is conferred by law and not assumed. In view of the artificial nature of the personality of a company, the law does not assume the capacity of the company in the same way as the assumption of the capacity of a natural person. Unlike natural persons where the law assumes the capacity of the individual unless the law negates or limit the capacity, for artificial persons, the law must expressly confer the capacity. That is, whilst no specific laws state the capacity of natural persons but rather exempt or limit the capacity, for an artificial person, the law must expressly confer the capacity on the entity for it to have a capacity. Since the artificial person is the creation of statute, the statute creating the entity must provide for the capacity of that person. In respect of a company, the incorporation of the company confers on it a legal capacity.⁵⁷² As discussed, one of the consequences of incorporation flowing from the separate legal personality conferred on the company is the capacity to enter into a transaction, capacity to sue and be sued, capacity to acquire and own property, capacity to exercise borrowing powers, and others, all in its name.⁵⁷³

This section examines the scope of the capacity of a company incorporated under the Companies Act, 2019 (Act 992) and discusses the effect of the company acting beyond the scope of capacity conferred on the company under the Act.

⁵⁷⁰ *Nash v. Inman* [1908] 2 KB 1.

⁵⁷¹ *Imperial Loan Co. Ltd v. Stone* [1892] 1 QB 599.

⁵⁷² Section 14(2) of Act 992.

⁵⁷³ *Salomon v. Salomon & Co. Ltd* [1895-9] All ER 33; [1897] AC 22.

8.2 Capacity of a company

Act 992 provides in section 14(2) that upon incorporation of a company, the company becomes a body corporate capable of performing functions of an incorporated company. Section 18 of Act 992 provides for the capacity of an incorporated company in terms of what the company can do and not do. Section 18(1) of Act 992 provides that:

- “(1) Subject to this Act and to any other enactment, a company shall have*
- (a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and*
 - (b) full rights, powers and privileges for the purposes of paragraph (a).”*

Unlike the now repealed Companies Act, 1963, where the capacity of the company relates to carrying on the authorised business or pursuing the authorised objects of the company as stated in the Regulations of the company, the Companies Act, 2019 provides that a company has the capacity to undertake any business or activity, to do any act or enter into any transaction. The Act, therefore, does not require the capacity to be exercised in relation to only the authorised business. The reason relates to the fact that it is no longer mandatory for a company to state its authorised business or object. In exercising its capacity to undertake any business, do any act or enter into any transaction, the company has full rights, powers and privileges.

Even though it is not mandatory to state the authorised business or objects, a company may opt to state the authorised business or object, and thereby restrict its capacity to carrying out the authorised business or pursuing the authorised object. Section 19(1) of Act 992 provides that:

“Where the registered constitution of a company sets out the nature of business or objects of the company, there is deemed to be a restriction in the registered constitution on the business or activities in which the company may engage, unless the registered constitution expressly provides otherwise.”

Notwithstanding section 19(1) of Act 992, subsection (3) of section 19 of the Act provides that the company still have unfettered capacity and an act or contract engaged in the company contrary to section 19(1) remains valid. Section 19(2) of Act 992 provides that:

- “(2) Where the registered constitution of a company provides for any restriction on the business or activities in which the company may engage,*
- (a) the capacity and powers of the company of the company shall not be affected by that restriction; and*
 - (b) an act of the company, a contract or other obligation entered into by the company and transfer of property to or by the company shall not be invalid by reason only of the fact that it was done in contravention of that restriction.”*

In addition to a possible restriction of capacity or powers of the company to authorised business or object, the Companies Act, 2019 just as the repealed Companies Act, 1963, permits a company with a registered constitution to have rules that may restrict or limit the powers, capacity, rights or privileges of the company. Section 18(3) of Act 992 provides that:

“The registered constitution of a company may contain a provision regarding the capacity, rights, powers or privileges of the company if the provision restricts the capacity of the company or those rights, powers and privileges.”

The legal capacity of a company under Act 992 can be summarized as follow:

- (a) The company has full capacity to undertake any business, do any act or enter into any transaction, and has full rights, powers and privileges when doing so.
- (b) Even though not mandatory, where the company opts to state the authorised business in a registered constitution, the registered constitution is deemed to restrict the business or activity that the company can engage in.
- (c) The Act permits a company with a registered constitution to have detailed rules that restrict the capacity of the company. The Companies Act, 2019 and other enactments may also limit the capacity of the company

Thus, the default position under Act 992 is that there is no restriction on the capacity of the company unless so provided in the Act, any other enactment or the registered constitution of the company. This is different from the position under the repealed Companies Act, 1963 where the default position is to limit the capacity of the company to undertake its authorised business or object. Act 992 permits a company that has a registered constitution to state its authorised business thereby restricting the business or activity that a company can engage in. In addition, Act 992 permits the company that has a registered constitution to have provisions in the registered constitution that restrict the capacity of the company.

8.3 Limits on the capacity of a company

From sections 18 and 19 of Act 992, the default position is that there are no limitations on the capacity of the company. However, the sections provide that Act 992 or any other enactment, and the registered constitution of the company may limit the capacity, rights, powers and privileges of a company.

Under section 18(3) and section 19(1) of Act 992, three limitations may be imposed on the capacity of the company:

- (a) a company with a registered constitution which opts to state the authorised business or object is deemed to have restricted or limited the business or activities of the company to that stated;

- (b) the registered constitution may contain detailed rules that restrict the capacity of the company; and
- (c) the Act or any other enactment may have restriction on the capacity, rights and powers of a company.

The first two limitations are not automatic but are only applicable if first, the company has a registered constitution and second, if the registered constitution state the authorised business or object, or there are rules that provide for restrictions or limitations on the capacity of the company. The default position under Act 992, therefore, is that there is no limitation on the capacity of the company unless the registered constitution expressly provides for such limitation, either by stating an authorised business or object or providing for detailed rules that restrict the capacity.

The third limitation is stated under section 18(1) of Act 992. Even though the section provides for the capacity of the company without limitation, the full capacity of the company to undertake any business, do any act or enter into any transaction is “*Subject to this Act and to any other enactment*”. In view of that, the exercise of the full capacity of the company must be subject to the Act and any other enactment in terms of any restriction or procedure for the exercise of the full capacity conferred on the company. Where the full capacity is therefore exercised in contravention of Act 992 or any other enactment, the exercise of the capacity may be deemed unlawful with attendant consequences. In effect, notwithstanding the default position, the capacity of the company may be limited by law, the Companies Act itself or any other enactment, and the registered constitution of the company.

8.4 Doctrine of Ultra Vires

Ultra vires is a Latin phrase that means beyond the lawful authority or power of a person. The opposite of ultra vires is ‘intra vires’, where one acts within powers conferred on that person. Ultra vires doctrine is a corporate law concept that generally refers to acts beyond the powers or authority conferred by law on the corporate entity or contrary to the constitution of the body corporate. This may relate to where the company engages in a business not authorised by its constitution or engage in an authorised business in a manner contrary to the applicable law or its constitution. Within the context of Act 992, ultra vires will cover three situations:

- (a) an act by the company that is contrary to Act 992 or any other applicable enactment to the company. That is, the company engages in an unlawful act;
- (b) in the event the company has a registered constitution which states the authorised business or object of the company, the undertaking of any business or activity outside the scope of the authorised business or object of the company; and
- (c) in the event the company has a registered constitution that provides for rules that restrict the capacity and powers of the company, the breach of such restriction by the company.

In this general sense, ultra vires covers both acts that are lawful but beyond the powers or authority of a company as provided in its constitution and unlawful acts which are acts contrary to Act 992 or any other enactment. In other words, ultra vires acts include illegal acts. It has been argued that the use of ultra vires should be restricted to acts beyond the powers or authority, express or implied, of the company and not to cover illegal acts or acts contrary to public policy.⁵⁷⁴ However, in most cases, the distinction is blurred as acts that amount to ultra vires infringe the law. For example, where a company states an authorised business but engages in another business, that will be ultra vires as per its constitution. In the same breath, it amounts to a breach of section 19(1) of Act 992 which makes it an unlawful act. It is however important in some instances for students and practitioners to determine whether the act in question is ultra vires in the strict sense (that is not illegal or contrary to public policy) or an illegal act in order to determine the consequences of such act.

Cases that illustrate ultra vires must be understood in two senses. The first set of cases relating to instances where a company engages in a business not authorised by its constitution. In determining whether the act done by the company constitutes an unauthorised business, the court must construe the constitution of the company in relation to the act done. The second set of cases relate to instances where the company acts in a manner contrary to its constitution, which act is not in the nature of a company carrying on its authorised business.

*Ashbury Railway Carriage & Iron Co. Ltd v. Riche*⁵⁷⁵ - a company called "The Ashbury Railway Carriage and Iron Company," incorporated under the Companies Act, 1862 of England was started for the purpose of buying Mr. John Ashbury's business. Its objects, as stated in the Memorandum of Association, were these: *"to make, and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents."* The directors agreed to purchase a concession for making a railway in a foreign country, and afterwards (on account of difficulties existing by the law of that country), agreed to assign the concession to a Société Anonyme formed in that country, which Société was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. The company later repudiated the contract and the defendant sued on it. The court held that this contract, being of a nature not included in the Memorandum of Association, was ultra vires not only of the directors but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. Lord Cairns LC stated @ pgs. 667 and 670 that:

"The purposes for which a company, established under the Act of 1862, is formed, are always to be looked for in the Memorandum of Association of the company."

⁵⁷⁴ Elmer D. Hays, "Ultra Vires," Kentucky Law Journal 2, no. 5 (February 1914): 13-15.

⁵⁷⁵ (1875) LR 7 HL 653.

According to that Memorandum, the Ashbury Railway Carriage and Iron Company, Limited, is formed for these objects - "to make and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agent." Part of the argument at your Lordships' Bar was as to the meaning of two of the words used in this part of the memorandum - the words "general contractors... My Lords, I agree entirely, both with the description given here by Mr. Baron Bramwell of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. They purchased the concession of a railway - an object not at all within the memorandum of association; having purchased that, they employed, or they contracted to pay, as persons employing, the Plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association..."

Lord Chelmsford stated @ pgs. 679 and 680 that:

"The real description of the contract entered into by the company is, an engagement to supply the contractors for the construction of a foreign railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the memorandum of association, and the contract was ultra vires, and therefore not voidable merely, but absolutely void. ... I have already observed that the contract entered into by the company with Messrs. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act, was absolutely void. It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association."

Lord Hatherley stated @ pg. 683 that:

"My Lords, I am of the same opinion. I must confess it appears to me that the case is really reduced to one of a very simple character, and the question amounts merely to this - What is the true construction of the Act of Parliament with reference to the memorandum of association, and the powers conferred upon companies associated upon the limited principle, subject to that memorandum?.... Perhaps, however, it is unnecessary for me to enter into that point, considering that I hold, as I certainly do, upon this contract, that it was one which no body of shareholders had power to ratify, or could if they were to meet together possibly ratify, it being by the 12th section illegal and void, as being contrary to the purpose for which, and for which only, power and authority was given by the Legislature, and any other purpose being one which the Legislature has, according to my view of the case, by the clauses that I have referred to, expressly and distinctly prohibited."

Lord O'Hagan stated @ pg. 690:

"My Lords, I am clearly of the same opinion. First, were the contracts we have to deal with ultra vires of the directors? On the first question, I think, notwithstanding the very ingenious reasoning of the counsel for the Defendant in error, that the contracts in controversy were clearly ultra vires of the directors of the company. Indeed, this was the view of the directors themselves, and of their legal advisers; and I do not find that any of the learned Judges in the Court of Exchequer or the Court of Exchequer Chamber refused to adopt it. I cannot agree with the contention that the memorandum of association is not to be interpreted according to the ordinary rules of construction; and, so construed, it seems to me quite plain that the words "general contractors" cannot be held to indicate the possession, by the persons so described, of unlimited authority to enter into any sort of contract. Considering the description of the company contained in the first paragraph of the memorandum, and the immediate context which identifies them with "mechanical engineers," and points distinctly to the boundaries of their action, I have no doubt that their powers were confined to the making and completion of contracts connected with mechanical engineering, and the various objects, the selling or lending railway carriages, railway plant and rolling stock, and the purchases ancillary to and necessary for their proper business, which are specified in the 3rd clause of the memorandum before and after its employment of the description "mechanical engineers and general contractors." To hold that in such a case, and with such a memorandum, a company describing itself as the Railway Carriage and Iron Company should be at liberty to contract for the clothing of the army, or to trade in diamonds from Natal, would seem to me to nullify the statute alike in its policy and in its terms."

Re Jon Beauforte (London) Ltd⁵⁷⁶ - a company was authorised by its memorandum of association to carry on the business of costumiers, gown makers, and other related activities. The company decided to undertake the business of making veneered panels on which the company owed sums of money to builders and suppliers of veneers. The contracts were admitted to be ultra vires the company. In an action by the builders against the company for the sum of £2,078 9s 3d, it was ordered by consent that the company should pay £2,000 in four instalments, and, if it made default, the builders might sign judgment for the balance of the £2,078 9s 3d then remaining due. The company having defaulted, the builders signed judgment for the whole amount. The suppliers of veneers brought an action against the company for £1,011 2s 10d, the price of goods supplied, and, as the company did not defend the action, they obtained leave to sign judgment for the sum claimed and costs. The issue of ultra vires was not raised in either of the actions. On the winding-up of the company by the court, the builders and suppliers each lodged proof for the amount of their judgment debt, but the liquidator rejected the proofs on the ground that the contracts were ultra vires the company. The court held that no judgement on an ultra vires contract was inviolable unless it embodied a decision of a court on the issue of ultra vires of a compromise of that issue; and compromise made on the footing that the contract was intra vires or any judgement in which the defence of ultra vires was not realised, could be set aside; and therefore, the liquidator had rightly rejected the proofs of the builders and the suppliers.

Roxburgh J stated @ pg. 637 that:

"The first difficulty is to decide whether the Privy Council adopted the reasoning of the Chancellor with only one reservation (namely, that, where ultra vires or intra vires is a point substantially in dispute, that point may be validly compromised) or whether the Board declined to decide the issue between the Chancellor and the Supreme Court in the general terms in which it was raised and confined themselves to holding that, where both parties are equally insisting on the contract in the circumstances which existed in that case, a consent order cannot be valid. I think that the first alternative is to be preferred. Lord Hobhouse said (ibid, 124):

"It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting ... "

That proposition seems to me to negative the basis of the judgment of the Supreme Court that a consent judgment raises an estoppel and to involve the adoption of the reasoning of the Chancellor, with the one reservation to which I have referred. If that be so, the next question is to draw the line which bounds the principle and the reservation. It seems to me that any compromise made on the footing that the contract is intra vires and any judgment suffered in an action in which the defence of ultra vires is not raised can be set aside, because (applying the principle stated) it is ultra vires the company to proceed on the footing that the contract is intra vires, whether by negotiating a compromise on that footing or by submitting to

⁵⁷⁶ [1953] 1 All ER 634; [1953] 1 Ch. 131; [1953] 2 WLR 465.

judgment without delivering an appropriate defence. Accordingly, I interpret the judgment of the Privy Council as meaning that, in the case of an ultra vires contract, no judgment founded on it is inviolable unless it embodies a decision of a court on the issue of ultra vires or a compromise of that issue, and I adopt the reasoning which appears to lead to that conclusion. This decision was cited to Russell J, in York Corporation v H Leetham & Sons Ltd, where he said ([1924] 1 Ch 573):

“An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay.”

Accordingly, the proofs of the builder and the suppliers were rightly rejected. In view of this conclusion, I need not further explore the arguments which I heard on the question whether these judgments could be re-opened in accordance with the principles applied in bankruptcy and liquidation to judgments generally. But the rejection of the proofs must be accompanied by a reservation of tracing rights which may arise.”

*Tsatsu Tsikata v. The Republic*⁵⁷⁷ - in a criminal prosecution, it was alleged that Tsatsu Tsikata as the Chief Executive of Ghana National Petroleum Corporation (GNPC) in 1996 in Accra willfully caused financial loss to the State by illegally authorizing and causing to be paid the sum of Two Million Three Hundred and Six Thousand Three Hundred and Seventy-Four French Francs Forty-One Centimes (FRF 2,306,374.41) equivalent of Seven Hundred Seventy-Five Million One Hundred and Twenty-Six Thousand Three Hundred and Ten Cedis (¢775,126,310) from the accounts of GNPC to Caisse Francaise de Development on behalf of Valley Farms Company Ltd., a private limited liability company which had defaulted on a loan it had contracted from the said Caisse Francaise de Development. The appellant was arraigned before the High Court on three counts of willfully causing financial loss to the state, contrary to section 179A(3)(a) of the Criminal Code, 1960(Act 29), as amended; and on a fourth count of intentionally misapplying public property, contrary to section 1(2) of the Public Property Protection Decree, 1977(SMCD 140). On the issue of the authority a chief executive of a public corporation has in making investment commitments in other enterprises, the court upheld the holding of the earlier court. The court held that GNPC's equity investment in Valley Farms falls outside the scope of the object of the corporation and was *ultra vires*. It was rejected that investment in an unrelated business to yield foreign investment for the conduct of the core business of GNPC was an incidental business. Justice Professor Modibo Ocran JSC stated that:

“At issue here is the amount of latitude a chief executive of a public corporation has in making investments commitments in other enterprises or companies, when such investments arguably fall outside the core business of that corporation as established by law. We grant that as a matter of corporate law, GNPC did have the authority to make investments or otherwise enter into transactions that are incidental to its core business. However, it is another matter altogether when the

⁵⁷⁷ (unreported) Criminal Appeal No J3/4/2004.

management of a corporation intentionally, or as a matter of conscious policy, embarks upon investments in objectively unrelated areas of business. There is clear evidence in the record that an equity investment of 20 million cedis in 1990 value terms, was made in a company whose objects were described by its own founder as "the production of first grade, first class cocoa", by a public corporation set up to "undertake the exploration, development and disposal of petroleum ...". GNPC was not set up as a finance company or an all-purpose investment company. Hence it is no justification in law to show that an arguably ultra vires investment has the potential of yielding enormous amounts of foreign exchange for the investor-corporation. Nor is it any justification in law to demonstrate that such an investment forms part of that corporation's investment strategy and investment portfolio; for if a corporate investment is wrong, it is no less wrong because it is done as part of a package. It also appears from the evidence adduced that the specific investment by GNPC in Valley Farms, which forms the basis of Count 4, was not approved or even discussed by the Board of Directors of GNPC. The cumulative circumstances surrounding the GNPC equity investment in Valley Farms does require more explanation than what appears in the record at this point in the trial... The Ghana National Petroleum Corporation was not set up as a finance company or as an all-purpose investment corporation. Further, investments by a public corporation arguably falling outside their core objects or purposes require some justification. It is unlawful and unacceptable for the management of a corporation to undertake basic investments or make other important corporate commitments without prior underlying approval of its Board of Directors."

The case below illustrates an instance where the ultra vires act does not relate to engaging in businesses that do not fall within the scope of authorised business as provided in the constitution. The ultra vires act relates to engaging in acts that are not in accordance with the constitution.

*In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others*⁵⁷⁸ - Northern Engineering Co. Ltd. was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000. All the shares were subscribed to and allotted to its four subscribers—each holding 25 per centum of the shares. The secretary of the company called an extraordinary general meeting at which meeting the company purported to issue additional shares above the 10,000 shares and appointed seven directors to replace the original directors. The regulations of the company stated the maximum number of directors as five directors. It was argued in defence by the acting managing director that the company had in 1975, increased (by special resolution of the board of directors) the shares of the company from 10,000 to 100,000 shares. He however admitted that no prior notice of the alleged

⁵⁷⁸ [1979] GLR 477.

increase was served on the applicant. It was held that the meeting was not validly held and that the members were not duly appointed in accordance with the Act. It was also held that the meeting was not properly held, and the appointment of the directors and issue of shares were ultra vires and therefore null and void. Taylor J stated @ pgs. 503 to 504 that:

"Clearly this exemplifies a situation where the directors have sought to enter into transactions with the eight persons which are beyond the powers even of the company. Such a transaction which is for an unauthorised purpose has for many years been regarded as ultra vires. A long line of cases cited in the judgment of Cranworth L.C. in Eastern Counties Ry. Co. v. Hawkes (1855) 5 H.L. Cas. 331 at p. 346 et seq., supports the view that such transactions are unenforceable against the company. If the transaction is ultra vires the powers of the directors but not ultra vires the company, the matter may very well be different. As Mellish L.J. said in MacDougall v. Gardiner (1875) 1 Ch.D. 13 at p. 25, C.A.:

"if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

In this case apart from the fact that the company had no shares to issue because its shares have been exhausted by the prior allotment to the subscribers, it seems that for the majority to get its wishes, regulation 10(4) of N.E.C. regulations has to be altered and it can only be altered with the consent of the applicant. I think a member of a company in the position of the applicant has a right to maintain an action in order to prevent the company from invading his individual right as a member as Jessel M.R. pointed out in Pender v. Lushington (1877) 6 Ch.D. 70 at pp. 80-81.

As I have already indicated the eight respondents alleged to be shareholders may very well be the innocent victims of an incompetent management. It is not necessary for me to declare their rights as such innocent victims. Although their shareholding efforts must in the view of the ultra vires doctrine, be considered abortive I think that they may be able to get their money back if they can trace their respective contributions in accordance with the rather cumbersome and complicated procedures expounded by the House of Lords in Sinclair v. Brougham [1914] A.C. 398, H.L. and the Court of Appeal in In re Diplock [1948] Ch. 465, C.A.

As matters stand now however, they cannot be considered shareholders. It is for the reasons I have addressed myself to in this decision that I declared the said eight respondents as not being shareholders of the N.E.C.

With regard to the third declaration sought, it was agreed to by all parties that the only lawful directors of the N.E.C. are Mr. Ziblim Andan, Mr. C.K.A. Djokotoe and Mr. A.A. Luguterah. Mr. T.B. Frimpong who had been appearing in the minutes of the board as a director and chairman of the board of directors addressed this court and conceded that his appointment as a director of the company was not done in accordance with the Companies Code and the regulations of N.E.C. I have already dealt with acts ultra vires the directors when considering the second declaration sought. The third declaration would seem to involve the question of acts fundamentally ultra vires the powers of the company itself.

At the inception of these proceedings, the persons passing off as directors of the N.E.C. are the following seven persons: Ziblim Andan—chairman; L.K. Djokotoe—secretary; T. B. Frimpong—member; C.K.A. Djokotoe—managing director; D.A. Mensah—member; A.A. Luguterah—member and Mahama Alhassan—member. They were appointed directors at the meeting of 11 June 1977 summoned by the notice dated 7 June 1977 already dealt with in this judgment. What is remarkably amazing about these appointments made by the company is that they were done in flagrant disregard of the provisions of regulation 57 of N.E.C. regulations which is: "57. The number of directors, not being less than two or more than five, shall be determined by ordinary resolution of members in general meeting and until so determined shall be four."

*In spite of this provision, the so-called meeting appointed seven persons as directors. Before the appointment, the lawful directors were Mr. Ziblim Andan, Mr. C.K.A. Djokotoe and Mr. A.A. Luguterah. Assuming for the purpose of deciding the question of who the proper directors are, that the meeting of 11 June 1977 was a properly summoned and validly constituted meeting, by regulation 57 of N.E.C. regulations, the number of the directors of the N.E.C. should be not less than two nor more than five. The appointment of seven directors is therefore ultra vires the company. As was decided by the House of Lords in *Ashbury Ry. Carriage and Iron Co. v. Riche* (1875) L.R. 7, H.L. 653 companies could only do acts expressly or impliedly authorised by their articles of association. It seems to me therefore that where the act of the company is ultra vires the company as in this case, then the act is completely void. It cannot confer any right on a third party like the so-called seven directors nor does it create any enforceable obligation against the company: see *In re Jon Beauforte (London) Ltd.* [1953] Ch. 131.*

The appointment of the seven directors is therefore null and void as being ultra vires the company. Before the appointment of the seven directors, the lawful directors were, as I have already pointed out, three namely: Mr. Ziblim Andan, Mr. C.K.A. Djokotoe and Mr. A.A. Luguterah. In the circumstance since I agree with all the parties that the said three persons are the lawful directors, I do not consider it

necessary to canvass in any detail whatsoever the reasons why Mr. Ziblim Andan Mr. C.K.A. Djokotoe and Mr. A.A. Luguterah must be considered the only lawful directors of the company. It is sufficient to hold that in order to preserve the status quo before the ill-fated meeting of 11 June 1977 and since the parties are now agreed on this issue, it is necessary to declare that the said three persons are the only lawful directors of N.E.C. and this is the reason why on 27 July 1978 I declared them the only lawful directors of N.E.C.”

8.5 Ultra vires relating to directors or officers

The board of directors constitutes an organ of the company and can act on behalf of the company.⁵⁷⁹ In addition, individual directors are officers of the company and exercise powers conferred on them on behalf of the company under the constitution and Act 992.⁵⁸⁰ Act 992, in section 189, provides for limitations on the powers of directors of a company. Sections 190 to 198 of Act 992 impose a number of duties on the directors which the directors must observe in acting for and on behalf of the company, or in exercising the corporate powers. Where the directors act outside the scope of their powers, exercise their powers for an improper purpose or breached the duties imposed on them as directors, the directors will be deemed to have acted beyond their powers. The directors, therefore, act ultra vires when they exercise powers not conferred on them, exercise the powers conferred on them for an improper purpose or breach duties imposed on them. An ultra vires act engaged in by a director even though beyond the powers of a director may be within the powers of the company. Thus, an act can be ultra vires in relation to the powers of the directors but can be intra vires in relation to the company.

*Howard Smith Ltd v. Ampol Petroleum Ltd*⁵⁸¹ – in this case, it was found that the primary purpose of an allotment of shares by the directors was to dilute and remove the blocking stake of two other shareholders who had refused to accept an offer to buy the share capital of the company, an offer which minority shareholders and a majority of the directors wished to accept. The judge held that the directors had not exercised their powers for a “proper purpose” since the aim, on the basis of the evidence, was to remove the blocking stake and not to act in the best interests of the company. Lord Wilberforce in delivering the judgement stated @ pg. 838 that:

“The directors, in deciding to issue shares, forming part of Millers’ unissued capital, to Howard Smith, acted under clause 8 of the company’s articles of association. This provides, subject to certain qualifications which have not been invoked, that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and either at a

⁵⁷⁹ Section 144 of Act 992.

⁵⁸⁰ Section 148 of Act 992.

⁵⁸¹ [1974] AC 821.

premium or otherwise and at such time as the directors may think fit. Thus, and this is not disputed, the issue was clearly intra vires the directors. But, intra vires though the issue may have been, the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted. It is at this point that the contentions of the parties diverge. The extreme argument on one side is that, for validity, what is required is bona fide exercise of the power in the interests of the company: that once it is found that the directors were not motivated by self-interest - i.e. by a desire to retain their control of the company or their positions on the board - the matter is concluded in their favour and that the court will not inquire into the validity of their reasons for making the issue. All decided cases, it was submitted, where an exercise of such a power as this has been found invalid, are cases where directors are found to have acted through self-interest of this kind... and at what price shares are to be sold cannot be related to any purpose for which the power over the share capital was conferred upon them. That this is the position in law was in effect recognised by the majority directors themselves when they attempted to justify the issue as made primarily in order to obtain much needed capital for the company. And once this primary purpose was rejected, as it was by Street J., there is nothing legitimate left as a basis for their action, except honest behaviour. That is not, in itself, enough. Their Lordships therefore agree entirely with the conclusion of Street J. that the power to issue and allot shares was improperly exercised by the issue of shares to Howard Smith. It was not disputed that an action to set aside the allotment and for rectification of the register was properly brought by Ampol as plaintiff."

In *Lugutera v. Northern Engineering Co Ltd*⁵⁸², the facts of which are stated earlier Taylor J stated @ pg. 503 that:

*"Clearly this exemplifies a situation where the directors have sought to enter into transactions with the eight persons which are beyond the powers even of the company. Such a transaction which is for an unauthorised purpose has for many years been regarded as ultra vires. A long line of cases cited in the judgment of Cranworth L.C. in *Eastern Counties Ry. Co. v. Hawkes* (1855) 5 H.L. Cas. 331 at p. 346 et seq., supports the view that such transactions are unenforceable against the company. If the transaction is ultra vires the powers of the directors but not ultra vires the company, the matter may very well be different. As Mellish L.J. said in *MacDougall v. Gardiner* (1875) 1 Ch.D. 13 at p. 25, C.A.:*

"if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly

⁵⁸² [1979] GLR 477.

which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

*Politis and Another v. Plastico Ltd (No. 2)*⁵⁸³ – a director, who was the sole remaining director upon the death of another director, appointed another director to fill the casual vacancy. The law requires that there must be a written consent from the prospective director prior to appointment. No written consent was received by the director prior to the appointment. The court held that even though the director has the power to appoint in this instance, appointing the director without the required consent is ultra vires and renders the appointment void. Amissah JA stated @ pgs. 30 and 33 that:

"One of the grounds on which Mr. Kuma's appointment was challenged was that this statutory prerequisite, his consent in writing before appointment as a director, had not been fulfilled. The argument was that if there was consent it ought to have been included in the minutes recording the decision to appoint him. I would not go so far as to say that the consent in writing should invariably appear in the minutes of a meeting, if any, at which a director is appointed. If it does appear, of course, it would settle all questions, as to whether the requirement was fulfilled or not. But surely, the fact that the appointee did consent in writing before appointment could have been referred to in the minutes, or in the document which evidenced his appointment. In this particular case not only was it not referred to.... Had there been such a piece of writing I am sure either he or Mr. Kuma or both of them would have produced it or explained why it was not referred to in the minutes and sought an adjournment to produce it. They did no such thing. I am therefore driven to the conclusion that the point was completely ignored because there was no such consent which could have been produced or discussed. In the absence of this, I am bound to declare that Mr. Kuma's appointment as a director was invalid. ... it is hereby declared that his appointment as a director of Plastico Ltd. was ultra vires, null and void."

An act that constitutes ultra vires acts in relation to the powers of directors may not necessarily be deemed to be an ultra vires act of the company. A director may take an action on behalf of a company which the particular director is not empowered to undertake. Even though the director is not empowered to do so, the act is within the authorised business of the company. Such an act is ultra vires in relation to the director but not ultra vires in relation to the company.

⁵⁸³ [1967] GLR 24.

Rolled Steel Products (Holdings) Ltd v. British Steel Corp⁵⁸⁴ - Rolled Steel Products Ltd gave security to guarantee the debts of a company called SSS Ltd to British Steel Corporation. This was a purpose that did not benefit Rolled Steel Products Ltd. Moreover, Rolled Steel's director, Mr. Shenkman was interested in SSS Ltd (he had personally guaranteed debt to British Steel's subsidiary Colvilles, which SSS Ltd owed money to). The company was empowered to grant guarantees under its articles but approval of the deal was irregular because Mr. Shenkman's personal interest meant his vote should not have counted for the quorum at the meeting approving the guarantee. The shareholders knew of the irregularity, and so did British Steel. Rolled Steel Products wanted to get out of the guarantee and argued that it was unenforceable either because it was ultra vires, or because the guarantee had been created without proper authority. At first instance Vinelott J held British Steel's knowledge of the irregularity rendered the guarantee ultra vires, void and incapable of validation with the members' consent. British Steel appealed. The Court of Appeal held that the transaction was not ultra vires and void. Simply because a transaction is entered for an improper purpose does not make it ultra vires. He emphasized the distinction between an act which is entered into for an improper purpose (which is not beyond the capacity of a company, or void) and an act which is wholly outside a company's objects (and hence ultra vires and void). However, it was unenforceable because British Steel, with knowledge of the irregularity, could not rely on a presumption of regularity in the company's internal management. On ultra vires Browne-Wilkinson LJ stated:

"The critical distinction is, therefore, between acts done in excess of the capacity of the company on the one hand and acts done in excess or abuse of the powers of the company on the other. If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void: whether or not the third party had notice of the invalidity, property transferred or money paid under such a transaction will be recoverable from the third party. If, on the other hand, the transaction (although in excess or abuse of powers) is within the capacity of the company, the position of the third party depends upon whether or not he had notice that the transaction was in excess or abuse of the powers of the company. As between the shareholders and the directors, for most purposes it makes no practical difference whether the transaction is beyond the capacity of the company or merely in excess or abuse of its power: in either event the shareholders will be able to restrain the carrying out of the transaction or hold liable those who have carried it out. Only if the question of ratification by all the shareholders arises will it be material to consider whether the transaction is beyond the capacity of the company since it is established that, although all the shareholders can ratify a transaction within the company's capacity, they cannot ratify a transaction falling outside its objects.

In this judgment, I therefore use the words "ultra vires" as covering only those transactions which the company has no capacity to carry out, i.e., those things the company cannot do at all as opposed to those things it cannot properly do.

⁵⁸⁴ [1986] Ch 246.

The two badges of a transaction which is ultra vires in that sense are (1) that the transaction is wholly void and (consequently) (2) that it is irrelevant whether or not the third party had notice. It is therefore in this sense that the transactions in In re David Payne & Co Ltd [1904] 2 Ch 608 and Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] Ch. 62 were held not to be ultra vires. The distinction between the capacity of the company and abuse of powers was also drawn by Oliver J in In re Halt Garage (1964) Ltd [1982] 3 All ER 1016, 1034. I consider the reasoning of the decision in In re Lee, Behrens and Co Ltd [1932] 2 Ch. 46 to be wrong for the reasons given by Pennycuik J. in the Charterbridge case [1970] Ch 62: the decision itself can only be justified (if at all) on the footing that the widow who was granted a pension had notice of the impropriety of the grant...

In the present case, I construe the words "as may seem expedient" in clause 3(K) of the plaintiff's memorandum not as limiting the corporate capacity of the plaintiff but as simply imposing a limit on the authority of its directors. To adapt the wording of Harman L.J. in the Introductions Ltd. case [1970] Ch. 199 following the David Payne decision [1904] 2 Ch. 608, the guarantee and pro tanto the debenture were not executed for a legitimate purpose of the plaintiff; Colvilles and British Steel Corporation knew it and, therefore, cannot rely on the guarantee and pro tanto the debenture. All this results from the ordinary law of agency, not from the corporate powers of the plaintiff. The relevant transactions in the present case, in my opinion, were not beyond its corporate capacity.

The judge [1982] Ch. 478, 499 explained that the reason why he regarded a transaction which is within the powers, express or implied, of a company but which is entered into for a purpose which is not authorised by its memorandum of association as equated with one which is ultra vires in the narrow sense is that "such a transaction like a transaction which is ultra vires in the narrow sense is incapable of being made binding on the company even by the assent of all the members." We have had the benefit of extensive argument as to the extent, if any, to which the assent of all the members of a company is capable of binding it to a transaction of this nature. Since the shareholders' consent point is not open to British Steel Corporation and Mr. Cooper on the facts of the present case, I wish to make only the following few, obiter, observations in the context of this argument. First, if an act is beyond the corporate capacity of a company it is clear that it cannot be ratified. As against the company itself "an ultra vires agreement cannot become intra vires by means of estoppel, lapse of time, ratification, acquiescence, or delay": York Corporation v. Henry Leatham and Sons Ltd. [1924] 1 Ch. 557, 573 per Russell J. However, the clear general principle is that any act that falls within the corporate capacity of a company will bind it if it is done with the unanimous consents of all the shareholders or is subsequently ratified by such consents: see, for

example, Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, 57 per Lord Davey; In re Horsley & Weight Ltd. [1982] Ch. 442, 454 per Buckley L.J. and Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258. This last-mentioned principle certainly is not an unqualified one. In particular, it will not enable the shareholders of a company to bind the company itself to a transaction which constitutes a fraud on its creditors: see, for example, In re Halt Garage (1964) Ltd. [1982] 3 All E.R. 1016, 1037, per Oliver J. But none of the authorities which have been cited to us have convinced me that a transaction which (i) falls within the letter of the express or implied powers of a company conferred by its memorandum, and (ii) does not involve a fraud on its creditors, and (iii) is assented to by all the shareholders, will not bind a fully solvent company merely because the intention of the directors, or the shareholders, is to effect a purpose not authorised by the memorandum.

The recent decision of this court in the Multinational case [1983] Ch. 258 seems to me to point to a contrary conclusion: see also Attorney-General's Reference (No. 2 of 1982) [1984] Q.B. 624, 640, per Kerr L.J. However, none of these matters relating to ratification, in my opinion, call for decision on this appeal. I have touched on them only because they weighed with the judge and have been covered fully in argument.

Whether or not in 1969 the consent or ratification of all the shareholders was incapable of rendering the transactions of 22 January 1969 binding the plaintiff, I myself think that the concept of ultra vires "in the wider sense" embodied by the judge in his judgment carries with it some risk of confusion. If confusion is to be avoided, it seems to me highly desirable that, as a matter of terminology, the phrase "ultra vires" in the context of company law should for the future be rigidly confined to describing acts which are beyond the corporate capacity of a company. Transactions entered into by a company such as those considered in the David Payne case [1904] 2 Ch. 608 and those under consideration in the present case cannot, in my opinion, be properly regarded as beyond its corporate capacity (and, therefore, ex hypothesi wholly void) if they are capable of conferring rights on a third party - albeit only on a third party who dealt with the company in good faith and without notice that they were being entered into in furtherance of improper purposes.

To sum up, my conclusions on the ultra vires point are these. The relevant transactions of 22 January 1969 were not beyond the corporate capacity of the plaintiff and thus were not ultra vires in the proper sense of that phrase. However, the entering into the guarantee and, to the extent of the sum guaranteed, the debenture was beyond the authority of the directors, because they were entered into in furtherance of purposes not authorised by the plaintiff's memorandum. Despite

this lack of authority, they might have been capable of conferring rights on Colvilles if Colvilles had not known of this lack of authority. Colvilles, however, did have such knowledge and so acquired no rights under these transactions. Even if the no due authorisation point discussed earlier in this judgment were not open to the plaintiff, because Mr. Shenkman had duly declared his interest at the relevant board meeting, the plaintiff could disclaim these transactions, which its directors had carried out on its behalf, as being unauthorised, inasmuch as they were carried out for improper purposes. The practical relevance of the no due authorisation point discussed in an earlier section of this judgment is that it enables the plaintiff also to disclaim the borrowing of the £401,448 and the whole (as opposed to part only) of the security given by the debenture (as having been in each case entered into by the directors without its authority) and also to attack the validity of the receiver's appointment."

A breach of the duties imposed on directors will amount to ultra vires act since the directors are acting outside the lawful or regular exercise of their powers. Ultra vires, therefore, does not only relate to the company but the exercise of the corporate powers by constituents beyond the scope of the powers or contrary to the manner in which the powers are to be exercised.

Once the directors act ultra vires, section 199 of Act 992 provides for civil liabilities imposed on directors which include the liability to account to the company, compensate the company or have contract or transactions entered into between the director and the company rescinded. However, where the contract in addition to being ultra vires in relation to the director's powers, is ultra vires in relation to the company, the consequences discussed below will follow.

8.6 Abrogation of ultra vires doctrine

The memorandum to the Companies Bill that was passed into the Companies Act, 2019 provides that *"Clause 19 reflects the abrogation of the ultra vires doctrine. By this clause, the actions of a company shall not be invalidated as against third parties on grounds of ultra vires. This however does not preclude actions being brought against members of the company and the seeking of reliefs for the best interests of a company."* This statement may be misleading if construed to mean that due to section 19 of the Companies Act, 2019, a company cannot be said to engage in an act that is said to be an ultra vires act. Any act by the company which is contrary to Act 992 or any other enactment is an ultra vires act. Every act contrary to a registered constitution of the company is ultra vires act. Every act contrary to the default constitution as provided in the Second Schedule, Third Schedule or Fourth Schedule, as applicable, is ultra vires act. Where shareholders or members of the company act contrary to the powers given to them under Act 992 and the constitution of the company, the exercise of the powers will be ultra vires. Where directors act contrary to or in breach

of the duties imposed on them under Act 992 or any other applicable enactment, or the constitution of the company, the act or exercise of the powers by the directors will be ultra vires. It is, therefore, inaccurate to state that the doctrine of ultra vires is not applicable unless a company has a registered constitution or state authorised business or object in the registered constitution, or provides for restriction on the capacity of the company in the registered constitution. Once the position is accepted that Act 992 recognises ultra vires acts, then one can examine the consequence of the ultra vires act in the various scenarios.

It may be argued that a distinction should be drawn between illegal acts and ultra vires acts. Where illegal acts refer to acts contrary to law and public policy. These will include acts contrary to the Companies Act and other enactments as provided in section 18(1) of Act 992 when it subjects the capacity of the company *“to this Act and to any other enactment”*. In this case, ultra vires is restricted to acts contrary to the constitution, registered or default, of the company. Where that is the case, section 19(2) of Act 992 becomes relevant to a limited extent. The section provides that ***“(2) Where the registered constitution of a company provides for any restriction on the business or activities in which the company may engage in (a) the capacity and powers of the company shall not be affected by that restriction”***. The section in essence gives a carte blanche to a company with a registered constitution. The company can thus exercise any power and engage in any activity. In that case, it will be said that ultra vires in the strict sense, which is limited to acts that are contrary to the registered constitution of the company, will not be applicable to the company. The company can never act contrary to powers conferred under the constitution. It may be accepted in that case that the doctrine of ultra vires in the strict sense has been abolished or abrogated by section 19 of Act 992. However, that will only be the case if the act which is contrary to the restrictions in the registered constitution is also not against any provision of Act 992 or any enactment, which will make the act illegal. Further, the abrogation of the ultra vires doctrine will not be applicable to companies without registered constitutions since section 19(2) of Act 992 refers to only companies that have registered constitutions. That is, those companies that adopt the default constitution in Second Schedule, Third Schedule and Fourth Schedule. The abrogation will, therefore, not be applicable to companies with default constitutions as provided under the Schedules. One should, therefore, be very measured in arguing simply based on the legislative intent stated in the memorandum that the ultra vires doctrine in Ghana has been abolished.

Section 19(1) of Act 992 also provides for the implication where a company with a registered constitution provides for its authorised business or object, which is deemed to be a restriction on the business or activity the company can engage in. That means acting outside the scope of such business or undertaking unrelated stated business will amount to ultra vires. However, as stated above, section 19(2) of Act 992 provides that such restriction should not affect the capacity of the company. The section then provides for the effect of such ultra vires conduct which is discussed below.

It seems that it is wholly inaccurate for the memorandum to state that section 19 of Act 992 abrogates the ultra vires doctrine if abrogation is understood to mean the doctrine is no longer applicable in Ghana in any form. It is also inaccurate to state that the ultra vires doctrine is abolished because the company can now engage in any business either because no authorised business is provided for in the registered constitution or even if one is stated, Act 992 impliedly permits a company to engage in business not stated in the registered constitution. The doctrine of ultra vires covers many instances and at the heart of the doctrine is simply the understanding that a company, the members, the board of directors, each director or officers have acted either contrary to law, Act 992 or any other enactment, or the constitution of the company, either the registered constitution or the default constitution.

8.7 Reason for ultra vires doctrine

The development of ultra vires doctrine is for a good reason. Investors invest in companies for returns on their investment based on the analysis of the potential risks of the business and the governance system prescribed for the administration of the company among other considerations. An investor may have a choice to purchase the shares of a company engaged in the business of oil and gas production or business of banking services. The investor may assess the business of banking as less risky. Therefore, upon purchasing shares in the company engage in banking, such company should not be allowed to simply engage in an unrelated business as oil and gas production without the knowledge of the investor who is now a shareholder. Similarly, a lender who intends to provide a facility to a company will analyse the business of the company to be comfortable with the ability of the company to repay the facility. Therefore, upon assessing the risk of a company engaging in a banking business based upon which the facility is provided, it will be wrong to permit the company to now engage in a riskier business (example, oil and gas) without the knowledge of the lender. The same may be said of a company not incorporated to carry on a business but to pursue an object. The member may give an undertaking to contribute a specific amount to the company and continue to make a membership contribution because the member associates with the specific object. The company should therefore not be allowed to pursue a different object without the knowledge of the member. The assessment of risks may also relate to the examination of the system of governance which may impose certain limitations on the powers of directors and officers of the company.

Ultra vires doctrine was thus developed to prevent the company from engaging in unauthorised business or object or acting contrary to the constitution of the company since it undermines the risk assessment of the shareholders or members and creditors who provide funds to the company. Ultra vires doctrine is, therefore, to protect shareholders or members, or creditors of the company by prohibiting the company from using their funds to engage in business or pursuing objects not known to them and approved by them. Ultra vires doctrine protects shareholders or members and creditors

by restricting the capacity of the company to its authorised business or objects, and to act within the limits on the capacity and powers of the company.

However, a company is not restricted to the business registered with at the time of incorporation for the life of the company. A company may change its authorised business or object if one is stated at the time of incorporation or thereafter if it intends to undertake another or additional business. Section 20 of Act 992 provides for the alteration of the business or object of a company. A company that intends to engage in a business outside the scope of the stated authorised business can, therefore, do so by adding or amending the business or objects stated in the registered constitution in accordance with section 20 of Act 992. The section requires approval of the members and notice to the secured creditors with a floating charge for the purpose of altering the authorised business. Similarly, a company can alter any restrictions on the manner of exercising the powers conferred on the company, subject to the provisions of Act 992. Section 30 of Act 992 provides for alteration of the constitution of a company by a special resolution as the minimum requirement. Therefore, if a company intends to exercise powers, capacity or rights that are beyond those stated in its constitution, the company may amend the registered constitution or in the event the default constitution is applicable, adopt a registered constitution, which provides for the capacity, power or right it intends to exercise, or remove the limitation existing in respect of the capacity, power or right of the company.

8.8 Consequences of ultra vires act

There have been changes to the consequences or effect of ultra vires transaction as developed under the common law. Common law took a very drastic and harsh approach to avoid ultra vires act by companies which adversely affected third parties. This approach was informed by the constructive notice doctrine which imputes knowledge of the internal rules of a company to third parties dealing with the company. In that respect, the common law provides that notwithstanding that the ultra vires transaction, contract or act may be desirable as it may be for the benefit of the company, the company was prohibited from engaging in the act. In the event the company engaged in the ultra vires transaction or entered into an ultra vires contract, the transaction or contract was declared by the court to be void ab initio. The court further held that the unanimous ratification of the members or directors did not save the ultra vires transaction or contract. Since the transaction or contract is void, it is deemed as never coming into existence and does not confer any right, liability or obligation on either the company or the third party.

In *Ashbury Railway Carriage & Iron Co. Ltd v. Riche*,⁵⁸⁵ it was held that the contract entered into to purchase a concession for making a railway in a foreign country and assigned to a Société Anonyme formed in that country, which Société was to supply the materials for the construction of

⁵⁸⁵ (1875) LR 7 HL 653.

the railway, and to receive periodical payments from the English company was void as contrary to object provided in the memorandum of association. That consequence was not affected by the subsequent assent of the whole body of shareholders as they do not have the power to ratify it. Lord Chelmsford stated @ pgs. 679 and 680 that:

“The real description of the contract entered into by the company is, an engagement to supply the contractors for the construction of a foreign railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the memorandum of association, and the contract was ultra vires, and therefore not voidable merely, but absolutely void. ... I have already observed that the contract entered into by the company with Messrs. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act, was absolutely void. It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association.”

In *Re Jon Beauforte (London) Ltd*⁵⁸⁶, it was held that a consent judgment based on a contract that was *ultra vires* will not render the *ultra vires* contract valid. Roxburgh J stated @ pg. 637 that:

“The first difficulty is to decide whether the Privy Council adopted the reasoning of the Chancellor with only one reservation (namely, that, where ultra vires or intra vires is a point substantially in dispute, that point may be validly compromised) or whether the Board declined to decide the issue between the Chancellor and the Supreme Court in the general terms in which it was raised and confined themselves to holding that, where both parties are equally insisting on the contract in the circumstances which existed in that case, a consent order cannot be valid. I think that the first alternative is to be preferred. Lord Hobhouse said ...:

“It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting ... ”

That proposition seems to me to negative the basis of the judgment of the Supreme Court that a consent judgment raises an estoppel and to involve the adoption of the reasoning of the Chancellor, with the one reservation to which I have referred. If that be so, the next question is to draw the line which bounds the principle and the reservation. It seems to me that any compromise made on the footing that the contract is intra vires and any judgment suffered in an action in which the defence of ultra vires is not raised can be set aside, because (applying the principle stated)

⁵⁸⁶ [1953] 1 All ER 634; [1953] 1 Ch. 131; [1953] 2 WLR 465.

it is ultra vires the company to proceed on the footing that the contract is intra vires, whether by negotiating a compromise on that footing or by submitting to judgment without delivering an appropriate defence. Accordingly, I interpret the judgment of the Privy Council as meaning that, in the case of an ultra vires contract, no judgment founded on it is inviolable unless it embodies a decision of a court on the issue of ultra vires or a compromise of that issue, and I adopt the reasoning which appears to lead to that conclusion. This decision was cited to Russell J, in York Corporation v. H Leatham & Sons Ltd, where he said ([1924] 1 Ch 573):

"An ultra vires agreement cannot become intra vires by reason of estoppel, lapse of time, ratification, acquiescence, or delay."

Accordingly, the proofs of the builder and the suppliers were rightly rejected. In view of this conclusion, I need not further explore the arguments which I heard on the question whether these judgments could be re-opened in accordance with the principles applied in bankruptcy and liquidation to judgments generally. But the rejection of the proofs must be accompanied by a reservation of tracing rights which may arise."

The strict position under common law is that ultra vires transaction or contract are void and no action or right can be grounded on that contract or transaction by the company or the third party. Impliedly, the company can therefore set up the doctrine of ultra vires as a valid and total defence to failure or refusal to perform a contract entered into which failure or refusal is to the advantage of the company as it avoids liability for its act. This leaves the third party without a remedy for breach of the otherwise valid contract by the company. As noted, the reasoning behind the strict application of the ultra vires doctrine was based on the constructive notice doctrine where the constitution of the company was deemed to be a public document and as such persons dealing with the company are deemed to have knowledge of the internal rules of the company. As noted earlier, the constructive notice doctrine has been displaced by the presumption of regularity⁵⁸⁷ and expressly abolished by the statute⁵⁸⁸.

In view of the statutory intervention, the repealed and current Companies Acts, 1963 depart from the common law position on the consequence of ultra vires transaction, contract or act. Section 25 of the now repealed Companies Act, 1963 provides that notwithstanding the ultra vires nature of the act or transaction, *"no act of a company and no conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not done or made for the furtherance of any of the authorised businesses of the company or that the company was otherwise exceeding its objects or powers."* In effect, the repealed Companies Act, 1963 took a contrary position from the common law position by holding the *ultra vires* transaction, contract or

⁵⁸⁷ Section 150 of Act 992.

⁵⁸⁸ Section 149 of Act 992.

act valid.

Notwithstanding the statutory position, the courts have held such acts to be invalid and in some instances void.

In *Luguterah v. Northern Engineering Co Ltd*⁵⁸⁹, Taylor J held that persons issued shares contrary to the regulations of Northern Engineering Company are not shareholders of the company as the issue of the shares is *ultra vires*.

In *Politis and Another v. Plastico Ltd (No. 2)*⁵⁹⁰ – where a director was appointed without a written consent contrary to the Companies Act, Amissah JA held @ pgs. 31 and 33 that: *“In the absence of this [evidence of the written consent], I am bound to declare that Mr. Kuma’s appointment as a director was invalid. ... it is hereby declared that his appointment as a director of Plastico Ltd. was ultra vires, null and void.”*

The reason may be that not only were the acts under those case *ultra vires* in the strict sense but were contrary to the Act.

The Companies Act, 2019 (Act 992) maintained the position under the repealed Companies Act, 1963 with additions. Section 19 of Act 992 provides that:

“(2) Where the registered constitution of a company provides for any restriction on the business or activities in which the company may engage

(a) the capacity and powers of the company shall not be affected by that restriction; and

(b) an act of the company, a contract or other obligation entered into by the company and a transfer of property to or by the company shall not be invalid by reason only of the fact that it was done in contravention of that restriction.”

“(4) Despite subsection (1), an act of a company and a conveyance or transfer of property to, or by, a company is not invalid by reason of the fact that the act, conveyance or transfer was not done or made for the furtherance of any of the authorised businesses or that the company was otherwise exceeding its objects or powers.”

In effect, the Section 19(2) and (4) of Act 992 provides that restriction in the registered constitution of a company on the business or activities of the company shall not be construed to restrict the capacity and powers of the company, and more importantly any such restriction shall not be used

⁵⁸⁹ [1979] GLR 477.

⁵⁹⁰ [1967] GLR 24.

to invalidate any act, transfer of property or assumption of obligations by the company. In other words, an ultra vires act, transfer of property or assumption of obligations by the company is valid and enforceable against the company. The ultra vires transaction, contract or act remains valid notwithstanding that it is not in the interest of the company. Section 19(7) of Act 992 provides that *“[t]he capacity of the company to do an act shall not be affected by the fact that the act is not, or would not be, in the best interest of a company.”*

The above provision should be read in conjunction with the understanding that a company incorporated under Act 992 does not need to state an authorised business or object, in which case the capacity of the company is not limited to undertaking that authorised business or object. This is related to the fact the section 18(1) of Act 992 which gives the company full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction, and has the full rights, powers and privileges to do so.

In sum, Act 992 holds that notwithstanding the ultra vires nature of the transaction, contract or act engaged in by the company, such transaction, contract or act remains valid. Act 992 goes further to remove the limitation on capacity and powers of the company in addition to providing that even where such limitation is provided in the registered constitution, an ultra vires transaction, contract and act remains valid. This may be the reason why it is stated in the memorandum to Companies Bill that clause 19 (now section 19 of Act 992) abrogates ultra vires doctrine. However, it seems section 19 of Act 992 simply abrogates the common law position on the consequence of ultra vires, which position was already stated in the repealed Company Act, 1963. The section provides that such a contract or act should not be invalidated on the reason only of the fact that it was done in contravention of the restriction in the registered constitution. This implies that for one to hold the act or contract invalid, there must be an additional reason. Such reason could be the fact that the act or contract is also contrary to the Act or any other enactment. In addition, section 19(3) of Act 992 provides what can be construed as remedies for ultra vires transaction.⁵⁹¹ This may strengthen the position that section 19 of the Act does not abrogate the ultra vires doctrine as reflected in the memorandum to Companies Bill which has been passed into the Companies Act 2019.

The very section 19 of Act 992 provides in subsection (3) that *“Subsection (1) shall not affect the application of the provisions of subsection (5) and sections 200, 219 and 275.”* All the listed sections provide for remedies against ultra vires acts by the company or directors of the company, which sections are in addition to other remedies available under Act 992.

⁵⁹¹ Even though section 19(3) of Act 992 makes reference to “Subsection (1)” it is suspected that this reference is a draftsman’s error. There is nothing in subsection (1) which contravenes subsection (3) for the subsection (1) to be subjected to subsection (3). The right reference should be to subsection (2), which is contrary to import of subsection (3).

8.9 Remedy Available for Ultra Vires Act

Even though Act 992 provides: (a) the restriction in the registered constitution of a company does not affect the capacity and powers of the company; and (b) that ultra vires transactions or acts remain valid,⁵⁹² the Act recognised that the concept of ultra vires was developed for protection of investors (shareholders and members) and creditors (debenture holders) of the company. As such it will be unfair and unjust to permit the company to engage in transactions that are ultra vires which probably may be detrimental to the interest of the shareholders or members and creditors. A shareholder in acquiring shares in the company is likely to assess the associated risks in terms of the business the company can engage in, the governance system put in place to avoid or limit the abuse of power by the managers of the company. The same position is also applicable to creditors. Therefore, even though the Act fails to invalidate ultra vires transaction that adversely affect the shareholders and creditors, it deems it appropriate to provide remedies to ensure the company does not engage in such ultra vires acts or at least for appropriate redress if the company does so. The available remedies are discussed below. It should be noted that the sections provide for available remedies, specific acts that will trigger the available remedies and who qualifies to apply for the available remedies.

(a) Remedy under sections 19(5)

Section 19 of Act 992 provides that:

“(5) On the application of

(a) a member of the company, or

(b) the holder of a debenture secured by a floating charge over all or any of the property of the company or by the trustee for the holders of those debentures,

the Court may prohibit, by injunction, the doing of an act or the conveyance or transfer of a property in breach of subsection (1).”

Notwithstanding that ultra vires act is valid under Act 992, the subsection provides the remedy of injunction which exists to prevent a person from engaging in an ultra vires act. This means the remedy under the subsection can only be invoked in respect of acts yet to be performed. That is, where the company is yet to engage in the act, convey or transfer the property contrary to the limitation on its capacity and powers. The remedy of injunction to prohibit the acts must therefore be applied for timeously before the company engages in the act or at least completed the act.

Two persons have the capacity to invoke the remedy under the subsection. That is shareholder or member and debenture holder secured by a floating charge. Any member or shareholder can therefore invoke the remedy as the subsection did not qualify the member or shareholder. But in

⁵⁹² Section 19(2) of Act 992.

relation to a debenture holder, the debenture holder must be a secured debenture holder with a floating charge over all or any of the assets of the company or a trustee of such a debenture holder. Therefore, an unsecured debenture holder or a secured debenture holder with a fixed charge cannot invoke the remedy under the section.

In order to ensure the court takes the interest of third parties that may be affected by prohibiting the transaction, section 19 of Act 992 provides:

“(6) Where the transactions sought to be prohibited in proceedings under subsection (5) are being, or are to be, performed or made in accordance with a contract which the company is a party, the Court may,

- (a) if the Courts considers it equitable and if all the parties to the contract are parties to the proceedings, set aside and prohibit the performance of the contract, and*
- (b) allow for the payment of compensation to the company or to the other parties to the contract for the loss or damage sustained by the company or the other parties by reason of the setting aside or prohibition of the performance of the contract, but not compensation of anticipated profits to be derived from the performance of the contract.”*

The subsection sets out the parameters for the Court to grant the injunction to prohibit the ultra vires act as arising from a contract entered into by the company with a third party. The subsection requires that the court must ensure it is equitable to all the parties involved and where appropriate may provide for the compensation to a party adversely affected for loss or damage sustained for setting aside the contract or prohibition of performance. However, such damages do not cover anticipated profits to be derived from the transaction.

(b) Remedies under section 200 against the directors

As noted earlier, directors may act in ultra vires manner where the directors exercise powers not conferred on them under the constitution or Act 992, or exercise powers beyond the scope or limit imposed by the constitution or Act 992 or for an improper purpose, or breach the duties imposed on the directors by the constitution or Act 992. In the event of any of these ultra vires acts by directors, section 199 of Act 992 provides for the liabilities of the directors which include the liability to account, liability to compensate the company, or the power of the company to rescind a contract entered into with the director.

Section 200 of Act 992 provides for the enforcement of the liability against the directors. The section provides that:

“(1) Proceedings may be instituted by the company or by a member of the company to

- (a) Enforce the liabilities referred to in section 199;***
- (b) Restrain a threatened breach of a duty under sections 190 to 192; or***
- (c) Recover from a director of the company a property of the company”***

Section 200 of Act 992, therefore, provides for remedies against ultra vires acts of directors of a company. Two persons are permitted to institute an action to enforce the remedies, members of the company or the company itself. The section provides an exception to the general principle that a wrong committed against the company must be vindicated by only the company by providing that a member can institute the action in the name of the members against the director. In addition, an action can be taken against the director by the company. The remedies the member or the company can enforce are the three remedies provided under section 199 of Act 992 (which are damages, recovery of property or profit and rescission of contract), restrain a threatened breach or recover property of the company from the director as provided in section 200 of Act 992.

(c) Remedy under section 218

Section 218 of Act 992 provides for a remedy against illegal or irregular activities by a company. Section 218 of Act 992 provides:

“(1) The Court on the application of a member may by injunction restrain the company,

- (a) from doing an act or entering into a transaction which is illegal or beyond the power or capacity of the company or which infringes a provision of the constitution or the company, or***
- (b) from acting on a resolution not properly passed in accordance with the Act or the constitution of the company, and may declare that act, transaction or resolution already done, entered into, or passed to be void.”***

Section 218(1) of Act 992, therefore, provides for two remedies in the event of ultra vires act. That is, the remedy of injunction to prevent the illegal act or the ultra vires act, or to have the illegal or ultra vires act already done declared void. The person with the capacity to apply to the court for this remedy under section 218 of Act 992 is the member or shareholder of the company.

Section 218 of the Act recognises the protection offered to persons dealing with the company by the presumption of regularity. Subsection (2) of section 218 of Act 992, therefore, provides that: ***“(2) Subsection (1) does not derogate from the protection afforded by provision of this Act to a person dealing with the company.”*** A court will, therefore, not use the lack of capacity of the company to

invalidate a transaction with a third party who relies on the presumption unless it will be equitable to do so. In recognition of the removal of the limitation on the capacity of the company and providing for the validity of ultra vires under section 19 of Act 992, section 218 provides that *“(3) In relation to acts beyond the capacity of power of the company, this section is subject to section 19 and does not limit its application.”* This avoids inconsistency between the two sections by subjecting section 218 to section 19 of the Act.

(d) Remedy under section 219 against ultra vires transaction

Section 219 of Act 992 provides for what is generally termed remedies against oppression. Under section 219 of the Act, where the affairs of the company are conducted, an act is done or threatened, or a resolution is passed or proposed which adversely affect a member or debenture holder, the member or debenture holder, and in some cases, the Registrar, has the power to apply to the court for remedies listed under the section. Whilst ultra vires acts that amount to oppressive acts come under the section, the section does not require the act to be unlawful or irregular or contrary to the constitution or the Act. The court has held that the act must be a continuous act or series of acts which effect are harsh and burdensome on the affected member or debenture holder in his capacity as a member, debenture holder or officer of the company.⁵⁹³ The section permits any member or debenture holder to apply for the available remedies under section 219. The remedies available under the section are wide in scope including an order to direct or prohibit an act; vary or cancel a transaction or act; regulate the affairs of the company; order for the purchase of the shares or debentures of the member or debenture holder respectively; or make any order the court thinks fit within the circumstance as appropriate to bring the oppressive act to an end.

(e) Compulsory liquidation of the company

Under the Corporate Administration and Insolvency Act, 2020 (Act 1015), a company may be compulsorily liquidated on one of the following grounds:⁵⁹⁴

- (a) the business or objects of the company are unlawful;
- (b) the company is operated for an illegal purpose; or
- (c) the business being carried out by the company is not authorised by the constitution of the company.

This means where a company engages in ultra vires act, a person entitled to do so may apply to the court for an order to liquidate the company. Section 84(1) of Act 1015 provides that the Registrar,

⁵⁹³ West Coast Dyeing Industry Ltd, In re; Adams v. Tandoh, Court of Appeal, 7 March 1985; digested in [1984-86] G.L.R.D 131; Pinamang v. Abrokwa [1991] 2 GLR 284; Mahama v. Soli & Another [1977] GLR 215.

⁵⁹⁴ Paragraphs (f), (g) and (h) of subsection (2) of section 84 of Act 1015.

creditor, member or Attorney-General may apply for an order for the liquidation of the company on the ground that it is engaged in ultra vires business.

9.0 DOCTRINE OF CORPORATE VEIL

9.1 Introduction

The most important characteristic assumed by a company upon incorporation is that the company has a separate legal personality which is distinct, separate and independent from the personality of its members, directors and officers.

The case of *Salomon v. Salomon & Co. Ltd*⁵⁹⁵ is the most authoritative case on the principle of separate legal personality. In that case, Mr. Aron Salomon previously carried on a leather and boot manufacturing business as a proprietorship. A company was incorporated and one of the objects of the company which was implemented was the acquisition by the company of the business then carried on by Mr. Salomon. The business had been a prosperous one and was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons. The wife and children of Mr. Salomon each subscribing for one share. Mr. Salomon afterwards had 20,000 shares allotted to him. The company afterwards became insolvent and went into liquidation. In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. The learned judge thought the liquidator was entitled to the relief asked for, and made the order complained of. He was of the opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal, the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company ... was a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures. On the issue of whether or not the company is the agent of the subscribers or trustees of the company thus formed, the House of Lords held that the company after incorporation attained a separate legal personality distinct from its members. Lord Mcnaghten stated @ pg. 52 that:

"When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the

⁵⁹⁵ [1895-9] AII ER 33; [1897] AC 22.

words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."

Lord Davey concurred and stated @ pg. 56 that;

"Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust. The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity"

Not only does the concept of separate legal personality distinguish an incorporated entity from an unincorporated entity but provides the basis for all other attributes of an incorporated entity. The concept of separate legal personality has been characterized as the cardinal principle that underpins company law in all common law jurisdictions.⁵⁹⁶ There is a plethora of cases that illustrate the application of the separate legal personality as discussed in chapters 2.0 and 3.0.

⁵⁹⁶ Per Sophia Akuffo, JSC in the case of *Morkor v. Kuma* (East Coast Fisheries Case) [1998-99] SCGLR 620 @ 632.

9.2 Corporate veil

A direct outcome of the separate legal personality is the concept of limitation of liability where the liability of the company is that of the company and no one else. As such, where a company incurs liability, the rightful person to sue is the company and not the members or directors.⁵⁹⁷ The members may in certain instances contribute to the satisfaction of the liability of the company. That is based on whether they owe liability to the company on the shares they take or undertake to contribute specific sums to the company in the event of winding up for limited companies by shares or guarantee respectively. In the case of an unlimited company, the shareholders, based on the attribute of the shares they have taken in the company, agree to contribute to fully satisfy the liability of the company. In all these cases of contribution by the members, the essential principle still remains that the liability of the company is that of the company, and members and directors under the concept of separate legal personality cannot be sued for the liability of the company. The liability of members to pay to the company for the satisfaction of the debts and liabilities of the company only arises where the company is winding up.⁵⁹⁸ The only exception is for a company with shares where the shareholder has unpaid liability on the shares which must be paid at the time agreed or when a valid call is made by the company.⁵⁹⁹ The contribution in the case of a company limited by shares is limited to the amount remaining unpaid on the shares held by the member.⁶⁰⁰ In case of a company limited by guarantee, amount undertaken by the member to contribute in the event of winding up.⁶⁰¹ For an unlimited company, the amount to contribute is only limited by the total indebtedness of the company.⁶⁰²

In recognition of the above position to separate the liabilities of the company from the member or shareholders and officers, the concept of corporate veil or the veil of incorporation has been used to figuratively cover the members, directors and officers of the company in order to indicate the separation of the company from the members and officers. The purpose of indicating such separation is that the liability of the company is not ascribed or attributed to the members and officers and vice versa. The concept of corporate veil, therefore, prevents situations where the liability of the company is assigned to the members or directors. That is, a person who deals with a company is prohibited under the corporate veil doctrine from instituting an action against any other person to enforce the liability of the company. The company on the one hand and the members and officers on the other hand are separate, and this separation is indicated by the figurative corporate veil.

As in a wedding, where the bride wears a veil to signify the separation of the bride and the groom

⁵⁹⁷ *Morkor v. Kuma* (East Coast Fisheries Case) [1998-99] SCGLR 620.

⁵⁹⁸ Section 40(4) of Act 992.

⁵⁹⁹ Section 40(1) of Act 992.

⁶⁰⁰ Section 40(4)(c) of Act 992.

⁶⁰¹ Section 40(4)(d) of Act 992.

⁶⁰² Section 40(4) of Act 992.

as two separate individuals until the end of the ceremony where they are pronounced husband and wife, and thus deemed to be one, company law adopts the opposite effect of the figurative veil, where the veil of incorporation is put between the company and its members and officers upon the incorporation of the company. Those who deal with the company are therefore not permitted to look behind the veil of incorporation in order to assign liability of the company to the members and officers who are covered by the veil. A creditor of the company is, therefore, prohibited from treating the liabilities of the company as liabilities of members or officers of a company. In the same vein, members and officers are prevented from treating the rights of the company as rights of the members or officers of the company.

*Morkor v. Kuma (East Coast Fisheries Case)*⁶⁰³ – in a sale agreement between the parties for some metric tons of fish to the first defendant which was a company, the chief executive and shareholder of this company entered into the sale agreement on behalf of the company and when the company defaulted in payment of the remaining amount, it was sued together with the chief executive. The trial court held that the chief executive of the company was liable. On appeal, the issue for determination was whether the appellant was a proper party to the suit. It was held that the proper defendant in an action on a contract is the person (or persons) who made the promise, the breach of which created the cause of action. Since the first appellant had been sued jointly with the first defendant, she would be a proper party to the suit only if specific personal liability were established against her, or the veil of incorporation could be lifted to make her acts synonymous with those of the company, or vice versa. Akuffo JSC stated @ pgs. 631 and 632 that:

“It is clear on the face of exhibit A, the sale agreement that the transaction was between the respondent and the company. Furthermore, the claim against the appellant was grounded solely in this sale agreement. It is also patently clear from the statement of claim that the only reason the appellant was sued was because she was the chief executive, a director and the main shareholder of the first defendant company. The statement of claim made no averments against the appellant that would, prima facie, attach any personal liability to her, or render her jointly liable with the first defendant, under the agreement. The fundamental question, therefore, is “were there any circumstances that justified the lifting of the veil of incorporation?”... Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorised business. In this capacity a company is a corporate being, which, within the bounds of the Companies Code, 1963 (Act 179) and the regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it. From the time the House of Lords clarified this

⁶⁰³ [1998-99] SCGLR 620.

cardinal principle, more than a century ago, in the celebrated case of Salomon v. Salomon & Co [1897] AC 22, HL it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Act 179 is grounded ... For the purposes of taxation, there are numerous statutory provisions which in effect require the corporate veil to be pierced; and the courts have in recent years shown an increasing tendency for such purposes to look at the economic consequences of transactions rather than their strict format, thus in effect bypassing the question of corporate identity. ... Turning to the instant case, it is clear from the record that the proceedings, in which the allegations of fraudulent trading were made, were ex parte. It is also clear that in none of the affidavits filed by the respondent in the subsequent proceedings on notice did the respondent repeat these allegations of fraudulent trading. Therefore, it was erroneous for the majority of the Court of Appeal to base their finding that the circumstances justified the lifting of the veil of incorporation, upon these allegations. Neither the appellant nor the defendant was ever in a position or had the opportunity to respond to the same ... The fact that the appellant was at all material times a shareholder, director and manager of the first defendant is not in dispute, although as to whether she was the majority shareholder, we have no proper evidence and it is, in any event, quite irrelevant. As has already been noted, it is also clear on the face of the agreement that the same was between the first defendant company per se, and the respondent as agent for his principals. There is no evidence that the appellant negotiated the agreement on her own behalf or for her immediate personal purposes. Rather, what is quite clear is that she negotiated the agreement in the normal course of the first defendant's business. As the chief executive officer of the first defendant, it would be part of the normal functions of the appellant to negotiate agreements on behalf of the company. Although the appellant co-executed the agreement, she did so with another director of the company, as is the common practice with corporate bodies. The signature of a single director is not usually acceptable in such circumstances. Furthermore, since a company is non-human the only means by which it may execute an agreement is for its directors, or some other authorised person, to sign on its behalf. When an officer of a company, in the normal course of her duties, so negotiates or signs an agreement entered into by the company, no personal liability is thereby created, in the absence of other clear indications to the contrary. We see no such indications in this case."

*Owusu v. R.N Thorne Ltd*⁶⁰⁴ - the plaintiff-applicant sued the first defendant, a limited liability company and the second defendant, who was a shareholder and director, as its agent. By an ex parte application, he obtained an absconding warrant against one R.N. Thorne who, together with his

⁶⁰⁴ [1966] GLR 90.

wife, also a director of the first defendant company, on the grounds that they had closed the company offices and sold their property and that R.N. Thorne was going on leave and was not likely to return to Ghana. He, therefore, prayed for an order that R.N. Thorne be ordered to furnish personal bail for appearance under the rules of court. The court held that the company existed apart from the directors and members. That R.N. Thorne was not sued personally and was therefore not a defendant within the meaning of rules of court for the court to go into the question of security. Per Boison J. stated @ pg. 92 that:

“What the court has to determine in this motion is whether R. N. Thorne personally or the company is the first defendant in this case. The theory of legal personality of corporations has its own practical problems but it is clear that a limited company or corporation has legal existence apart from the directors and members, and it is in a few recognised exceptions that the law lifts the “corporate veil,” as it has been put, and looks to the directors and members personally. On the plaintiff’s own pleadings he sued R. N. Thorne Ltd. the first defendant and one other as the second defendant — the first defendant was the master of the second defendant. It may well be and undoubtedly is true that R. N. Thorne and his wife are the only directors of the company but the company exists apart from the directors and the members. To hold that the directors are personally the first defendant in this case will be defeating the doctrine of the separate existence of a limited liability company. The action is not against R. N. Thorne personally. I am not determining the liability of the first defendants as a company. The question here is: Is R. N. Thorne personally sued as the first defendant so that he is a “defendant” within Order 35? The answer is no. As far as the court is aware the company is not in the process of being wound up and even if that were so, it would not make R. N. Thorne personally the first defendant in this case. In the absence of R. N. Thorne from Ghana, another director has been appointed. The company as far as the court can gather is still in existence and R. N. Thorne is not and cannot be personally the first defendant herein so as to go into the question of his security.”

The concept of corporate veil encourages persons to invest in a company since they are guaranteed that their personal assets are not at risk for the liability of the company, especially members of a limited liability company. This is especially in the case of members who do not play any active role in the administration and management of the company. Whilst the concept may be of benefit to members and directors, it is of disadvantage to the creditors of the companies. In the event the company is unable to satisfy the liability of the company, especially where members are not under obligation to contribute to the company to satisfy the debts, the creditors are left with no other option to recover amounts due from the company.

9.3 Inherent abuse of the concept of corporate veil

There is an inherent possibility of abuse of the concept of corporate veil. It is likely that a person may incorporate a company with the knowledge that the resultant liability for acts done in the name of the company will be limited to the company and not extend to the person. That is, the company may simply be a means to avoid personal liability by the person incorporating the company. The abuse is more evident in circumstances where creditors are left to proceed against the company with limited liability that is unable to satisfy the liability of the creditors and members are under no obligation to contribute to the company to satisfy its liability. It is thus possible that a person may incorporate a company for the sole purpose of avoiding liability that he would otherwise have been personally liable for. The law must therefore balance the need to uphold the doctrine of corporate veil on the basis of the separate legal personality doctrine to restrict liability resulting from the action or inaction of the company to the company and circumstances where the law prevents unjust abuse of the corporate veil doctrine by ignoring the doctrine of separate legal personality. The law achieves this by providing for circumstances where the veil of incorporation may be lifted or pierced to ascribe liability to members or officers of the company or to ignore a transaction a company has entered into.

9.4 Lifting or piercing the veil of incorporation

As explained above, the concept of corporate veil may be abused. However, the doctrine of separate legal personality has been stated as the foundation on which our company law is based. Its direct implementation under the concept of corporate veil must be maintained if a company as a vehicle to undertake business is to be maintained. The inherent possibility of abuse must also be checked. In order to balance the need to maintain the application of the concept of separate legal personality as against the possibility of abuse, the law permits a number of instances where the separate legal personality of a company may be ignored and liability ascribed to members or officers of the company. The expression “lifting the veil” or “piercing the veil” refers to the circumstances where the law ignores the separate legal personality and permits third parties to maintain legal action against members and officers or impose direct liability on the members or officers for the action or inaction of the company, or ignore transaction entered into by the company by treating it as a transaction of the member or officer of the company.

In *Morkor v. Kuma (East Coast Fisheries Case)*⁶⁰⁵ Akuffo JSC stated @ pgs. 632 to 634 that:

“The fundamental question, therefore, is: were there any circumstances that justifies the lifting of the veil of incorporation?

Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorised

⁶⁰⁵ [1998-99] SCGLR 620.

business. In this capacity, a company is a corporate being, which within the bounds of the Companies Code, 1963 (Act 179) and the regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it. From the time the House of Lords clarified this cardinal principle more than a century ago in the celebrated case of Salomon v. Salomon & Co [1897] AC 22, it has, subject to certain exceptions, remained the same in all common law countries and is the foundation on which our Companies Code, 1963 is grounded.

The corporate barrier between a company and the persons who constitute or run it may be breached only under certain circumstances. These circumstances may be generally characterized as those situations where, in the light of the evidence, the dictates of justice, public policy or the Companies Code itself so requires. It is impossible to formulate an exhaustive list of the circumstances that would justify the lifting of the corporate veil. However, the authorities indicate that such circumstances include where it is shown that the company was established to further fraudulent activities or to avoid contractual liability. In paragraph 90 of the (4th ed) of Halsbury's Laws of England, Vol 7(1) is stated as follows:

"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct, but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such cases the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders, or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced. For the purposes of taxation, there are numerous statutory provisions which in effect require the corporate veil to be pierced; and the courts have in recent years shown increasing tendency for such purposes to look at the economic consequences of transactions rather than their strict format, thus in effect bypassing the question of corporation identity.

Therefore, whether or not a circumstance is one in which the lifting of the veil of incorporation is merited is dependent on the peculiar factors driving each particular

case. Thus, the veil of incorporation was lifted in the case of Re Darby; Ex parte Brougham [1911] 1 KB 95, where Phillimore J found that the company was a mere alias to cloak the identities of two fraudulent and undischarged bankrupts in their financial activities. Also, in Amartey v. Social Security Bank; Social Security Bank v. Robertson Consolidated [1987-88] 1 GLR 497, CA where a demand notice was addressed to the managing director of a company indebted to the bank, rather than to the mortgagor as was required by the deed of mortgage securing the repayment of a loan granted to the company, the Court of Appeal held that, since the managing director was also the chairman of the debtor company, as well as being the same person as the mortgagor, the veil of incorporation could be lifted to justify a finding that the mortgagor had been duly notified. The court held that it was fraudulent on the part of the plaintiff (mortgagor) to deny receipt of the notice, since he had, indeed received it in his capacity as the managing director of the debtor company. In Jones v. Lipman [1962] 1 WLR 832, the defendant had contracted to sell his house to the plaintiff. Later, however, he changed his mind and sought to avoid completion of the agreement by conveying the house to a company that had always been under his control. The plaintiff brought an action for an order of specific performance against either the defendant or the company. Russell J found that the company was "a devise, a sham, and a mask which the defendant holds before his face in an attempt to avoid recognition by the eye of equity." It has also been held that the veil may be lifted if it is established that the company is so under the unfettered control of a particular individual as to make it, effectively, his alter ego. (See also Dallas v. Dallas [1979] 1 All ER 801."

There are other instances where a purported act of a company may be attributed to those who own or control the company. However, the concept of lifting or piercing the veil of incorporation refers to instances where the separate legal personality of the company as stated in the celebrated case of *Salomon v. Salomon & Co. Ltd*⁶⁰⁶ is ignored.

*Prest v. Petrodel Resources Ltd*⁶⁰⁷ - after a divorce, Ms. Prest brought an action against the company, solely owned by Mr. Prest, claiming under the Matrimonial Causes Act, for the transfer of a number of properties held by the company. Under the law, the properties can only be transferred if Mr. Prest is entitled to the properties. Mr. Prest claimed he was not entitled to the properties. The High Court held that he was entitled as he has the ability to transfer the properties. On appeal, the Court of Appeal reversed the High Court decision on the ground that the court could only have made the order of the transfer of properties if there was an abuse of the corporate personality. On appeal, the Supreme Court reversed the decision of the Court of Appeal holding that Mr. Prest beneficially

⁶⁰⁶ [1895-9] All ER 33; [1897] AC 22.

⁶⁰⁷ [2013] UKSC 34.

owned the assets of the Petrodel Resources Ltd companies under a resulting trust because he contributed to their purchase price. There was no need to pierce the corporate veil, which could only be done in limited situations. Lord Sumption on the concept of piercing of the veil of incorporation stated:

"Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In Salomon v. A Salomon & Co Ltd [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In Macaura v Northern Assurance Co Ltd [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster said, at pp 626-627: "no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."... I should first of all draw attention to the limited sense in which this issue arises at all. "Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by "firms", which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in Salomon v A Salomon & Co Ltd... i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control."

Company law permits two general instances where the veil of incorporation may be lifted. These are where the law, the Companies Act itself or any other enactment, or the courts in the interest of justice or public interest permits the lifting and piercing of the corporate veil. Various instances where the law expressly permits the lifting of the veil or where the court in the interest of justice or public interest lifted the veil of incorporation are discussed below.

The general consequences for the lifting and piercing of the veil of incorporation include imposing liability on members and officers of the company, or the disregard of transactions entered into which otherwise will be upheld based on the separate legal personality of the company.

9.4.1 Statutory prescription on piercing the veil of incorporation

As earlier discussed, legal personality and capacity are conferred on a corporate entity by the statute under which the corporate entity is created. The general position, therefore, is that what is conferred by statute can be taken away by statute. That is, the corporate personality conferred on a company by the statute can be lifted or pierced by the same statute or another statute.

*Dimbleby v. National Union of Journalists*⁶⁰⁸ - Lord Diplock stated:

"My Lords, the reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical, is to enable business to be undertaken with limited financial liability in the event of the business proving to be a failure. The "corporate veil" in the case of companies incorporated under the Companies Act is drawn by statute and it can be pierced by some other statute if such other statute so provides; but in view of its raison d'être and its consistent recognition by the courts since Salomon v. Salomon and Co. Ltd. [1897] A.C. 22, one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language. I do not wholly exclude the possibility that even in the absence of express words stating that in specified circumstances one company, although separately incorporated, is to be treated as sharing the same legal personality of another, a purposive construction of the statute may nevertheless lead inexorably to the conclusion that such must have been the intention of Parliament."

As stated in the case, the intent of the statute to permit the piercing of the veil of incorporation must be clear.

⁶⁰⁸ [1984] 1 WLR 427.

There are two instances where the veil of incorporation may be lifted pursuant to statutory provision. The first instance is where the Companies Act, 2019 itself provides for instances where the separate legal personality of the company may be ignored and liability imposed on the members or officers personally either in terms of fine or hold the members or directors responsible for the debt and liability incurred by the company. In many of the instances permitted under the Companies Act, 2019, the fundamental observation is that permission is granted to lift the veil where the company fails to comply with the requirements of the Act. The position may therefore be understood as withdrawal of the protection offered by the Act to members and officers based on the separate legal personality once the company fails to comply with the Act. Members and officers who seek to hide under the separate legal personality concept must ensure the company is in compliance with the Act that provides for the concept of separate legal personality.

The second instance is where a statute other than the Companies Act, 2019 provides expressly for the lifting of the corporate veil by imposing liability on members or officers for the action or inaction of the company. The Constitution, 1992, Corporate Insolvency & Restructuring Act, 2020 (Act 1015), Income Tax Act, 2015 (Act 896), Banks and Specialised Deposit Taking-Institutions Act, 2016 (Act 930) are some of the enactments that expressly permit the piercing of the corporate veil.

A number of specific instances are discussed below. These are not to be seen as exhaustive as there are many instances under the Companies Act, 2019 and other enactments that permit piercing of the corporate veil that are not discussed here.

Instances under the Companies Act, 2019 (Act 992) include:

1. Section 41 of Act 992 provides *"If at any time a company ceases to have a member and it carries on business without at least one member, every person who is a director of the company during the time that it so carries on business is jointly and severally liable for the payment of all the debts and liabilities of the company incurred during that period."* A company is required to at all times have at least one member. Where a company fails to have a member, it must cease to carry on business. If it continues to carry on business, the protection afforded to directors under the concept of separate legal personality is taken away. Such directors become jointly and severally liable for debts incurred by the company in carrying on business at the time there was no member.
2. Section 171 of Act 992 in subsection (1) mandate that a company must have at least two directors, one of which must be ordinarily resident in Ghana. Subsection (2) provides that *"If at any time the number of directors is less than two in contravention of subsection (1), and the company continues to carry on business for more than four weeks after that time, the company, the director and each member of the company that is in default is liable to pay to*

the Registrar, an administrative penalty of twenty-five penalty units for each day during which the company so carries on business after the expiration of the four weeks having at least two directors." A company that fails to have a minimum of two directors must cease to carry on business on the expiration of four weeks from the date the number of directors falls below two. If the company continues to carry on business after the four weeks in breach of the requirement, the Act does not only impose liability on the company but also on each director and each member of the company.

3. Section 8(1) of Act 992 prohibits a company limited by guarantee from carrying on business for the purpose of making profit if the purpose of the profit is not to further its object. If a company limited by guarantee undertakes business for the purpose of profit other than to further its object in breach of section 8(1) of the Act, the Act expressly permits that the separate legal personality should be ignored by imposing a fine on the company, members and officers, and also provides for holding them liable for all the liabilities of the company incurred in carrying on such business in breach of the section. Section 8(2) of Act 992 provides that: *"Where a company limited by guarantee carries on business for the purpose of making profits, other than for the furtherance of the objects of the company, the officers and members of that company who are cognizant of the fact that the company is so carrying on business are jointly and severally liable for the payment and discharge of the debts and liabilities of the company incurred in carrying on that business, and the company and those officers and members are each liable to pay the Registrar, an administrative penalty of twenty-five penalty units for each day during which the company carries on the business."*
4. Section 8(3) of Act 992 mandates that the total undertaking given by members of a company limited by guarantee to be of a prescribed minimum failing which the Act imposes liabilities on the directors and members. Section 8(4) of Act 992 provides that *"Where in breach of subsection (3), the total liability of the members of a company limited by guarantee is at any time, less than the amount specified in the application required for incorporation, every director and member of the company who is cognizant of the breach is liable to pay to the Registrar an administrative penalty of five hundred penalty units."*
5. Section 125(1) of Act 992 requires the company to paint or affix its name on its offices, have the name engraved in its seal, and stated at the head of the business letters, invoices, receipts, notices and other publications from the company. Where there is a failure by the company to comply with this requirement, a fine is imposed on not only the company but also on each officer of the company. Section 125(2) of Act 992 provides that *"Where a company defaults in complying with subsection (1), the company and each officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of two hundred and fifty penalty units."*

Instances under other legislations for the piercing of the veil of incorporation

1. Breach of Constitutional Provision – Article 181(5) of the Constitution, 1992 requires parliamentary approval for the validity of international business transactions or agreements of which the government is a party. Whilst it is clear that an agreement between the government and a foreign entity comes under this clause, the courts have held that in relation to a company incorporated in Ghana, the court will have to look beyond the company by lifting the veil of incorporation to see the nationality of the shareholders and managers, determine the place of management, etc. to determine whether the company should be regarded as a domestic or foreign company for the purposes of the requirement of parliamentary approval to determine the validity or otherwise of the agreement with the government.⁶⁰⁹

*Attorney-General v. Balkan Energy Ghana Ltd; Balkan Energy LLC & Philip David Elgar*⁶¹⁰ (the *Balkan Case*) - the Government of Ghana negotiated with Balkan Energy LLC, a company based in Texas, for the refurbishment and commissioning of the Osagyefo Barge, an unused power barge located in the Western Region of Ghana. In order to carry out the project, and as required by Ghanaian law, Balkan Energy LLC formed a local subsidiary, Balkan Energy Ghana Ltd. Balkan Ghana is a wholly-owned subsidiary of Balkan UK, a company formed and registered in the United Kingdom and Wales. Balkan UK, in turn, is a wholly-owned subsidiary of Balkan Energy LLC. Eleven days after its formation, Balkan Ghana and the Republic of Ghana entered into a Power Purchase Agreement (“PPA”). The obligations of both parties were stated in the PPA. Under the PPA, the parties agreed to submit any disputes to arbitration before the Permanent Court of Arbitration in The Hague, Netherlands and the PPA was to be governed by and construed in accordance with the laws of the Republic of Ghana. Article 181(5) of the 1992 Constitution of Ghana requires parliamentary approval for any “international business or economic transaction to which the Government is a party”. In light of this requirement, Article 7.2 of the PPA conditioned the effectiveness of the PPA on the requirement that Ghana provides assurances regarding its authority to enter into the agreement with Balkan Ghana without parliamentary approval, in the form of “a letter from the Government of Ghana that all the required approvals from the relevant authorities in Ghana have been obtained, as well as a “legal opinion of the Attorney General of the Republic of Ghana as to the validity, enforceability and binding effect of [the PPA].” Accordingly, on October 26, 2007, Ghana’s Attorney General and Minister for Justice provided Balkan Ghana with two legal opinions. The first opinion explained that because Balkan Ghana was a locally incorporated company, the project “involve[d] a local company in a local transaction with the Government,” and thus the “PPA does not come under the ambit of Article 181(5) of the 1992 Constitution” and

⁶⁰⁹ Ferdinand Adadzi & Ikemefuna Stephen Nwoye, Parliamentary Approval of International Business Transaction in Ghana: Attorney General v. Balkan Energy Ghana Ltd in Perspective (Law Digest – Spring 2014).

⁶¹⁰ Unreported Supreme Court, Ghana J6/1/2012.

“parliamentary approval would not be required for the effectiveness of the [PPA].” In the second opinion, the Attorney General assured Balkan Ghana that “[Ghana] has the power to enter into the [PPA] and to exercise its rights and perform its obligations thereunder, and execution of the [PPA] on behalf of [Ghana] by the person(s) who executed the [PPA] was duly authorised. Subsequently, a dispute arose between the parties. Balkan Ghana accused Ghana of failing to fulfil its obligations under the PPA. This was denied by the Government of Ghana. The matter was referred to arbitration, but the AG subsequently filled and obtained an *ex parte* injunction from the Ghana High Court restraining Balkan Ghana from proceeding with arbitration pending the court’s determination of whether the PPA and its arbitration clause required parliamentary approval under Article 181(5) of the 1992 Constitution. The Supreme Court of Ghana had to decide on the issue of whether or not the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution. The court in reviewing the transaction and holding that it constitutes an “international business transaction” looked at those behind the Ghana incorporated company and other terms of the transaction. Dr. Date-Bah JSC stated that:

“The phrase “international business or economic transaction to which the Government is a party”, if purposively construed, should not lead necessarily to the result that only agreements between entities resident abroad and the Ghana Government can be embraced within the meaning of the term. Given the complexity of contemporary international business transactions, there will be transactions of such a clear international nature that they should come within any reasonable definition of an international business transaction, but which may have been concluded with the Ghana Government by an entity resident in Ghana. In such a situation, our view is that the substance, rather than the form, should prevail. What we have just said begs the question of what “international” means. In this connection, we think that there is the need to combine both the nature of the business or economic transaction criterion and the parties criterion proposed by the plaintiff in his submission, in order to formulate a test for determining what transactions come within the ambit of article 181(5) of the 1992 Constitution... What then is the meaning of “international” in this context? We think that a business transaction is “international” within the context of article 181(5) where the nature of the business which is the subject-matter of the transaction is international in the sense of having a significant foreign element or the parties to the transaction (other than the Government) have a foreign nationality or reside in different countries or, in the case of companies, the place of their central management and control is outside Ghana. The word “significant” is used in the above definition to denote the fact that the foreign elements or contacts that lead to a judgment of internationality in relation to a transaction have to be subjected to a qualitative assessment before reaching that judgment... Our next task,

therefore, is to examine some of the specificities of the PPA in order to decide whether it is an international business or economic agreement to which the Government is a party within the meaning of article 181(5). Our general impression, upon reading the submissions of the parties, is that the overall transaction involved here was a foreign investment by a US investor in a power generation project to supply power to the Ghana Government and that the Government was a party to this transaction. We are viewing the transaction in the round, without resorting technically to the piercing of the corporate veil doctrine. We interpret "transaction" in this context as meaning a series of agreements or acts united by their purpose of attaining the project objective of the parties to it. We will now set out the circumstances which support this impression and whether a transaction of this nature comes within the ambit of article 181(5). The PPA between the Government and the first defendant was the result of negotiations between a foreign investor (the third defendant acting on behalf of owner of the second defendant) and the Government. This is a significant foreign element in the transaction. Secondly, the first defendant, though a Ghanaian company, is wholly-owned by a foreign entity, incorporated in the United Kingdom. Thirdly, the managing director of the first defendant is a foreigner, the third defendant, and control of the management of the first defendant is in foreign hands. Fourthly, the PPA contains a clause providing for international commercial arbitration... All these circumstances cumulatively lead us to the conclusion that the answer to the first question referred to this Court is that the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution. On the other hand, the answer to the second issue referred is that the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited does not constitute an international business transaction within the meaning of Article 181(5) of the Constitution. This is because applying the interpretation of article 181(5) arrived at above, it is clear that the international arbitration provision cannot, in and of itself, constitute an international business or economic transaction."

2. Fraudulent trading under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015): section 117 of Act 1015 permits the lifting of the veil when a company is in liquidation and it has been established that persons used the company for fraudulent trading. Where the company is in official liquidation, the liquidator, a member or contributory, or a creditor may apply to the Court for the veil of incorporation to be lifted to enable persons who carried on business in the name of the company with the intent to defraud creditors to be personally

held liable for that debt.⁶¹¹ Section 117(1) of Act 1015 provides that:

“(1) Where, in the course of the official winding up of a company, it appears that a business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for a fraudulent purpose, the Court may, on the application of

- (a) the liquidator,*
- (b) a creditor, or*
- (c) a member or contributory of the company*
declare that the persons who were knowingly parties to the carrying on of that business in the manner stated are personally responsible, without a limitation of liability to the debts or any of the debts or any other liabilities of the company that the Court may direct.”

For the veil of incorporation to be lifted and persons held liable, the company must be going through official liquidation, the application must be made by the liquidator, a creditor, or member or contributory, it must be established that the business was carried on to defraud creditors or for a fraudulent purpose, and the person to be held liable were knowingly parties to that business. The knowledge of such a person is, therefore, crucial for personal liability.

*R v. Grantham*⁶¹² - the appellant, who was a consultant in charge of a company's administration and sole authorised signatory of its cheques, was tried with others on a count of fraudulent trading, contrary to the Companies Act 1948. There was evidence that whoever was running the business was intending to deceive or was actually deceiving a person supplying potatoes, in compliance with repeated orders, that he would be paid in twenty-eight days or shortly thereafter and that whoever was running the company knew at the time that there was no hope of the supplier being so paid. The jury were directed that they could find dishonesty and intent to defraud if they found that the appellant obtained or helped to obtain credit or further credit when he knew that there was no good reason for thinking funds would become available to pay the debt when it became due or shortly thereafter. He was convicted. On appeal against conviction on the ground that the judge had misdirected the jury in that it was for the prosecution to prove that the appellant knew at the time at which the debts were incurred that there was no reasonable prospect of the creditors ever receiving payment of their debts. The court held dismissing the appeal, that the judge did not err in the direction given, for on a prosecution under section 332 of the Companies Act 1948 an intent to defraud was established on proof of an intention dishonestly to prejudice the creditors in receiving payment of their debts. Lord Lane CJ stated that:

⁶¹¹ Section 117 of Act 1015.

⁶¹² [1984] 1 QB 675.

“There were two main issues to be decided. First, was this business carried on dishonestly by way of fraud upon a creditor, namely, Joseph Jacob? Secondly, if so, was the appellant party to the dishonesty and fraud? ... There was, in short, ample evidence that the company was being operated dishonestly. Indeed had there been a charge of conspiracy laid against the appellant, it would, questions of jurisdiction apart, probably have succeeded. From the outset, no sufficient capital was available. No overdraft facilities were sought. There was some suggestion in the later stages that the situation might be retrieved by trading in other commodities, or by raising a loan from a merchant bank or by introducing fresh backers, but nothing came of these suggestions. Mr. Beckman’s first complaint is that the judge misdirected the jury as to what it was upon which they had to be satisfied before convicting the appellant under section 332 of the Companies Act 1948 as amended. Section 332(1) provides: “If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.” ... What the judge in the present case was doing was to direct the jury in the first passages as to the general meaning of the section and, then, in the latter passage as to which complaint is made, directing the jury that it was possible for them, if they thought fit, to come to the conclusion that the appellant was acting dishonestly and fraudulently if he realised at the time when the debts were incurred that there was no reason for thinking that funds would become available to pay the debt when it became due or shortly thereafter. We do not think that the judge was in error in this direction... Appeal dismissed.”

In addition to being held liable, that person is guilty of an offence and is liable on summary conviction to a fine between five hundred penalty units and thousand penalty units or a term of imprisonment between two years and five years, or both a fine and imprisonment.⁶¹³ If the person is a director, the person is disqualified for being a director for a period of five years. These punishments are without prejudice to any other criminal liability on the person.⁶¹⁴

3. Breach of duty of the director not to engage in business leading to insolvency: directors of a company are under a duty not to engage in business or trade or incur debt or liability that

⁶¹³ Section 118(1) of Act 1015.

⁶¹⁴ Section 118(3) of Act 1015.

causes or likely causes the company to become insolvent. A breach of that duty will lead to the lifting of the veil of incorporation and directors punished for such breach. Section 119 of Act 1015 provides:

“(1) A director who causes a company to engage in any form of business or trade or incur a debt or liability where that director
(a) has reasonable grounds to believe that the company is insolvent,
or will become insolvent; or
(b) ought to have known at the time of causing the company to
engage in the business or trade or incur the debt or liability that
the company was insolvent or would become insolvent as a
result of incurring that debt
commits an offence and is liable on summary conviction to a fine of not less than five
hundred penalty units and not more than one thousand penalty units or to a term of
imprisonment of not less than two year and not more than five years or both.”

Act 1015 thus permits the veil of incorporation to be lifted for directors to be punished for running a company into insolvency. The Act imposes a punishment on a director who causes a company to carry on a business or trade, or causes a company to incur debt or liability which was done at the time the company was insolvent, or which led to the insolvency of the company. However, to be held liable, it must be established that the director has reasonable ground to believe or ought to have known that causing the company to engage in the business or trade or incurring the debt or liability will lead to insolvency of the company. Once established, the director is liable to a fine or term of imprisonment or both.

4. Taxation: for taxation purpose, the relationships between two corporate entities may be ignored. Where a wholly owned subsidiary company is being used as a vehicle by its holding company to avoid taxes, the Ghana Revenue Authority may ignore the declared income of the company operating in Ghana and base the tax liability on the consolidated income of the holding or related company. Income Tax Act, 2015 (Act 896) in section 32 contains rules on income splitting which is aimed at avoiding under-declaration of income to pay lower tax. In addition, the Commissioner has the power to disallow deductions which may be seen as transfer pricing under the general anti-avoidance rules in section 34 of the Act. Payments made between associated companies for services rendered or goods supplied may be disregarded between the associated companies by the Commissioner. In doing so, the Commissioner is ignoring the separate legal personality of the companies by lifting the veil of incorporation to establish the relationship between the associated companies.

*Gramophone & Typewriter Ltd v. Stanley*⁶¹⁵ - in this case, an English company held shares in a German company. The Inland Revenue Commission was of the view that the business was wholly owned by the English parent and the English parent should therefore be taxed on the profit accruing from the subsidiary operation. In order to support this position, the Commission had to show the German company is a fiction, a sham, or the German company is an agent of the English company. The Master of the Rolls stated that:

"This is an appeal from the Judgment of Mr. Justice Walton, who held that the Plaintiff Company, whom I shall call the English Company, are not liable to pay Income Tax in respect of £15,000, part of the profits of a German Company, not distributed in the way of dividend or transmitted to England, but written off by the German Company in Germany to meet the depreciation of patents. The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head. They have carefully stated the evidence, but they have not, in my opinion, to use words found in one of the authorities, 'stated the Appellants out of Court.' I may add that the arguments before Mr. Justice Walton proceeded upon this footing. The German Company was established in Germany in 1900 in accordance with German law. It was undoubtedly a Company with several-shareholders who brought in considerable capital. One of those shareholders was an English Company, whose undertaking was subsequently acquired by the present English Company. At some date which is not stated, the English Company acquired all the shares of the German Company, and I assume in favour of the Crown that this event had happened before the material dates. The fact that an individual by himself or his nominees holds practically all the shares in a Company may give him the control of the Company in the sense that it may enable him, by exercising his voting powers, to turn out the Directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the Directors, or make the property or assets of the Company his as distinct from the Corporation's. Nor does it make any difference if he acquire not practically the whole, but absolutely the whole of the shares. The business of the Company does not thereby become his business. He is still entitled to receive dividends on his shares, but no more. I do not doubt that a person in that position may cause such an arrangement to be entered into between himself and the Company as will suffice to constitute the Company

⁶¹⁵ [1908-10] AII ER 833 CA.

his agent for the purpose of carrying on the business, and thereupon the business will become for all taxing purposes his business. Whether that consequence follows is in each case a matter of fact. In the present case I am unable to discover anything in addition to the holding of the shares, which in any way supports this conclusion. The German Company was not at first, and there is no evidence that it has ever become, a sham company or a mere cloak for the English Company. It has its Board of Management and its Board of Supervision as required by the German law. Its accounts are made out in accordance with German law. On the other hand, the English Company has its Board of Directors, some of whom are on the German Board. It has a proper account and balance sheet in which its interest in the German Company is described accurately as so many shares in the German Company, and the gross profits of the German Company are in no way brought into the Profit and Loss Account of the English Company. Against this the only thing to be said is that the Chairman of the English Company made a foolish speech in which he treated the gross profits of the German Company as profits of the English Company; but the dividend declared by the English Company did not proceed upon this footing. In my opinion it would be wrong to attribute to the loose and inaccurate language of the Chairman a force sufficient to override the formal acts of both the English Company and the German Company and all the other circumstances of the Case."

5. Banking: there a number of provisions under the Banks & Specialised Deposit-Taking Institutions Act, 2016 (Act 930) which permits lifting of the veil of incorporation to ascribe liabilities to shareholders and officers of companies engaged in banking and specialised deposit-taking business for non-compliance with the Act. These include the following instances:
 - (a) Section 22(2) of Act 930 – where a company carries on a deposit-taking business without a license or in breach of conditions of the license, the veil of incorporation can be lifted and fine or terms of imprisonment imposed on directors.
 - (b) Section 33(2) of Act 930 – veil can be lifted to impose personal liability on directors and chief executive where the bank fails to meet the minimum capital requirement or capital adequacy ratio.
 - (c) Section 35(4) of Act 930 – personal liability of directors for declaration and payment of dividends contrary to the provisions of the Act.

9.4.2 Exception to the corporate veil doctrine by the courts

The Courts have over the years pronounced on instances where it is in the public interest or the interest of justice for the veil of incorporation to be pierced where the separate legal personality is ignored resulting in either the imposition of liability on persons other than the company or avoiding

transactions that may otherwise be upheld under the separate legal personality doctrine. The instances stated below are based on specific facts before a court on which the judgment given by the court establishes a binding precedent that will be applicable to similar facts. It should be noted that such binding precedents, within the context of using English cases in Ghana, create a persuasive authority that contrary position will require judicial explanation. A more fundamental point to note is that judicial inroads made in the separate legal personality through the lifting of the veil of incorporation are not closed. Thus, the courts retain the inherent power to provide for additional instances based on facts before the court in the interest of justice or the public interest. Some of the instances that the courts have pronounced on include the following:

1. On the ground of public interest, where a company is owned or controlled by the nationals of an enemy country in times of war, the courts apply the nationality of the members of the company to the company and will not recognise the company as a separate legal entity from its members, despite the incorporation in the jurisdiction.

Daimler Co. Ltd v. Continental Tyre & Rubber Co (Great Britain) Ltd⁶¹⁶ - a company (Continental Tyre Ltd) was incorporated in England for the purpose of selling in England tyres made in Germany by a German Company, who held the bulk of the shares in the English company. The holders of the remaining shares (save one) and all the directors were Germans resident in Germany. The one share was registered in the name of the secretary, who was born in Germany, but resided in England and had become a naturalized British subject. After the outbreak of the war between England and Germany an action was commenced in the name of the English company by specially indorsed writ, issued by the company's solicitors on the instructions of the secretary, for payment of trade debt. Daimler Company averred that payment to Continental Tyre Co Ltd would be in the nature of trading with the enemy. The court had to determine whether the character of a company's corporators is relevant to determine the nature of the company, that is whether it was an enemy state or not, or whether the company is capable of acquiring an enemy character, especially in times of war. The House of Lords held that though the Continental Tyre Company was incorporated in England, its effective control was in the hands of the Germans and therefore the company had an enemy character. Lord Atkinson stated @ pgs. 319 - 320 that:

"...It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country. It would certainly appear to me, therefore, that, having regard to the issue raised in this suit, the residence of the respondent company was of necessity a vital matter for consideration. During the argument a passage was read out from the shorthand writer's notes of the argument before the

⁶¹⁶ [1916] 2 AC 307 HL.

Court of Appeal, from which it appeared that Mr. Gore-Browne, the leading counsel for the Daimler Company, admitted that the residence of the respondent company was in England. He could not well do otherwise, since the company was registered and incorporated in England, and all the facts going to show where it really resided were, with the exception already mentioned, shut out from the view of the Court. It by no means follows, however, that, despite that admission of counsel, your Lordships could not, if sufficient facts were disclosed in evidence before you, hold that the residence of the company was not in England, but, in truth, in Germany."

2. A corporate shareholder may act through its subsidiary acting on its behalf as an agent. In that case, the principal who is the shareholder may be held liable notwithstanding that the transaction was undertaken through its subsidiary once the agency relationship can be established. This does not amount to lifting the veil of incorporation. There is no presumption of agency relationship when associated companies act in such a manner. However, it stands to reason that where the facts clearly show that one member of the associated company has undertaken a transaction with the intent to bind the parent company, and it is shown that the parent company by conduct led the third party to so believe, the separate legal personality among the associated companies may rather be upheld for the act to be binding on the parent company as the principal of the subsidiary company, which will be seen as the agent.

In *Adams v. Cape Industries Plc*⁶¹⁷, discussed below, it was held that the relationship between associated companies was not such that liability of one company should be enforced against another. Scott J stated @ pg. 544 that:

"... we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."

3. **Mere Façade / Evasion of Contractual Duty** – there are a number of instances where the court may in the interest of justice ignore the separate legal personality and limitation of liability doctrine and hold those behind the company liable or avoid transaction that may otherwise be valid. The cases falling under this ground is where a company is incorporated not to undertake any actual activity but as a sham or mere façade to avoid the performance of some

⁶¹⁷ [1990] Ch. 433.

contractual obligation by the persons behind the company. Therefore, where the court comes to the conclusion that the main purpose of the incorporation of the company is to evade contractual obligation, the court may ignore the separate legal personality of the company and grant an order of rescission of the contract.

*Gilford Motor Co Ltd v. Horne*⁶¹⁸ - the plaintiff company carried on the business of selling motor vehicles, and "servicing" and supplying spare parts for them. Mr. Horne was employed and later appointed the managing director. His agreement with the company contained a trade restraint clause which prohibited him from soliciting the customer of the company after leaving the employment. Upon leaving the employment, he engaged in a similar business. Having received legal advice that the conduct of the business will breach the clause, he set up JM Horne & Co Ltd which took over his business. In an action for an injunction to restrain the breach of the clause, it was held granting the injunction that the restraint of trade clause was reasonable. In relation to the fact that JM Horne & Co Ltd was different from Horne, Lord Hanworth stated that:

"I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effect carrying on of a business of Mr. EB Horne. The purpose of it was to enable him, under what is a cloak or sham, to engage in business which, on consideration of the agreement..."

*In re Bugle Press Ltd*⁶¹⁹ - in this case, there were three shareholders in a publishing company with an issued share capital of 10,000 shares of £1 each. The two majority shareholders each held 4,500 and the minority shareholder held the remaining 1,000 shares. In 1958, the majority shareholders promoted and caused to be incorporated a company with the intention of taking over the publishing company. The two majority shareholders were the only shareholders of the transferee company. The transferee company, which did not carry on business, subsequently made an offer to all three shareholders for their shares at £10 for each share. The offer was based on a valuation made by independent valuers of the fair price for the transferor company's share capital as £100,000. In the letter making the offer, it was stated that the majority shareholders would accept the offer. The minority shareholder refused the offer. The transferee gave notice of intention to exercise the statutory power of compulsory acquisition under section 209 of the Companies Act, 1948, and the minority shareholder sought a declaration under the section that the transferee company was neither entitled nor bound to acquire his shares on the terms offered, notwithstanding the approval of nine-tenths of the shareholders. The minority shareholder filed evidence to show that the offer was below the value of his shares. The transferee company filed no evidence to support the valuation or to show the nature of the instructions given to the valuers or to give details of the information on which it was based. Buckley J. held that in the circumstances the onus of showing that the price was fair was on the transferee company and, as they had not discharged the onus, the minority shareholder was

⁶¹⁸ [1933] Ch. 935.

⁶¹⁹ [1961] Ch. 270.

entitled to the declaration sought. The transferee company appealed. It was held that the minority shareholder had shown that there were special circumstances why the court should, in the exercise of the discretion conferred by section 209 of the Act of 1948, "order otherwise" than to sanction the expropriation of the minority holding. Although the transferee company was in law distinct from its only two shareholders, in substance it was the same as the majority shareholding in the transferor company. In such circumstances, unless good reasons in the interest of the company were shown making expropriation of the minority interest desirable, the court should "order otherwise." Harman L.J. stated @ pg. 288:

"In my judgment this is a barefaced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, unless the articles so provide, to expropriate a minority. It would be all too simple if all you had to do was to form a £2 company and sell to it your shares and then force the outsider to comply. If the point had been taken earlier I for one should have been prepared to hold that this case never came within the section at all. Indeed, no serious attempt to comply with the section has ever been made in the present case, and that can be seen when one looks at the summons which talks about the scheme and contract dated July 14. There is no sign anywhere of any scheme or contract made on July 14 and, therefore, the section does not, I think, begin to operate. The minority shareholder might have ignored this notice altogether, but he had not the courage to do that, and I am not surprised. So he made his application and, thereby I suppose, he admitted that there was a scheme and a contract of July 14 though everybody must have perfectly well known that there was none... Apart from that, these two individuals, the majority shareholders, or their advisers, did not even trouble to comply with the next part of the section, namely, the length of delay and the notice which they had to give. They were in a hurry and they ignored that part of it. The minority shareholder's advisers waived that objection also, and he, having applied to the court under the section, had, like any other applicant, to prove his case, that is to say, to set up a case which the respondents had to answer. He did that, it seems to me, as it seemed to my Lord, quite simply by showing that the transferee company was nothing but a little hut built round his two co-shareholders, and that the so-called "scheme" was made by themselves as directors of that company with themselves as shareholders and the whole thing, therefore, is seen to be a hollow sham. It was then for the transferee company to show that nevertheless there was some good reason why the scheme should be allowed to go on. The transferee company, whether because the two members did not wish to go into the witness-box and be cross-examined or for some other reason, did not file any evidence at all; they merely purported to rely on a copy of a valuation said to have been made on their behalf by a firm of chartered accountants. That valuation was not sworn to, nobody was able to cross-examine the authors of it and there is

in my judgment no case in answer. The minority shareholder has nothing to knock down; he has only to shout and the walls of Jericho fall flat. I am surprised that it was thought that so elementary a device would receive the court's approval."

*Jones and Another v. Lipman and Another*⁶²⁰ - the first defendant agreed to sell freehold land with registered title to the plaintiffs for £5,250. Pending completion, he sold and transferred the land to the defendant company (having a capital of £100), which he acquired and of which he and a clerk of his solicitors were sole shareholders and directors, for £3,000, of which £1,564 was borrowed by the defendant company from a bank and the rest remained owing to the first defendant. The plaintiff then sued for specific performance. It was held that in the circumstances of this case the defendant company was a cloak for the first defendant, who could compel a transfer of the land to the plaintiffs, and the court would accordingly decree specific performance against both defendants. Russell J stated @ pgs. 445 and 446 that:

"For the plaintiffs the argument was twofold. First: that specific performance would be ordered against a party to a contract who has it in his power to compel another person to convey the property in question; and that admittedly the first defendant had this power over the defendant company. Second: that specific performance would also, in circumstances such as the present, be ordered against the defendant company. For the first proposition reference was made to Elliott v Pierson... For the second proposition reference was made to Gilford Motor Co, Ltd v Horne... Those comments on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The case cited illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances... The proper order to make is an order on both the defendants specifically to perform the agreement between the plaintiffs and the first defendant, but excepting from the order against the defendant company that part of the agreement which involves the chattels. Accordingly, the court will declare that the contract dated 27 February 1961, mentioned in the writ of summons, ought to be specifically performed as to both the realty and personality comprised therein by the first defendant and as to the realty comprised therein by the second defendant."

*Worldwide Shipping & Agency Ltd v. Darko*⁶²¹ - the defendant appellants, EBM and BO, were the managing director and deputy managing director, respectively of Worldwide Shipping and Agencies Ltd (WSAL). They entered into an agreement with the plaintiff-respondent under which the respondent paid them \$5,200 as freight charges for shipping a container of goods from Benin to

⁶²⁰ [1962] 1 All ER 422.

⁶²¹ [2001-2002] 2 GLR 488 CA.

Ghana. The appellants issued signed receipts on WSAL letterhead as evidence of the payments. After the payments, however, neither the goods nor the container arrived in the country, and after making repeated demands for his money, the respondent sued the company in the High Court for the money paid plus interest. Counsel for the appellants initially entered conditional appearance on behalf of the company but he neither pursued the appearance nor filed any defence; rather he wrote a letter to the registrar of the High Court withdrawing as counsel for the company. The respondent therefore successfully obtained judgment in default of defence against WSAL. But before he went into execution, the same counsel purporting to act for EBM wrote to the court that his client had resigned as director of the company and so the processes filed against the company and were served on him were improper and returned all the processes to the registrar. The respondent then filed a motion on notice to lift the veil of incorporation and to proceed against EBM and BO personally for the reliefs claimed in the writ. Even though EBM filed an affidavit on behalf of himself and BO in opposition to the motion, the same counsel wrote two more letters to the court purporting to act for the two directors without formally entering appearance as a solicitor and neither did the appellants file any notice of appointment of solicitor with the court. Counsel argued against the motion for the lifting of the veil of incorporation on behalf of the appellants without regularizing his representation to the court. Eventually, judgment was given in favour of the respondent. The appellants then appealed by a different lawyer against that judgment on the grounds, inter alia, that the trial judge erred in lifting the veil of incorporation and authorizing the respondent to proceed against the appellants. In support of the appeal, counsel argued that the appellants acted for a limited liability company that had a separate legal personality from its employees and that the money the appellants collected was for their principals abroad. The appellants further contended that the respondent paid the money on behalf of one B and therefore he had no locus standi to have brought the action since he was neither the consignee of the goods nor was the waybill in his name. At the hearing of the appeal, the court deprecated the conduct of counsel who represented the appellants at the trial for not only obstructing the respondent's claim but also depriving him of the opportunity to react to the defence of all the defendants. The court further found on the record that the appellants neither provided any evidence on what happened to the money they had collected from the respondent nor on the principals, they alleged they had collected the money for. The Court of Appeal per Brobbey J stated @ pgs. 497 to 501 in dismissing the appeal that:

"In considering the issue of the lifting of the veil of incorporation, counsel for the appellants argued that the appellants were mere employees and directors who collected money on behalf of the defendant company for its principals. His argument was based on the fact that the defendant being a limited liability company had a separate legal entity from its employees and so the latter cannot be held liable for the acts of the company. Quite obviously, his argument was premised on the principle of Salomon v Salomon and Co Ltd [1897] AC 22, HL. Counsel however conceded that there were exceptions to that principle, save that he confined the exceptions to situations where the company was established to further fraudulent

activities or avoid contractual liability. He contended that the company was not set up to further fraudulent activities or avoid contractual liabilities.

He buttressed his arguments by relying on a quotation from Morkor v Kuma [1998-99] SCGLR 620 at 635, which was that:

"When an officer of a company, in the normal course of her duties, so negotiates or signs an agreement entered into by the company, no personal liability is thereby created, in the absence of other clear indications to the contrary."

... The important point was that the onus was on the appellants to have shown where the company or the other directors were. This was because by the time the appellants were brought into the case, the respondent was alleging that the two had used the façade of the company to defraud or at least cheat him of his money. Since they asserted the positive that the company was in existence, they had the onus to have proved their positive averment that the company was in existence and that the business they did on its behalf was genuine.

By implication, their case was that they acted for a limited liability company that was in existence and so the respondent should have proceeded against it, not them. If that was the position, why did they not disclose the whereabouts of the company and its directors so that the respondent could have gone after them or at least the court could have ordered the respondent to go after them? By maintaining complete silence over the whereabouts of the company or its directors, they left the respondent with no choice but to believe as he did in the motion to lift the veil of incorporation that the company did not exist even at the time they collected the moneys from him. Since he dealt with the appellants and gave the moneys to them, it was only logical that he should go after them for his money. Their total silence about the whereabouts of the company or its directors gave the unmistakable impression that they collected the moneys for themselves, and not for any company, but they merely used the name of the company to collect the money. This is where this case differs from that of Morkor v Kuma (supra). The difference lies in the fact that that case refers to officials acting in the normal course of their business. The evidence or the record did not show that the two directors acted in the normal course of their business. It showed that they engaged on a venture which they, and not the company, profited from.

In situations like the instant case, it is important that the court compels the directors or employees of the company who rely on the fact of incorporation as a defence to disclose the particulars of the company because they have better knowledge of the company than the creditor or the one who does business with the company who may be an outsider to the internal workings of the company. If that were not so, it would be easy for any group of people to come together, form a

company, transact business in the name of the company with innocent businessmen, collect moneys or assets, and hide the whereabouts of the company, its employees or directors; and when the creditors attempt to seek redress arising from the business, the very people who transacted the business in the name of the company will plead that by reason of the fact of incorporation, the company is responsible and so the creditor should go after the company while at the same time they refuse or fail to disclose the whereabouts of the company. In other words, they will hide behind the fact of incorporation of the company and at the same time make it virtually impossible to go after the incorporated company. If the directors or employees were not compelled to disclose the whereabouts of the company, the courts would aid them to defraud innocent businessmen and women by the misuse or abuse of the concept incorporation. The views of Sanborn J in United States v. Milwaukee Refrigeration Co, 142 at 255 (quoted in Pennington's Company Law (3rd ed), p 51) which represents the position of the American Courts on the issue, sums up the view espoused here:

"... A corporation will be looked upon a legal entity as a general rule ... but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

There is no doubt that the receipts were issued on the letterhead of the company and that created the impression that the transaction was undertaken in the name of the company. However, the real people behind the transaction were the two appellants who actually took the money from the respondent. They merely used the incorporation of the company to conduct that business. They took the money and they know where the money went. Not having filed any defence or shown where the money went or where the company and the other directors were, it would be unjust and against public policy to allow them to get away and keep the moneys behind the cloak of incorporation by alleging that they merely acted in the name or on behalf of the company... In effect, although Worldwide Shipping and Agencies (Gh) Ltd had a separate identity and legal existence, this is a case in which the court should unveil the cloak of incorporation and allow the real operators behind the facade of the company to be held liable for the business they entered into."

*Akoto v. Akoto*⁶²² - in this divorce case the fact shows that the husband sold properties acquired by both parties and invested the money in companies that the respondent was not a shareholder or director. An order was made for some properties of the companies to be transferred to the respondent. On appeal to the Supreme Court on grounds that the Court of Appeal erred in law when in its judgment it gave certain percentages and properties that belonged to the company to the

⁶²² [2011] SCGLR 533.

Respondent who was neither a shareholder nor a director nor a subscriber to the company's regulations, Atuguba JSC on the issue of lifting the corporate veil stated @ pgs. 544 to 545 dismissing the appeal that:

"The ground of appeal relating to corporate personality must likewise fail. At p. 627 of the Record the Court of Appeal said:

"There is no doubt from the evidence that in respect of the properties owned jointly by the parties, the Appellant stood in a fiduciary relationship with the Respondent. To our minds, what the appellant did amounted to converting the East Legon and North Labone properties, which he owned jointly with the respondent, into money and putting the money into his companies for the operation of the companies and for his exclusive benefit. We do not think that in the face of the facts the trial court was precluded by any principle of law or equity from ordering that one or two vehicles registered in the name of one or the other of the companies be given to the respondent."

In Worldwide Shipping & Agencies (GH) Ltd v. Darko [2001-2002] 2 GLC, CA, Brobbey JA (as he then was, his other brethren concurring), quoted with approval the views of Sanborn J in United States v. Milwaukee Refrigeration Transit Co 142 Fed 247 at 255 (quoted in Pennington's Company Law (3rd ed), p 51 reflecting the position of the American courts) as follows:

"... A corporation will be looked upon as a legal entity as a general rule ... but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Again in In re Polly Perk International plc (in administration) [1996] 2 All ER 433 at 447 Robert Walker J said:

"... I was referred to quite a lot of authority touching on what is sometimes called lifting (or piercing) the corporate veil. That is a vivid but imprecise metaphor which has possible application in several different contexts, some far removed from this case. The most relevant, it seems to me, is where corporate personality is (in the words of Lord Keith in Woolfson v. Strathclyde Regional Council 1978 SLT 159 at 161) used as 'a mere façade concealing the true facts.' Façade' (or 'cloak' or 'mask') is perhaps most aptly used where one person (individual or corporate) uses a company either in an unconscionable attempt to evade existing obligations (Gilford Motor Co Ltd v. Hone [1933] Ch 935, [1962] 1 WLR 832) or to practice some other deception (a sort of unilateral shame, since the corporate façade has no independent mind). In Adams v. Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433 the establishment

and interposition of the Liechtenstein corporation referred to as AMC was a façade in this sense, and “no more than a corporate name,”

See also Morkor v. Kuma (East Coast Fisheries Case) [1998-99] SCGLR 620.

It is clear on these principles that the courts below, impliedly or in substance, if not in form, did properly lift the veil of incorporation and granted the wife the necessary reliefs. In any case, this court could have itself done so upon plenary appellate powers if necessary.”

4. **Single Economic Unit** – generally, the courts treat a group of associated companies as separate legal entities notwithstanding the relationship that may exist among the companies. However, based on available facts, the courts may also lift the corporate veil to allow a group of associated companies to be treated as one and not several separate entities. The conditions for holding the companies as a single economic unit are discussed in the cases below.

*DHN Food Distributors v. Tower Hamlets*⁶²³ - in 1965 a company ('DHN') was formed to carry on the business of importing and distributing groceries. In order to purchase premises from which to trade, DHN made certain borrowing arrangements with a bank. It was agreed that the bank would buy the property and then sell it to DHN for £120,000, £20,000 to be paid on exchange of contracts and the remainder within one year. The premises were bought for £115,000 and transferred to Bronze, a wholly owned subsidiary of the bank. DHN went into possession and began trading. In May 1964 Bronze contracted to sell the property to DHN; the date for completion was subsequently postponed until 1966, but the contract was not completed. DHN in the meantime arranged a loan of £100,000 from a separate source and, in order to save stamp duty on a conveyance by Bronze, agreed with the bank to purchase the share capital of Bronze and then to repay the loan from the bank for a total sum of £120,000. That transaction was carried out and thereafter DHN and Bronze had the same directors. Bronze retained the legal title to the premises and DHN continued to use them for the purpose of their business. In 1969 the local authority made a compulsory purchase order and paid Bronze compensation for the value of the land under the Land Compensation Act 1961. DHN claimed also to be entitled, by virtue of the Act, to compensation for disturbance. The local authority contended that DHN were only a licensee of Bronze and therefore were not entitled to compensation for disturbance except for the value of their interest in the land as a tenant from year to year, within the Compulsory Purchase Act 1965. The court held that DHN were entitled to compensation because since Bronze was a wholly owned subsidiary of DHN with common directors running both companies, DHN were to be treated as having an irrevocable contractual licence to carry on their business on the premises. That licence gave rise to a constructive trust under which Bronze could not turn out DHN. DHN accordingly had a sufficient interest in the land to qualify them for compensation for disturbance. Moreover, in the circumstances, the court was entitled to look at the realities of the situation and to pierce the corporate veil. The group was virtually a partnership and

⁶²³ [1976] 1 WLR 852.

for the purpose of compensation, the two companies should be treated as one which was effectively DHN. DHN were therefore entitled to claim compensation for disturbance. Lord Denning MR. state @ pg. 467 that:

"... A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.... This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it."

Goff LJ stated:

"This is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely, whether the owners of this business have been disturbed in their possession and enjoyment of it."

*Adams v. Cape Industries plc*⁶²⁴ - Cape Industries plc, a UK parent company, had a number of subsidiaries. Its subsidiaries mined asbestos in South Africa and shipped it to Texas, where a marketing subsidiary, NAAC, supplied the asbestos to another company in Texas. Employees of the Texas subsidiary became ill, with asbestosis. They sued Cape and its subsidiaries in a Texas court including a special purpose vehicle incorporated Liechtenstein. Cape was joined and argued there was no jurisdiction to hear the case. Judgment was given against Cape for breach of a duty of care

⁶²⁴ [1990] Ch 433.

in negligence to the employees. The employees commenced an action to enforce the judgment in the UK courts. Under the applicable conflict of laws rules, Cape would have been liable if Cape consented to be subject to Texas jurisdiction or that it was present in the US. The fact established that Cape did not consent. The question was therefore whether, through the Texas subsidiary, NAAC, Cape Industries plc was 'present'. For that purpose, the claimants had to show in the UK courts that the veil of incorporation could be lifted and the two companies to be treated as one. The court of first instance held that the parent, Cape Industries plc, could not be held to be present in the United States. The employees appealed. The court of appeal rejected the three allegations that Cape should be part of a single economic unit, that the subsidiaries were a façade and that an agency relationship existed. That save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. Salomon & Co* merely because it considers that justice so requires.' On the test of the 'mere façade', the court emphasised that the motive was relevant whenever such a sham or cloak is alleged, as in *Jones v Lipman*. That a company must be set up to avoid existing obligations, not future and hypothetical obligations not yet arisen. The court held that the special purpose vehicle incorporated in Liechtenstein was in fact a façade, but on the facts, it was not a material subsidiary such as to attribute liability to Cape. Scott LJ stated @ pg. 544:

"The question of law which we now have to consider is whether the arrangements regarding N.A.A.C., A.M.C. and C.P.C. made by Cape with the intentions which we have inferred constituted a façade such as to justify the lifting of the corporate veil so as that C.P.C.'s and A.M.C.'s presence in the United States of America should be treated as the presence of Cape/Capasco for this reason if no other... The relationship between Cape/Capasco and C.P.C. is the crucial factor, since C.P.C. was undoubtedly carrying on business in the United States of America. We have already indicated our acceptance of the judge's findings that C.P.C. was a company independently owned by Mr. Morgan and that the shares therein belonged to him in law and in equity. These findings by themselves make it very difficult to contend that the operation of C.P.C. involved a façade which entitles the court to pierce the corporate veil between C.P.C. and Cape/Capasco and treat them all as one. Is the legal position altered by the facts that Cape's intention, in making the relevant arrangements (as we infer), was to enable sales of asbestos from the South African subsidiaries to be made while (a) reducing if not eliminating the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for United States taxation or subject to the jurisdiction of the United States courts and the risk of any default judgment by such a court being held to be enforceable in this country? We think not. Mr. Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as

*third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr. Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of A.M.C. to which special considerations apply) to expect that the court would apply the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 in the ordinary way. The plaintiffs submitted (paragraph 7 of their notice of appeal) that the motive of the defendants in setting up the arrangements regarding N.A.A.C., A.M.C. and C.P.C. as revealed in the documentary evidence were "consistent only with an acceptance by Cape that they were present in the United States through N.A.A.C. and C.P.C." We think there is no substance in this point. These arrangements at most indicated an apprehension on the part of the defendants that they might be held to be so present and a desire that they should not be. They involved no admission or acceptance of such presence. We reject the "corporate veil" argument."*

*Smith, Stone and Knight v. Birmingham Corporation*⁶²⁵ - a company acquired a partnership concern and having registered it as a company, continued to carry on the acquired business as a subsidiary company. The parent company held all the shares except five which its directors held in their respective names in trust for the company. The profits of the new company were treated as profits of the parent company, which appointed the persons who conducted the business and were in effective and constant control. The defendant corporation compulsorily acquired the premises upon which the business of the subsidiary company was carried on, and the parent company claimed

⁶²⁵ (1939) 4 All ER 116.

compensation in respect of removal and disturbance, but the respondents contended that the proper claimants were the subsidiary company, which is a separate legal entity. The question in this case is whether a subsidiary company has such an interest in the property upon which its business is conducted that it is entitled to receive compensation upon compulsory purchase. The court held that possession by a separate legal entity was not conclusive on the question of the right to claim, and as the subsidiary company was not operating on its own behalf but on behalf of the parent company, the parent company was the party to claim compensation.

Atkinson J stated @ pg. 122 that:

"There is no doubt that the claimants had complete control of the operations of the Waste Company. ... It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own. I have looked at a number of cases—they are all revenue cases—to see what the courts regarded as of importance for determining that question and I find six points which were deemed relevant for the determination of the question: Who was really carrying on the business? In all the cases, the question was whether the company, an English company here, could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere. The first point was: Were the profits treated as the profits of the company?—when I say "the company" I mean the parent company—secondly, were the person conducting the business appointed by the parent company? Thirdly was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control? Now if the judgments; in those cases are analyzed, it will be found that all those matters were deemed relevant for consideration in determining the main question, and it seems to me that every one of those questions must be answered in favour of the claimants. Indeed, if ever one company can be said to be the agent or employee, or tool or simulacrum of another, I think the Waste Company was in this case a legal entity, because that is all it was. There was nothing to prevent the claimants at any moment saying: "We will carry on this business in our own name." They had but to paint out the Waste Company's name on the premises, change their business paper and form, and the thing would have been done. I am satisfied that the business belonged to the claimants; they were, in my view, the real occupiers of the premises. If either physically or technically the Waste company was in occupation, it was for the purposes of the service it was rendering to the claimants, such occupation was necessary for that service, and I think that those facts would make that occupation in law the occupation of the claimants. An analogous position would be where servants occupy cottages or rooms for the

purposes of their business, and it is well settled that if they have to occupy those premises for the purposes of the business, their occupation is the occupation of their principal. I have no doubt the business was the company's business and was being carried on under their direction, and I answer the question in favour of the claimants."

*Kuni v. State Gold Mining Corporation and Another*⁶²⁶ - the plaintiff, an employee of the Prestea Goldfields Ltd, a subsidiary of the State Gold Mining Corporation, sustained serious injuries when a mass of loose graphite rocks fell on him whilst working underground at the mines. He, therefore, brought the present action against both the State Gold Mining Corporation and the Prestea Goldfields Ltd for damages. The main issue for the determination of the court was whether it was proper for the plaintiff to sue the State Gold Mining Corporation. The evidence adduced at the trial showed that the State Gold Mining Corporation held all the shares of the Prestea Goldfields Ltd. The profits of Prestea Goldfields Ltd were treated as profits of the State Gold Mining Corporation. The State Gold Mining Corporation was also responsible for appointing the general manager, the mines manager and the chief engineer who conducted the business of the mines and were in effective and constant control. Some of the directors of the State Gold Mining Corporation constituted the board of directors of Prestea Goldfields Ltd. Besides the Mining Regulations, 1970 (L.I. 665), made the working of a mine the responsibility of the manager who in this case was appointed by the State Gold Mining Corporation and was also responsible for the safety and proper discipline of the men employed above and below ground. The court held that under the ordinary rules of law, a parent company and a subsidiary company, even a hundred per cent subsidiary, were distinct legal entities. However, there was no rule of law which said that a company could not, and should not, act as an agent of its holder. From the facts, it was clear that the Prestea Goldfields Ltd were the agents of the State Gold Mining Corporation and carried on its business. Sarkodee J. stated @ pgs. 207 to 208 that:

"A company is said to be the subsidiary of another if that other (the holding company) is a member of it and controls the composition of its board of directors, or if the holding company holds more than half its "equity share capital": see the Companies Code, 1963 (Act 179), Sched. I, s. 2. Under the ordinary rules of law a parent company and a subsidiary company, even a hundred per cent subsidiary, are distinct legal entities. However it seems there is no rule of law which says that a company cannot and should not act as the agent of its holders. No problem arises where there is an express agreement as in Southern (Inspector of Taxes) v. Watson [1940] 3 All E.R. 439, C.A. where after the business had been converted into a private company the agreement provided that the company should fulfil existing contracts as agents of the seller. Where there is no such agreement it is a question of fact in each case whether the subsidiary company is carrying on the parent company's business or its own. In this regard I think all the circumstances must be taken into

⁶²⁶ [1978] GLR 205.

account the following being particularly relevant:

- (1) Are the profits treated as those of the parent company?
- (2) Are the persons conducting the business appointed by the parent company?
- (3) Is the parent company the head and brain of the enterprise?
- (4) Does the parent company govern the business and decide what should be done and what capital should be employed?
- (5) Are the profits made by its skill and direction?
- (6) Is the parent company in effectual control?

From the evidence of the plaintiff's third witness, the personnel manager of Prestea Goldfields Ltd., and that of the plaintiff's fourth witness, the Chief Inspector of Mines, there is no doubt that all these questions ought to be answered in the affirmative. The State Gold Mining Corporation holds all the shares of the Prestea Goldfields Ltd. The profits of Prestea Goldfields are treated as profits of the State Gold Mining Corporation. It is the State Gold Mining Corporation which appoints the persons who conduct the business of Prestea Goldfields Ltd. and who are in effective and constant control. These persons are the general manager, the mines manager and the chief engineer of Prestea Goldfields Ltd. To enable it to stamp its control on the Prestea Goldfields Ltd., the State Gold Mining Corporation by its manager appoints other senior employees who conduct the day to day affairs of the subsidiary company, the Prestea Goldfields Ltd. Some of the members of the State Gold Mining Corporation constitute the board of directors of Prestea Goldfields Ltd., commonly called the local board. Besides, the Mining Regulations, 1970 (L.I. 665), make the working of mine the responsibility of the manager who is also responsible for the safety and proper discipline of the men employed above and below ground. It is clear therefore that Prestea Goldfields Ltd. carries on the business of the State Gold Mining Corporation"

*Re FG Films Ltd*⁶²⁷ - the applicants were incorporated under the Companies Act, 1948, with a capital of £100 in £1 per shares. 90 shares were held by one director, J., an American citizen, 10 shares held by the second, who was British, and the third director, who also was British, did not hold any share. The applicants' sole place of business was their registered office, and they did not employ any staff. They agreed to produce a film based on a story the film rights owned by an American company of which J. was president, and which agreed to provide the finance and whatever facilities the applicants might require. The film was made in India, and the applicants applied to the Board of Trade to register it as a British film, which the Board of Trade, while admitting that the applicants were a British company as defined in the Act, declined to do on the ground that the applicants were not the "maker" of the film within the meaning of sections 25(1)(a) and 44(1) of the Cinematograph

⁶²⁷ [1953] WLR 483.

Films Act, 1938. On a summons by the applicants pursuant to section 31 of the Act, the court held that to satisfy the requirement of section 25(1)(a) the applicants must establish that they were the sole makers of the film; (2) that it was contrary to all sense and reason on the proved and admitted facts to say that the applicants undertook the arrangements for the making of the film, as their participation in any such undertaking was so small as to be practically negligible, and as they had acted, in so far as they acted at all, merely as the nominees of the American company. The applicants' intervention was purely colourable, and they were brought into existence for the sole purpose of being put forward as having undertaken the arrangements necessary for the making of the film and of enabling it to qualify as a British film and the Board of Trade's decision not to register the film as a British film was right. Vaisey J stated @ pg. 485 that:

"The sole question, therefore, which I have to decide is whether the applicants were the "maker" of the film. This is what they claim to be, but the respondent has decided that they were not and has, on that ground, refused to register the film "Monsoon" as a British film. ... In substance, I am asked to reverse the respondent's decision and to say that "Monsoon" is a British film under the Act ... In section 44 of the Act the expression "maker" is defined as meaning, "in relation to a film, the person by whom the arrangements necessary for the making of the film are undertaken ..." This is perhaps a strange collocation of words which might in other circumstances give rise to some difficulty of interpretation. "Undertake" means, I think, "be responsible for," especially in the financial sense, but also generally. So far as the present case is concerned, I think that it plainly suggests the following problem: was it the applicants alone who undertook the arrangements necessary for the making of the film, or did they do so in co-operation with some other person, firm or company, reading as including the plural number (in accordance with the Interpretation Act, 1889) the words "maker," "British subject" and "British company" in section 25 and the words "maker" and "person" in the definition? Here the applicants can succeed only if they establish themselves as the sole statutory makers of the film, for, if they were (as may well be the case) one of several makers, the other "maker" or "makers" certainly cannot, in the circumstances of this case, be brought within the description of "British subject" or "British company." Their claim is to be, or to have been, the sole exclusive maker of the film. The applicants have a capital of £100, divided into 100 shares of £1 each, 90 of which are held by the American director and the remaining 10 by a British one. The third director has no shareholding. I now understand that they have no place of business apart from their registered office, and they did not employ any staff. It seems to me to be contrary, not only to all sense and reason, but to the proved and admitted facts of the case, to say or to believe that this insignificant company undertook in any real sense of that word the arrangements for the making of this film. I think that their participation in any such undertaking was so small as to be practically negligible,

and that they acted, in so far as they acted at all in the matter, merely as the nominee of and agent for an American company called Film Group Incorporated, which seems (among other things) to have financed the making of the film to the extent of at least £80,000 under the auspices and direction of the said American director, who happened to be its president. The suggestion that this American company and that director were merely agents for the applicants is, to my mind, inconsistent with and contradicted by the evidence, and a mere travesty of the facts, as I understand and hold them to be. The applicants' intervention in the matter was purely colourable. They were brought into existence for the sole purpose of being put forward as having undertaken the very elaborate arrangements necessary for the making of this film and of enabling it thereby to qualify as a British film. The attempt has failed, and the respondent's decision not to register "Monsoon" as a British film was, in my judgment, plainly right. In lieu of the declarations for which the applicants ask, I will declare that the applicants were not the makers of the film called "Monsoon" and that that film is not a British film within the meaning of the Cinematograph Films Acts, 1938 and 1948. Judgment for respondent."

5. **Perpetuating Fraud** – the court may lift the veil of incorporation to prevent those behind the company from using the company to perpetuate fraud on others. This is different from the situation under the fraudulent trading under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), section 117. The Act deals with the situation where the company is put in liquidation. But under this concept, the action is not limited to instances of winding up a company.

*Chellaram & Sons (Ghana) Limited v. Halabi*⁶²⁸ - a limited company being heavily indebted to several people had insufficient funds to pay the salaries of its staff, including the plaintiff, who alleged that she was at the material time an assistant store manager. The plaintiff's husband was the managing director of the said company and the plaintiff had herself previously been a director. In July 1958, an action for debt was commenced against the company and in September 1958 having obtained judgment, the judgment-creditors attached the company's store. The plaintiff then claimed that the said store and all the goods in it were her property, that they had been conveyed to her by a deed executed on the 18th August, 1958, by the managing director of the company, and that she paid consideration of £G1160 10s being made up of £G440 arrears of salary due to her from the company and £G720 10s cash. There were no witnesses to the execution of this deed which was signed only by the plaintiff and her husband and there was no clear evidence that the plaintiff was ever in possession of the store. However, in her statement of claim, the plaintiff averred that she was an employee of the company until the 31st July, 1958. She thus had notice of the civil action against the company. The High Court gave judgment for the plaintiff on the ground that the agreement of

⁶²⁸ [1963] 1 GLR 214.

sale was not a fraudulent or fictitious one. On appeal, the Supreme Court allowed the appeal and held that the respondent was never an employee of Northern Territories Traders Ltd and that no arrears of salary were due to her. That the purported conveyance of the store and goods was fraudulent. Crabbe JSC stated @ pgs. 217 to 220 that:

"The defendants denied that the plaintiff was the owner of the store, and then made the following specific charges against her: (1) that the execution of the deed dated the 18th August, 1958, amounted to a conveyance in fraud of creditors; (2) that the purported sale was not authorised by the Northern Territories Traders Ltd. and therefore was of no legal effect; and (3) that there was collusion between the plaintiff and the Northern Territories Traders Ltd.

Although the defendants did not expressly plead the Statute of Fraudulent Conveyances, 1571, it is clear from paragraph 3 of their statement of defence in which charge (1) above was made that they intended to plead that statute.

The Statute of Fraudulent Conveyances, 1571, provided in effect that all conveyances and dispositions of property real or personal, made with the intention of delaying, hindering, or defrauding creditors, should be null and void as against them, their heirs, etc., and assigns. It further provided that nothing therein contained should extend to any estate or interest made on good consideration and bona fide to any person not having, at the time, any notice of such fraud. This statute has been held to be of general application and therefore applies in this country.

The burden of proving the intent to defraud is on the creditor who impeaches the conveyance, but the intent may be inferred from evidence of the circumstances in which the conveyance was made. As to what may in general be evidence of the fraudulent intent Kindersley V.C. in Thompson v. Webster (1859) 4 Drew. 628 at p. 632; 62 E.R. 241 at p. 242. said:

"The language of the Act being that any conveyance of property is void against creditors, if made with intent to defeat, hinder or delay creditors, the Court is to decide, in each particular case, whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder or delay his creditors."

The most striking feature of this case is that at the time when the purported sale to the plaintiff took place, of the store together with the goods, the defendants had already issued their writ of summons against the Northern Territories Traders Ltd., and the managing director had entered appearance on the 23rd July, 1958, that is to say, about a week earlier and before the purported sale. The plaintiff was at this material time the assistant manager of the store, the subject-matter of this case, and there can be no doubt whatsoever that she knew of the civil action pending

against the company.

The company was at this time heavily indebted to several people and it had not sufficient funds to pay salaries of the staff including that of the plaintiff. It was in these circumstances of pecuniary embarrassment when an action for debt was pending against the company that the managing director decided to sell the store and the goods to the plaintiff. A voluntary conveyance pendente lite has on it the badge of fraud, unless the pending action is frivolous or speculative; but where there is adequate consideration the evidence required to establish fraudulent intention must be strong. Inadequacy of consideration, however, is evidence of fraud.

*Another striking feature of the case is that the transaction which resulted in the conveyance of the store and goods to the plaintiff was made in secret. The deed of conveyance dated the 18th August, 1958, under which the property in the goods passed to the plaintiff was signed only by the plaintiff and her husband, the managing director; there were no witnesses to its execution. Secrecy is always evidence of fraud, though it is not in itself conclusive. Sir Edward Coke's advice, in *Twyne's Case* (1602) 3 Co.Rep. 80b at p. 81a; 76 E.R. 809 at p. 814. as to gift in satisfaction of a debt, made by one who is indebted to others also, is:*

"Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. Let the goods and chattels be appraised by good people to the very value and take a gift in particular in satisfaction of your debt. Immediately after the gift, take the possession of them; for continuance of the possession of the donor, is a sign of trust."

It seems to me that in this present case the advice of Sir Edward Coke fell on deaf ears.

There is also no clear evidence that the plaintiff was ever in possession of the store. Neither the plaintiff nor her husband could say the exact date in July 1958 when she effectively took possession. The evidence does not show what duties a director of the company performed, but it is clear that about a year earlier the plaintiff had relinquished her directorship on the grounds that she was pre-occupied with domestic duties. Both the plaintiff and her husband agreed that the plaintiff worked for the company from 1957 to July 1958 and that she did not receive her salary during this period. I am unable to reconcile this evidence with the following vague statement by the plaintiff: "I took possession of store at the end of July 1958." It is to me a point of some importance, small though it is, that the plaintiff and her husband sedulously refrained from giving evidence of the exact date on which possession was delivered to the plaintiff. However, in paragraph two of the statement of claim the plaintiff averred that she was an employee of the company from the 1st April, 1958, to the 31st July, 1958. To my mind this is a clear admission by the plaintiff that the company was owner of the goods in the store up to the end

of July 1958. Consequently, it cannot be that the plaintiff was the owner of the store at the same time. In order to show an honest intention to part with the property the delivery of the possession must be actual and complete and must exclude entirely the doctrine of reputed ownership. There is no reliable evidence in this case that the plaintiff was in actual occupation of the store before or after the 31st July, 1958.

A voluntary conveyance will be void under the Statute of Fraudulent Conveyances on the ground of actual or express fraudulent intention on the part of the grantor, and it can be impeached by either existing or subsequent creditors. Where, however, the fraudulent intent in a voluntary conveyance is not apparent it can be presumed from the circumstances. "The principle on which the statute [of 13 Eliz., c. 5.] proceeds is this, that in all matters persons must be just before they are generous, and that debts must be paid before gifts can be made": see *v. Pope* (1870) 39. L.J.Ch. 689 at p. 690.

The case for the plaintiff was that the sale of the goods in the store was for valuable consideration, and her evidence in support of this claim was as follows:

"When I stopped working the company was indebted to me in the sum of £G440. I entered into agreement with the company whereby the company sold me goods in store valued £G1,160 10s. and I paid cash £G720 10s. and salary due to me of £G440 was credited to me as part of sale price."

If this evidence of the plaintiff is true then it means that she was one of the numerous creditors of the company and therefore the conveyance executed in her favour was in good faith and valid. In those circumstances it would be immaterial whether the managing director knew at the time that execution would be issued against the company if the defendants recovered judgment. Thus, in *Middleton v. Pollock* (1876) 2 Ch.D. 104 at pp. 108-109. Jessel M.R. said that the meaning of the section, "is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority among the creditors of the debtor." Further the fact that she said that she paid cash the sum of £G720 10s. which is more than half the total value of the goods, would be some evidence that the sale and conveyance were made bona fide and for value. In these circumstances if her evidence is true an onus was cast upon the defendants to show either by adducing evidence or by cross-examination that the plaintiff was a party to the fraudulent intention of the company. Thus, in *Cadogan v. Kennett* (1776) 2 Cowp. 432 at p. 434; 98 E.R. 1171 at p. 1172 Lord Mansfield C.J. referring to the Statute of Fraudulent Conveyances made the following observations:

"The statute does not militate against any transaction bona fide, and where there is no imagination of fraud. And so is the common law. But if the transaction be not bona fide, the circumstance of its being done for a valuable consideration, will not alone take it out of the statute. I have

known several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void.

One case was where there had been a decree in the Court of Chancery and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The Court said, the purchase being with a manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void, because the purpose is iniquitous. It is assisting one man to cheat another, which the law will never allow."

*Handelmij NV v. Jebeille Brothers*⁶²⁹ - the plaintiff (judgement creditor) sought to attach certain properties belonging to the firm by the name Jebeille Brothers. Jebeille Brothers had imported goods from the plaintiffs to the tune of an amount for which they did not have the means to pay and judgment was given against them for the amount owed. An appeal by Jebeille Brothers to the Court of Appeal resulted in the grant of the stay of execution. During the grace period offered by the stay of execution, Jebeille Brothers transferred their assets in a confectionery and shoe firm to a limited liability company. Since it was admitted that Jebeille Brothers had no independent assets of their own, it meant that by vesting their assets in the new limited liability company, they had effectively prevented the plaintiffs from attaching their property. For Jebeille Brothers, it was argued that it was perfectly proper to attach the interest of the shareholder or director of the limited company who happened to be a member of the debtor firm but that a writ of *fi fa* on the assets of the company was an inappropriate and wrongful method of achieving that result. Counsel for the judgement creditor argued that the object of this new entity was to defraud the creditors. Accordingly, any transfer of assets which may have been made to the new company was void as against the execution creditors. The court held that the whole transaction was fraudulent. Apaloo J stated that:

"It is to me very significant that the ice cream firm should have been dissolved in September 1965 when there was subsisting an unsatisfied judgment debt against the firm and the rubber shoe firm should be turned into a limited liability company after the appeal against the Jebeille Brothers was lost and the judgement creditor had commenced execution proceedings. The answer to these questions and the one that common sense compels me to give is that the whole object was to put the properties of the two entities beyond the reach of the execution creditor. I cannot think of a more transparent attempt to defraud the judgement creditors."

⁶²⁹ High Court, Accra, 24 April 1967; digested (1960) C.C. 93.

Ord v. Belhaven Pubs Ltd⁶³⁰ - in 1991 the plaintiffs issued a writ against the defendant company, the legal owners of a public house, claiming, inter alia, damages for misrepresentation and breach of warranty arising out of the purchase of a 20-year lease of the public house by the plaintiffs from the defendant company. The amount of damages claimed was put at £387,750. The defendant counterclaimed for unpaid rent which the plaintiffs had refused to pay. The defendant company was a subsidiary and part of a group of companies which dealt with properties, especially hotels and public houses and in 1992, as the result of a severe recession in the property market, the group was restructured in such a way that the hotels in the defendant's name were transferred to the parent company. Thereafter the defendant effectively ceased trading although it continued to be the legal owner of the public house leased to the plaintiffs who, in 1997, applied under RSC Ord 15, r 7(2) for leave to substitute as defendants in the action the parent company and another subsidiary which had taken over the defendant's trading operations as part of the corporate restructuring, on the grounds that the defendant had become a mere shell with insufficient assets to pay any damages that might be awarded to the plaintiffs. The deputy judge ordered that the parent company be substituted as the defendant to the action. The defendant appealed to the Court of Appeal. It was held that in the absence of any impropriety, sham or concealment in the restructuring of the group it would be wrong to lift the corporate veil in order to make the shareholders of the defendant company liable instead of the company itself. The restructuring was a normal attempt to rationalize the group's operating structure in the light of the collapse in the property market in 1992 after the plaintiffs' writ had been issued and had not been undertaken in order to evade any liability towards the plaintiffs. Nor was it appropriate to treat the group as a single economic unit by disregarding the separate and distinct legal entities involved as the restructuring was not a mere façade concealing the true facts. Hobhouse LJ stated that:

"The second aspect is the factual aspect and the lifting of the corporate veil. As will be appreciated from what I have already said, the judge in the latter part of her judgment does not have proper regard to the evidence, or indeed what she has accepted in the earlier parts. She uses the words 'deliberately ignore the separate corporate identity', carrying with it an inference that something improper has been done. Nothing improper was done by the group or the companies in the group or their directors. Similarly, she suggests that there were breaches of duty because she said they deliberately and totally disregarded their duties to the creditors. That is not the position on the evidence and is not something which she was entitled to say on the evidence. Indeed, before us Mr. Ashe has frankly accepted that he does not put his case in that way. He says no impropriety is alleged. He does not allege that there was any breach of the provisions of the 1986 Act, nor that there was any conduct on the part of the directors (or any other person) in 1992 or 1995 which would give rise to remedies under the Companies Act 1985 or under the 1986 Act. Therefore, he is not able to rely upon any concept of fault or indeed of fraud in

⁶³⁰ [1998] 2 BCLC 447.

support of his contention that the corporate veil should be pierced. Therefore, the judge's factual basis was wrong, but she also seems to have relied to some extent on what can be described as a concept of corporate benefit, or a concept of the economic unit. ... There is no façade that was adopted at any stage; there was no concealment of the true facts. We pressed Mr. Ashe during the course of his submissions as to whether he was making any such suggestion. He was unable to give a satisfactory reply. This was obviously inevitable because there was no basis for suggesting that there was any such façade."

Re Darby; Ex Parte Brougham⁶³¹ - Darby and Gyde were undischarged bankrupts with convictions for fraud. They promoted and registered a company called City of London Investment Corporation Ltd (LIC). LIC had seven shareholders and issued £11 of its nominal capital of £100,000. Darby and Gyde were the only directors and entitled to all profits. LIC purported to register and float a company in England called Welsh Slate Quarries Ltd, for £30,000. LIC bought a quarrying licence and plant for £3500 and sold this to WSQ for £18,000. The prospectus invited the public to take debentures in WSQ. It stated the name of LIC, but not Darby and Gyde, or the fact that they would receive the profit on the sale. WSQ failed and went into liquidation. The liquidator claimed Darby's secret profit, which he made as a promoter. Darby objected that the LIC and not him was the promoter. Subsequently, Darby and Gyde became bankrupt. Darby had assets, Gyde had none. They were prosecuted for fraudulent and material misstatements in the prospectuses and convicted. The court held that under the circumstances the corporation was only an "alias" for Darby and Gyde and that the liquidator of the company could prove in the bankruptcy of Darby for the whole of the secret cash profit that Darby and Gyde had received. Phillimore J. stated @ pg. 102 that:

"Darby and Gyde (who are two fraudulent persons, both of whom have been convicted of fraud in the present case, and of several previous crimes) registered in Guernsey a company called the City of London Investment Corporation, of which they were the proprietors. It was merely an alias for themselves just as much as if they had announced in the Gazette that they were in future going to call themselves "Rothschild & Co." It was merely a name under which they carried on business, and I am quite clear in my own mind that that was their object, and that, whenever they represented that some business was being done by or through the corporation and concealed the fact that it was being done by or through Darby and Gyde, they were by that mere fact probably perpetrating a fraud. I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and

⁶³¹ [1911] 1 KB 95.

different from themselves. Having registered that corporation, and being minded to perpetrate a very great fraud, they, as such corporation, agreed to buy a trivial interest in a Welsh Slate Quarry for a small sum in cash and a consideration in shares, and then as such corporation purported to sell this interest to the Welsh Slate Quarries, Limited, and thereby they made a very large profit. It is said that they concealed that profit, and also that they concealed from the Welsh Slate Quarries Limited, the fact that they were themselves the real vendors and promoters, and therefore it is contended that the liquidator is entitled to recover the profit from them."

The above exceptions do not close the instances that the corporate veil may be pierced or lifted. It is still open for the courts to lift or pierce the corporate veil once it is established in each case that public policy or justice requires the lifting of the corporate veil. As indicated, when the corporate veil is lifted, the consequence is to assign liability to shareholders or members of the company, or those who control the company, or disregard purported transactions entered into by the company.

In the case of *VTB Capital Plc. v. Nutritek International Corporation*⁶³², the facts of which are stated below, Lord Neuberger stated that:

"The fact that there has been no case (until Gramsci) where the power to pierce the corporate veil has been extended in the way for which VTB contends in these proceedings does not necessarily mean that VTB's case, in so far as it is based on piercing the veil, must fail. However, given that the principle is subject to the criticisms discussed above, it seems to me that strong justification would be required before the court would be prepared to extend it. Once one subjects the proposed extension to analysis, I consider that it is plain that it cannot be sustained: far from there being a strong case for the proposed extension, there is an overwhelming case against it."

One must however be aware that, even if the corporate veil is lifted or pierced, the appropriate remedy is not necessarily one which sees the member or those in control of the company "step into the shoes" of the company. That is, the shareholders or those in control being put in the position of the company and held liable for all the liabilities of the company including contingent and future liability of the company. In the above cases that dealt with ascribing liability to shareholders or those in control of the company, such liability is limited to existing liability under a contract, and not to assume a liability that was not already in existence.

In *Adams v. Cape Industries Plc*⁶³³, discussed above, it was held that the relationship between

⁶³² [2013] UKSC 5.

⁶³³ [1990] Ch. 433.

associated companies was not such that liability of one company should be enforced against another. Scott J stated @ pg. 544 that:

“... we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.”

The concept of lifting the corporate veil is to permit existing liability to be assigned to shareholders or those who control the company. The concept cannot, however, be used to permit a shareholder or person in control of the company to be held as a co-party to a contract with the company when it was the company alone that was a party to the contract. In other words, lifting the veil of incorporation is not to allow persons behind the company to be sued as co-party to an agreement entered into with the company.

VTB Capital Plc. v. Nutritek International Corporation⁶³⁴ - in November 2007, the claimant bank (VTB Capital Plc) entered into, inter alia, a facility agreement (the agreement) with a Russian company, RAP, whereby it advanced the sum of \$US225m (the facility) to RAP. The facility was to enable RAP to finance a sale and purchase agreement with the first defendant, Nutritek, another Russian company, to acquire part of its business through the medium of a company called Newblade. The business comprised nine dairy plants in Russia (the dairy plants). In December 2010, the claimant brought an action against the defendants for fraudulent conspiracy, alleging that it had been falsely represented that the sale of Newblade to RAP was an arm's length transaction between two independent companies when, in fact, RAP was ultimately controlled by a group of companies (the M group), which included the second and third defendant companies and which was said to be controlled by the fourth defendant. The fourth defendant, a Russian resident, was also chairman of Nutritek, or its holding company, at the relevant time and was personally involved in negotiations with the claimant regarding the agreement. The second and third defendant companies were also associated with the transaction, which it was alleged the M group had coordinated. It was further alleged by the claimant that financial information provided to accountants as to the trading of the dairy plants for the purposes of the preparation of a report that valued the business at the equivalent of \$US366m was very seriously misleading. A fresh investigation subsequently determined that the real value of Newblade's assets in the dairy plants was under \$US35m. In August 2011, having discovered further information that gave it stronger grounds to believe that there was a real risk of dissipation of assets, the VTB made an application without notice for a worldwide freezing order

⁶³⁴ [2013] UKSC 5.

against the fourth defendant. Notwithstanding that, by August 2011, service against the fourth defendant had not yet been effected, he had been notified of the proceedings when copies of, inter alia, the claim form were sent to him on behalf of the claimant in May 2011. VTB applied for permission to amend its particulars of claim to add a claim in contract against the defendants, contending that they were liable for breach of the facility and interest rate swap agreements, that those agreements ought to be enforced against them even though they were not parties to the agreements, and for that purpose, the court ought to 'pierce the corporate veil' of RAP. The court held that assuming the court had jurisdiction to pierce the corporate veil at all, the principle of piercing the veil of incorporation could not be extended to hold that a person controlling the company was liable as if he had been a co-contracting party, with the company concerned, to a contract to which the company was a party, but he was not. To do so would be contrary to a fundamental principle on which contractual liabilities and rights were based, namely what would an objective reasonable observer believe was the effect of what the parties to the contract, communicated to each other by words and actions, as assessed in their context. Even if M was the person controlling the companies, he could not be held liable as if he was a co-contracting party to the facility and other agreements, since (i) at the time the agreements were entered into, none of the actual parties to the agreements intended to contract with M, and he did not intend to contract with them, and (ii) thereafter, he never conducted himself as if, or led any other party to believe, he was liable under the agreements. Lord Neuberger P stated that:

"VTB seeks to amend its pleaded case to contend that Mr Malofeev and Marcap should be treated as being jointly and severally liable with RAP for breaches of two of the agreements, namely the facility agreement and the associated ISA (the two agreements) and/or otherwise subject to remedies to enforce the two agreements. ... I therefore approach this question in the same way as the Court of Appeal, namely by considering whether, assuming in VTB's favour that the court can pierce the veil of incorporation on appropriate facts, the basis on which VTB seeks to pierce the veil can be justified in the present case. I do so on the basis that this issue is to be resolved by reference to English law. ... so far as VTB invokes the principle of piercing the veil of incorporation, its case involves what, at best for its point of view, may be characterized as an extension to the circumstances where it has traditionally been held that the corporate veil can be pierced. It is an extension because it would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party, and he was not. In other words, unlike virtually all the cases where the court has pierced the corporate veil, VTB is claiming that Mr Malofeev should be treated as if he were, or had been, a co-contracting party with RAP under the two agreements, even though neither Mr Malofeev nor any of the contracting parties (including VTB) intended Mr Malofeev to be a party. ... In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a

party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context... Quite apart from this, it seems to me that the facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as 'a façade concealing the true facts'. In my view, if the corporate veil is to be pierced, 'the true facts' must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB's case, 'the true facts' relate to the control, trading performance, and value of the dairy companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a 'façade to conceal the true facts'... For these reasons, I agree with the Court of Appeal in concluding that, assuming that there is jurisdiction to pierce the corporate veil on appropriate facts, VTB's proposed pleaded case does not give rise to arguable grounds for contending that this jurisdiction could be invoked in the present case. I would therefore refuse VTB permission to amend its pleaded case to raise such a claim."

10.0 INTRODUCTION TO GOVERNANCE OF COMPANIES

10.1 Introduction to corporate governance

Companies are artificial entities created by law and given legal status separate, distinct and independent from the owners or persons who formed the company. Ever since the case of *Salomon v. Salomon & Co.*⁶³⁵ established this principle, it has been the foundation of company law in all common law jurisdictions.⁶³⁶ As an artificial construct, the company must be governed and persons must act for and on behalf of the company. An artificial person has no mind to assess and enter into transactions or activities, neither does it have limbs to move around to do normal everyday activities. It does require others to think and act for it. This is the same for other artificial constructs like a country. Ghana as a country is an artificial person which is unable to think or act on her own. The 1992 Constitution, therefore, creates a system of governance to conduct the affairs of the country. This can broadly be seen in the 1992 Constitution as the tripartite system of governance with the Executive, Legislature and Judiciary, which is based on the concept of separation of powers, with interrelation among the organs of governance to serve as checks and balances. The system of checks and balances are complemented by independent constitutional bodies mandated to carry out constitutionally mandated duties. Each of these organs or institutions are to operate in accordance with the dictates of the laws under the concept of rule of law.

Similarly, a company requires a governance system. This governance system is usually referred to as corporate governance⁶³⁷. Just like a country, it is important for a company to have a governance system since the company has many stakeholders. The stakeholders, generally, refer to those who are engaged in the affairs of the company or affected by the activities of the company. These stakeholders include:

- (a) Members or shareholders who incorporate the company as a vehicle to undertake a specific business or pursue a specific object. The members as stakeholders may be interested in the company as they require return on their investment in the form of profit or remunerations received from the company, or the success of the object for which the company is incorporated.
- (b) Directors and officers who are appointed to manage the affairs of the company. The directors' interest may be in the growth of the company, remuneration paid to the directors and officers and success of the activities of the company.

⁶³⁵ [1897] AC 22; [1895-9] All ER 33.

⁶³⁶ *Morkor v. Kuma* (East Coast Fisheries Case) [1998-99] SCGLR 620.

⁶³⁷ Until recently, no legislation actually mentioned the term "corporate governance". The term first appeared in Ghana's statute books in the Bank & Specialised Deposit-Taking Institutions Act, 2016 (Act 930) in section 56, where the Bank of Ghana can give directive on corporate governance.

- (c) Employees who are employed to undertake specific acts on behalf of the company and who depend on the company for their livelihood.
- (d) The State or Community in which the company operates, which is to ensure the company operates within the remits of the law, fulfil its civic obligations including payment of taxes, and does not take actions adverse to the community. The collapse of a number of companies in the banking and financial sector illustrates the effect activities of companies can have on the politics of the State.⁶³⁸
- (e) A regulator who is to enforce specific laws that affect the activities of the company. There may be sector specific regulators and regulators who apply laws of general application. The regulators are generally required to implement specific laws that affect the activities of persons which include a company.
- (f) Customers or consumers of the company to whom the company either provide services, goods or works. Customers and consumers are stakeholders whose interest relate to among others, the availability of the goods and services at reasonable and affordable prices.
- (g) Creditors may be investors who invest in the company as debt or financial institutions who provide loans to the company. This may also include suppliers who supply goods and services on credit to the company. They are stakeholders whose interest is to recover their investment, repayment of the loans advanced or payment for the goods and services provided.
- (h) Suppliers who supply goods and services to the company are stakeholders of the company. The establishment of a company creates a value chain or supply chain which is to be maintained for the economic wellbeing of other goods or service providers. Suppliers to the company become stakeholders of the company.

These stakeholders can be classified as internal or external stakeholders. Internal stakeholders refer to stakeholders that are directly involved in the governance process of the company such as members, directors and employees. Whilst the external stakeholders refer to those that are affected by the activities of the company but not involved in the internal governance process such as consumers, the state and regulators. Each stakeholder has an interest that does not necessarily align with the interest of other stakeholders and in most instances, the interests may be competing interests. Given that all these stakeholders have interests, which in many cases may be competing interest, it is important that a company, which is a single unit, has a governance system that manages all the competing interests. A corporate governance structure must deal with these competing interests. This has given rise to issues relating to good corporate governance principles. Failure to efficiently manage the competing interests may invariably lead to challenges and the collapse of the company.

⁶³⁸ This is reference to 2017-18 collapse of a number of banks in Ghana.

10.2 Definition of corporate governance

Every company must, therefore, have a governance system for two basic reasons. First, the company is an artificial entity and requires others to act for and on its behalf. Second, the many stakeholders of a company require a corporate governance system that manages the competing interests to ensure the survival of the company.

The most widely accepted definition of corporate governance defined corporate governance as the system of rules, practices and processes by which a company is directed and controlled.⁶³⁹ Corporate governance, therefore, goes beyond rules, both legal and non-legal rules. It is a system that comprises rules, practices and processes. A comprehensive understanding of corporate governance, therefore, goes beyond the prescription of the law. The law provides a general framework which companies are permitted to adopt in the creation of a corporate governance system that best suits the particular company taking into account the industry, sector, object or purpose for which the company has been set up and other factors. There is, therefore, not a one size fits all governance system for all companies. What may work effectively for one company may not work for another. The question of what amounts to a good corporate governance system is therefore a value judgment based on the outcome or results attained by the company. There are however general principles of good corporate governance which are stated below.

Corporate governance can also be seen essentially as a system created to balance the interests of a company's many stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community. These interests are very often competing interests. Consumers want good quality products or services at reasonably low price, shareholders want high returns on investment which can be attained by increasing prices or fees for goods and services respectively. A good corporate governance system in place will balance both competing interests.

It must also be noted that governance takes precedent over management. Whilst governance involves the strategic task of setting the organisation's goals, direction, limitations and accountability frameworks, management is the allocation of resources and overseeing the day-to-day operations of the organisation. Governance thus looks at the strategic direction and setting objectives and goals, whilst management involves the implementation of activities to attain the set objectives and goals. Management must therefore focus on the implementation of the strategic objectives set under governance. It is thus the responsibility of governance to monitor and measure the performance of management.

⁶³⁹ Richard Smerdon, *A Practical Guide to Corporate Governance* (4th edn, Sweet & Maxwell, 2010).

10.3 Principles of good corporate governance

As indicated above, there is no single corporate governance system that fits all purpose. One cannot, therefore, make a judgment of whether a corporate governance system of an organization is good or bad without evaluating the outcome of the system put in place. Even within the same organization, there may be a need to change the governance system at different stages of the organization. However, there are general principles that must be reflected in a corporate governance system. A good corporate governance system must be based on the following principles:

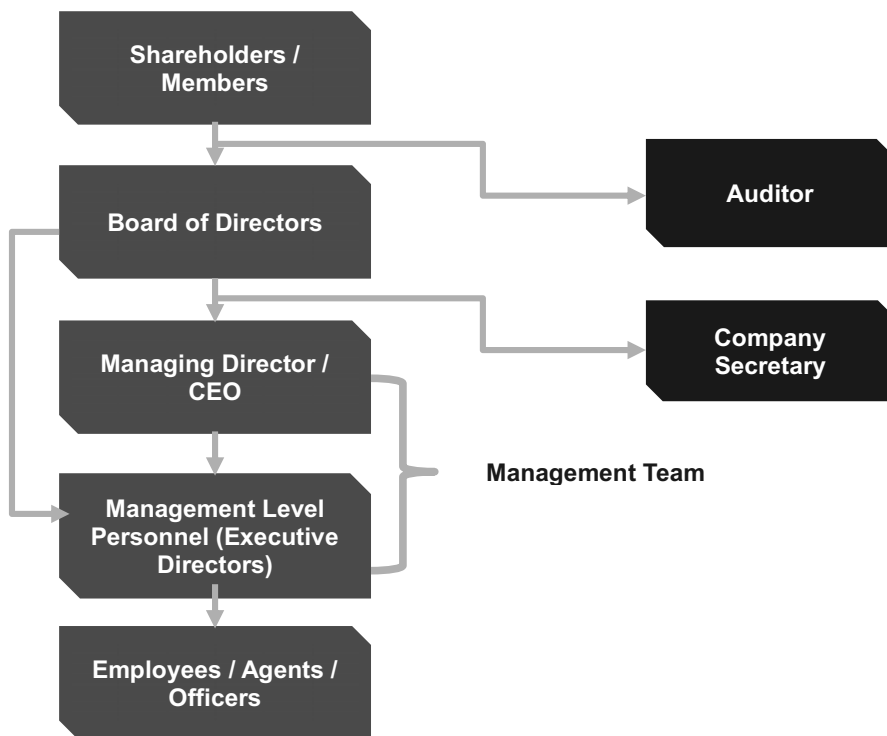
- (a) leadership, ethics and integrity
- (b) must be participatory and inclusive
- (c) be consensus oriented
- (d) accountability and transparency
- (e) must be responsive, effective and efficient
- (f) must be equitable or fair
- (g) must be based on rules – both legal and non-legal rules
- (h) clear roles and responsibilities of the various actors

Corporate governance is, therefore, not only a matter of law. It goes beyond company law and the scope of this book. The focus of this book is on the prescription of the Companies Act, 2019 on governance structure for a company incorporated under the Act.

10.4 Governance structure under the Companies Act

In a more specific reference to company law, rules of corporate governance determine who can act for and on behalf of a company for two principal reasons. The first relates to who is permitted by law to exercise corporate power as the company as an artificial person cannot act by itself. Secondly, the law provides for how the interests of the various stakeholders are taken into account in the exercise of the corporate powers by those who are permitted to so act.

The Companies Act, 2019 creates a governance structure revolving around four principal constituents under the Act. These constituents are the shareholders or members of the company; the board of directors, the officers of the company including the managing directors and management personnel as well as employees and agents of the company; and the auditor of the company. The governance structure under the Act can be illustrated in a hierarchical structure as shown below without necessarily implying oversight over each other by the Act.



This diagram illustrates the default position of corporate governance under the Companies Act, 2019 (Act 992). The Act provides for default allocation of the corporate powers among the various constituents and permits the constituents to exercise the powers on behalf of the company. Within a system of governance, the concept of separation of powers seems to have been adopted and incorporated in the governance system under the Companies Act, where the corporate powers are allocated among different constituents. This is to avoid the abuse of corporate powers. In order to achieve that, the Companies Act not only allocated the power but imposes a number of limitations which acts as checks and balances on the exercise of the powers by each constituent. In sum, the prescription of the Act on corporate governance is based on four pillars – shareholders or members, board of directors, management or officers of the company, and auditors.

Through the exercise of the corporate powers by the constituents, the constituents are able to create a binding obligation for the company.

*In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Lugutera v. Northern Engineering Co., Ltd. and Others*⁶⁴⁰ - Taylor J. captured this position when in an action to seek remedy under the Companies Act, 1963 under section 217, he stated @ pg. 488 in relation to the power of the court under the section that:

“Clearly under this provision the court has power on the application of any member by injunction to restrain the company from doing certain specified acts. And so the gravamen of the argument of the respondent’s counsel devoid of its verbiage is that the power exists only against the company and not against individuals. So indeed it superficially seems and in advancing this argument counsel in my view is drawing a semantic distinction so artificial as to be inconsistent with the realities of company law. Ever since the decision of the House of Lords in Salomon v. Salomon & Co., Ltd. [1897] A.C. 22, the common law world has accepted the proposition that a company is a legal entity distinct from its members; but the law is not so naive as to add to this the further concept that this legal creature exists in such a manner as to enable it as an entity ipso facto to act suo motu. I think a fundamental philosophy of modern company law is that upon incorporation a company acts by or on the authority of its directors or its members.”

10.5 Rules of attribution or exercise of corporate powers

Rules of attribution in relation to corporate governance answer the question when an act is deemed to be an act of a company or when is an act attributable to the company. Given that a company is an artificial entity that has neither the brain nor physical attribute to, on its own, engage in any act, the company must act through others or others must act on behalf of the company. If permitted by the relevant law, the acts of the designated person or group of persons are attributable to the company as an act of the company. General prescription under company law is that the company as an artificial person acts through the organs of the company. The Companies Act, 2019, (Act 992) provides for those who can act for and on behalf of the company, whose act will be deemed to be the act of the company. These are the organs of the company. Section 144 of Act 992 provides as follows:

“(1) A company shall act through the members of the company in a general meeting or the board of directors or through officers or agents appointed by or under authority derived from the members in general meeting or the board of directors”.

There are therefore three organs through which a company is permitted to act:

- (a) Board of Directors
- (b) Members in general meeting
- (c) Officers or agents appointed by members or Board of Directors

⁶⁴⁰ [1979] GLR 477.

The board of directors of a company, and members or shareholders of the company acting in general meetings are the principal organs of a company, and officers or agents appointed by members or Board Directors are subordinate organs of the company. It should be noted that members are permitted to act in some instances even without a meeting⁶⁴¹, just as the board of directors are permitted under the Companies Act to act without a meeting⁶⁴². The express indication under section 144 of the Act that members in general meeting constitute an organ of the company and can act on behalf of the company should therefore not be construed that members cannot act without a general meeting.

Each of the above organs has been given powers that it can exercise on behalf of the company. General corporate governance principles dictate that there must be clear separation and allocation of powers to the various organs with appropriate limitation on those powers to act as check and balances to avoid abuse by the organ exercising the power. The Companies Act, 2019 and the constitution of the company must, therefore, allocate the powers among the organs. Section 144 of Act 992 provides:

“(2) Subject to this Act, the respective powers of the members in a general meeting and the board of directors may be determined by the constitution of a company.”

“(3) Except as otherwise provided in the constitution of a company, the business of the company shall be managed by the board of directors who may exercise the powers of the company that are not by this Act or the constitution required to be exercised by the members in general meeting.”

The allocation of the powers among the organs must be done in the constitution of the company but subject to the Act. A company through its registered constitution, therefore, has the discretion to allocate corporate powers between the members and the board of directors. If the company through its registered constitution fails to allocate the power, the Companies Act, 2019 provides for a default position by vesting in the board of directors the power to manage the business of the company unless the Act or the default constitution requires a particular power to be exercised by members in a general meeting. The default position under the Act is therefore that the power to manage the business of the company is vested in the board of directors. Unless that position is modified in the registered constitution or the Act expressly vests particular management powers in shareholders or members, the board of directors will be acting *intra vires* in exercising the powers of managing the business of the company. In so doing, the Act provides that the board of directors is not bound to obey the instruction of the shareholders or members of the company. Section 144 of Act 992 provides:

“(4) Unless the constitution of the company otherwise provides, the board of directors when acting within the powers conferred on them by this Act or the

⁶⁴¹ See position on informal shareholders' or members' agreement; section 301 of Act 992.

⁶⁴² Section 188(2)(j) of Act 992.

constitution of the company, are not bound to comply with directions or instructions of the members in general meeting."

In addition, the Shareholders or members cannot exercise the powers of the Board unless the registered constitution of the company or the Act gives that powers to the shareholders or members.

*John Shaw & Sons (Salford) Ltd v. Shaw*⁶⁴³ - Peter, John and Percy Shaw were majority shareholders of a company John Shaw & Sons (Salford) Ltd. The two shareholders were indebted to the company and had a settlement agreement to repay the debt. As part of the settlement, Peter and John resigned as governing directors, promised not to take part in financial affairs, and independent directors were appointed and given control over the company's financial affairs. The independent directors required John and Peter to pay money to the company, John and Peter refused. The independent directors resolved to bring a claim against them. Just before the hearing, an extraordinary general meeting was called, where the majority shareholders Peter and John procured a resolution to discontinue the litigation. The company, and a third shareholder, Percy, contended the resolution was ineffective. At first instance, Du Parc J disregarded the resolution and gave judgment for the company. John appealed. The Court of Appeal upheld the judgment stating that the shareholders could not circumvent the company's constitution and order the directors to discontinue litigation. Greer LJ stated @ pg. 134 that:

"I am therefore of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. The law on this subject is, I think, accurately stated in Buckley on Companies as the effect of the decisions there mentioned: see 11th ed., p. 723. For these reasons I am of opinion that the Court ought not to dismiss the action on the ground that it was instituted and carried on without the authority of the plaintiff company."

⁶⁴³ [1935] 2 KB 113.

The case, therefore, established two options available to members or shareholders to exercise the powers of management of the business of the company. First, is by amending the registered constitution of the company. This is a direct way to assume the powers. Second, is indirectly through the powers of the members to remove directors who refuse to comply with their instruction or directives and appoint directors who will do the bidding of the members. The Companies Act, 2019 also provides for mandatory circumstances where the shareholders may exercise power to manage the business vested in the board of directors. There are four instances provided under the Act.

Section 144 of Act 992 provides:

- “(5) Subject to section 145, the members in a general meeting may*
- (a) act in a matter if the members of the board of directors are disqualified or are unable to act by reason of a deadlock on the board or otherwise;*
 - (b) institute legal proceedings in the name of and on behalf of the company if the board of directors refuse or neglect to do so;*
 - (c) ratify or confirm an action taken by the board of directors; or*
 - (d) make recommendations to the board of directors regarding an action to be taken by the board.”*

The first two instances relate to instances where the directors are unable to or failed to act on behalf of the company. The last two instances are not direct exercise by the members in a general meeting of the powers of the board of directors but only relate to instances where the members make a recommendation on a cause of action or seek to confirm acts already done by the board. In the first instance, where the directors are unable to act on a matter because the directors are so disqualified from acting or there is deadlock on the matter, the matter reverts to the shareholders or members.

*Foster v. Foster*⁶⁴⁴ - a family run company had three directors. The articles of association required the managing director to be appointed by the board of directors. Mr. Foster was the managing director and Mrs. Foster after inheriting the shares of the husband became the majority shareholder. On the matter of the appointment of a managing director, both Mr. Foster and Mrs. Foster were interested in the appointment and against the appointment of the other. Since the directors were disqualified from voting on a matter in which the director is personally interested, they were both disqualified from voting on the matter. The matter, therefore, reverted to the shareholder and Mrs. Foster in the exercise of her majority position was appointed the managing director. This was challenged in court by Mr. Foster. It was held that since the directors were disqualified from acting, the matter validly reverted to the shareholders, and the appointment by the majority shareholder was valid.

⁶⁴⁴ [1916] 1 Ch. 532.

The second position where the powers to institute legal action reverts to the shareholders is where the board of directors failed, neglect or refused to do so. In addition, Act 992 gives powers to bring legal action for corporate wrongs in the following instances:

- (a) Section 200(1) where a member can institute an action in his name against a director to enforce remedies for breach of director's duties;
- (b) Section 200(2) where members at a general meeting can pass a resolution to institute action on behalf of or in the name of the company against a director to enforce remedies for breach of director's duties;
- (c) Section 201 where a member can apply for and bring an action as a directive action;
- (d) Sections 29 and 205 where the member can institute an action as representative action for breach of the constitution of the company;
- (e) Section 218 where member can bring an action for injunction or declaration in the event of illegal or irregular activity; and
- (f) Section 219 where a member can bring an action for what is generally referred to as oppression.

Whilst it is stated that the direct way for the members in general meeting to assume the power of administration of the business of the company is through amending the registered constitution, the Companies Act, 2019 in section 144(5) provides that *"An amendment of the constitution of a company shall not invalidate a prior act of the board of directors which would have been valid if that amendment has not been made."* An amendment of the registered constitution to take away the powers of the board of directors and vest such powers in members, therefore, has no retrospective effect.

10.6 Delegation by the Board of Directors

The Companies Act, 2019 permits the board of directors to delegate the exercise of its powers to a committee or one of the members of the board appointed as a managing director.

Section 146 of Act 992 provides:

"Except otherwise provided in the constitution of a company, the board of directors may

- (a) exercise their powers through committees consisting of a member or members of the board as the board of directors think fit, and*
- (b) from time to time appoint one or more of the members of the board to the office of managing director and may delegate all or any of the powers of the board of directors to the managing directors."*

Delegation of the powers of the board of directors is, therefore, permitted. The delegation permitted under section 145 of the Act is to a committee consisting of members of the board or, to person or

persons appointed to the office of the managing director. Managing directors are therefore appointed and given some or all the powers of the board of directors and can exercise the powers of the board as delegated to the managing director as if the board was the organ engaged in the act. The managing director, therefore, constitutes an organ of the company, who can exercise the powers given to the board provided such powers are delegated by the board of directors to the managing director.

10.7 Major Transaction

In order to place some limitation on the powers of directors to manage the business of the company, the new Companies Act, 2019 unlike the repealed Companies Act, 1963 introduces an oversight power in favour of members over transactions that qualify as a major transaction. The Act, therefore, requires approval of members or shareholders over major transaction entered or to be entered by the board of directors in exercising its powers of management of the business of the company.

Section 145 of Act 992 provides:

“(1) A company shall not enter into a major transaction unless the transaction is

(a) approved by special resolution; or

(b) contingent on approval by special resolution.

(2) For the purposes of this section,

(a) ‘assets’ include property of any kind whether tangible or intangible:

(b) ‘major transaction’ means

(i) the acquisition of, or an agreement to acquire, whether contingent or otherwise, assets, the value of which is more than seventy-five percent of the value of the assets of the company before the acquisition; or

(ii) the disposition of, or an agreement to dispose of, whether contingent or otherwise, assets of the company the value of which is more than seventy-five percent of the value of the assets of the company before the disposition; or

(iii) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is seventy-five percent of the value of the assets of the company before the transaction; and

(c) the assets of the company as regards major transactions under paragraph (b), include the assets of the company and that of the subsidiaries.

- (3) The provisions of paragraphs (a) and (b) of subsection (2) shall not affect an agreement entered into by a company to give a charge secured over the assets of that company the value of which is more than seventy-five percent of the assets of the company, for the purpose of securing the repayment of money or the performance of an obligation.*
- (4) In assessing the value of a contingent liability for the purposes of subparagraph (iii) of paragraph (b) of subsection (2), the directors*
 - (a) shall have regard to every circumstances that the directors know, or ought to know, affects, or may affect, the value of the contingent liability;*
 - (b) may rely on estimates of the contingent liability that are reasonable in the circumstances; and*
 - (c) may take account of*
 - (i) the likelihood of the contingency occurring; and*
 - (ii) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.*
- (5) The provisions of this section do not apply to a major transaction entered into by a receiver appointed pursuant to an instrument that creates a charge over the whole or substantial part of the property of a company."*

The import of section 145(1) of the Act, read together with section 144 of the Act is that unless the constitution otherwise gave the power to manage the business of a company to members of a company, the directors can enter into transactions on behalf of the company. However, in entering into a major transaction, the directors require the approval by special resolution of the members of the company for the validity of the transaction. Where no approval is received, the validity of the transaction will be subject to obtaining the approval by special resolution of the member of the company. In entering into what constitutes a minor transaction, no approval of the members is required unless the specific subject matter requires such approval under any other sections of the Act or the constitution of the company. However, a major transaction requires approval by special resolution prior to the entry into the transaction or at a future day after the entry into the transaction for the major transaction to be valid.

A major transaction refers to any agreement by which either gains or liabilities are imposed on the company where the value of such gains or liabilities are more than seventy-five percent of the value of the assets of the company prior to the transaction. In ascertaining the total value of assets of the company for the purpose of determining the seventy-five percent value of the assets of a company, the assets of the company must include the assets of any subsidiary company. In certain instances, the liability may be a contingent liability. That is the liability is not due but may become due based

on the occurrence of uncertain future event or events. Examples may include where a company provides a guarantee for the performance of an obligation by a third party. It is uncertain whether the company will have to actually pay the amount due under the guarantee for the failure of the performance of the obligation. In the event the liability is contingent, the value is determined based on reasonable estimate of the value in the instance the contingent event does occur. In determining the estimates, the section requires that the likelihood of the event occurring and any factor that may reduce or extinguish the contingent liability may be considered.

There are two exceptions to where a transaction that ordinarily qualifies as a major transaction does not require the approval of members by special resolution. In cases where the company created a charge over the assets of the company to secure the repayment of money or the performance of an obligation, section 145 approval is not required even though the value of the charged assets is more than seventy-five percent of the assets of the company.⁶⁴⁵ Notwithstanding that the charge alone will not require approval under section 145(1) of the Act, if the value of the underlying transaction entered into by the company is more than seventy-five percent of the assets of the company, the approval will be required. Secondly, section 145(5) provides that the section is not applicable to major transactions entered into by a receiver appointed pursuant to a document creating a charge over all or substantial part of the property of a company.

10.8 Authority to bind the company

As indicated above, three organs are permitted to exercise the powers of the company. The principal organs being the members in general meeting and board of directors, and the subordinate organ being officers and agents appointed by the members in general meeting or the board of directors. The division of the corporate powers is required to be done under the constitution of the company. Therefore, the specific powers to be exercised by the organs must be provided in the constitution. As we have seen, the Act provides the default position of vesting the board of directors with the power to manage the business of the company. In furtherance of determining the scope of acts that can be attributed to the company, the Act makes a distinction between direct and automatic acts of the company, which are binding on the company, and indirect acts of the company, which are binding only when some conditions are met.

10.8.1 Acts of the company

Section 147 of Act 992 provides:

“(1) An act of the members in general meeting, or the board of directors, or of a managing director while carrying on in the usual way the business of the company,

⁶⁴⁵ Section 145(4) of Act 992.

is the act of the company; and accordingly, the company is criminally and civilly liable for that act to the same extent as if the company were a natural person."

The Act, therefore, makes the act of the board of directors or managing director, or the members in a general meeting automatic act of the company if the two organs are carrying on in the usual way the business of the company. The act of the principal organs whilst they act in the usual way the business of the company is undertaken is the act of the company and is binding on the company.

The section makes an exception in respect of acts that persons dealing with the company have actual or constructive notice that the principal organ has no authority to engage in. The section provides in subsection (2) as follows:

"For the purposes of subsection (1), (a) the company does not incur civil liability to a person if that person has actual knowledge at the time of the transaction in question that the members in general meeting, board of directors, or managing director, did not have the power to act in the matter or had acted in an irregular manner or if, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of the power or of the irregularity".

A company will, therefore, not incur liability for the act engaged in by the principal organ which is ultra vires once the other person dealing with the company knows or ought to know of the ultra vires nature of the act.

However, a company will not simply escape liability on the fact that a business carried on by the company is not part of its authorised business. Subsection (2)(b) of section 147 of Act 992 provides that:

"For the purposes of subsection (1), (b) if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely, because, the business in question was not among the businesses authorised by the constitution of the company."

10.8.2 Acts of officers or agents

Officers and agents constitute the subordinate organ of a company. Section 144(1) of the Act makes provisions for the company to act through officers or agents, appointed by or under the authority derived from members in general meeting or the board of directors. The Act provides that the acts of the principal organ are the automatic act of the company and binding on the company. However, the Act does not provide same for the officers or agents. Specific conditions must be met for the acts of officers and agents to be binding on the company.

Section 148 of Act 992 provides:

- “(1) Except as provided in section 147, the acts of an officer or agent of a company are not acts of the company, unless,*
- (a) the company, acting through the members in general meeting, the board of directors or managing director, has expressly or impliedly authorised that officer or agent to act in the matter; or*
 - (b) the company, acting under paragraph (a) has represented the officer or agent as having the authority of the company to act in the matter, in which event the company is civilly liable to a person who has entered into the transaction in reliance on that representation, unless that person had actual knowledge that the officer or agent did not have the authority, or unless, having regard to the position with, or relationship to, the company, that person ought to have known of the absence of authority.*
- (2) The authority of an officer or agent of the company may be conferred before action is taken by that officer or agent or by subsequent ratification.*
- (3) The knowledge of action by that officer or agent and acquiescence in that action by*
- (a) the members for the time being entitled to attend general meetings of the company,*
 - (b) the directors for the time being, or*
 - (c) the managing director for the time being,*
- is equivalent to ratification by the members in general meeting, by the board of directors, or by the managing director.”*

The act of an officer or agent of a company is not deemed to be the act of the company unless a number of conditions are established. These conditions are:

- (a) the act is authorised expressly or impliedly by the company through members in general meeting, board of directors or managing director;
- (b) the act is ratified by the company through members in general meeting, board of directors or managing director. The knowledge of the act and acquiesce by a principal organ is deemed to be ratification by the principal organ; or
- (c) the doctrine of estoppel where the company represented the officer or agent as having authority to act and a person has relied on that representation. This may be through express representation by members in general meeting, board of directors or managing director, or by the duties customarily undertaken by the officer.

A company will not be liable under the doctrine of estoppel if the person dealing with the officer or agent knows or ought to have known the actual lack of authority of the officer or agent.

In *Bousiako Co., Ltd. v. Ghana Cocoa Marketing Board; Kwabo-Osekyere Construction Works Ltd. v. Ghana Cocoa Marketing Board (Consolidated)*⁶⁴⁶, a distinction was drawn between the act of the principal organs as against the subordinate organs when a corporate entity sought to deny a letter written by a member of its Interim Management Committee. Osei-Hwere J stated @ pgs. 841 to 843 that:

“It was argued by counsel for the plaintiffs that as the plaintiffs had entered into a contract with the defendants and had dealt in good faith with them they had the right to assume that the acts within the constitution and powers of the defendants had been duly performed and that the plaintiffs are under no obligation to inquire whether acts of internal preliminaries and management had been regularly performed. Sections 139(a) and 140 of the Companies Code, 1963 (Act 179) regulate the above proposition. By section 139 it is provided, among others, that any act of the board of directors or managing director, for instance, while carrying on in the usual way the business of the company should be treated as the act of the company itself; and accordingly the company shall be civilly liable therefore to the same extent as if it were a natural person.

The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity. Section 140 also provides for situations when the acts of any officer or agent of a company shall be deemed to be acts of the company. These are, for instance, when the company, acting through its board of directors, or managing director, shall have expressly or indirectly authorised such officer or agent to act in the matter or shall have represented the officer or agent as having its authority to act in the matter. In any of these events the company shall be civilly liable therefore to the same extent as if it were a natural person. The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity.

The effect of the provisions of sections 139 and 140 of Act 179 is to protect third parties against the unfair operation of the ultra vires doctrine. In so far as there has been an express authorisation to act it is not difficult to hold a company liable for the acts of such officer. Section 137 of Act 179, for instance, expressly provides for the division of powers between its members in a general meeting on the one hand

⁶⁴⁶ [1982-83] GLR 824.

and its board of directors. These two bodies may also expressly act through their appointed officers or agents. Section 138 also permits the delegation of the powers of the board of directors to committees and managing directors. It is when we come to consider who those officers are who have the implied authority to act on behalf of the company that the problem of ascertainment arises. In this connection reference has frequently been made to the judgment of Denning L.J. (as he then was) in *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.* [1957] 1 Q.B. 159, C.A. where he said at p. 172:

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

The House of Lords considered the above dicta in *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153, H.L. and explained that Lord Denning's words cannot necessarily apply to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. Lord Reid at page 171 emphasised that Lord Denning only referred to those who "represent the directing mind and will of the company, and control what it does." Lord Reid went on to explain at the same page:

"Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company."

Upon the principle that Dr. K. G. Erbynn was one of those officers who represented the other two "directing mind" of the Ghana Cocoa Marketing Board, his act will fully be the act of the defendants.

The question of absence of authority in Dr. K. G. Erbynn to write the letter does not, accordingly, arise. Even if it does arise the onus was on the defendants to prove that the plaintiffs had actual knowledge that Dr. K. G. Erbynn had no authority to write,

or that having regard to their position with, or relationship to the company, they ought to have known of such absence of authority. The plaintiffs have shown that their business relationship with the defendants have been through the chief development officer and the Central Tender Board.

The chief development officer himself who heads his own department confessed his lack of sufficient knowledge about matters of management outside his department. I cannot conceive, therefore, how the plaintiffs should be expected to know of the internal management of the defendants' vast organisation. Most of the very many documents the plaintiffs called for in their notice on the defendants to produce those documents obviously came to their knowledge after they had commenced this action, otherwise they would have capitalised on them in their pleadings. In my view the defendants have failed to prove that knowledge in the proviso to sections 139 and 140 of the Companies Code which would disentitle the plaintiffs to take advantage of those provisions."

*Republic v. High Court, Accra, Ex parte Ploetner*⁶⁴⁷ - in this case, Mr. Ploetner was a managing director of Carl-Ploetner (Bremen) in Germany. Mr. Ploetner incorporated a company in Ghana of which he was a majority shareholder in Ghana called Carl-Ploetner Engineering Construction (Ghana) Ltd. As a result of a breach of German law, Carl-Ploetner (Bremen) was put into liquidation and a liquidator appointed. Even though Mr. Ploetner was not declared bankrupt in Germany, the liquidator unsuccessfully took an action in Ghana to attach the assets of Mr. Ploetner. Mr. Ploetner's lawyer in Ghana who advised on the incorporation of Carl-Ploetner (Ghana) and a resident-director of the Company purported to remove Mr. Ploetner as a director of the company and by an originating summons in the name of the Company took action to restrain Mr. Ploetner from acting as director of the company. An objection was raised in relation to authority to take the action in the name of the Company, but the High Court proceeded to assume jurisdiction restraining Mr. Ploetner from acting as director of the Company. On appeal to the Supreme Court, the order of the High Court was quashed. Taylor JSC stated @ pgs. 128 to 129 that:

"In regard to the first ground, Mr. Ploetner was not challenged when he swore that at the inception of the summons he was the majority shareholder and the managing director, and the minority shareholder was Mr. Ofosuene [the lawyer]. According to his unchallenged evidence, he did not sanction the suit in his capacity as the managing director, and it follows also that the board of directors had clearly taken no decision to commence any suit nor had the members met to take any decision to commence proceedings in court. In fact, the action was on the evidence clearly instituted at the instance and on the authority of only Mr. Ofosuene and the capacity in which he thus acted can only be as the resident director.

⁶⁴⁷ [1984-86] 2 GLR 107.

Section 139 of Act 179, makes provision for lawful acts of a limited liability company as follows:

"139. Any act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself, and accordingly the company shall be criminally and civilly liable therefor to the same extent as if it were a natural person ..."

There is a proviso which is irrelevant in the present proceedings. And section 140(1) of Act 179 also provides: "Except as provided in section 139 of this Code, the acts of any officer or agent of the company shall not be deemed to be the acts of the company..." There are exceptions in section 140 (1)(a) and (b) of Act 179 but these are inapplicable on the facts and circumstances of the case put forward in the affidavit supporting the originating summons. Obviously by virtue of these two provisions of Act 179, the objection which Mr. Ploetner raised by his affidavit completely renders the High Court bereft of jurisdiction to adjudicate on the summons because the institution of the proceedings was not an authorised act of the company and the court's assumption of jurisdiction when it was brought to its attention that it was Mr. Ofosuhen's act is in the circumstances legally erroneous and its decision null and void."

The following chapters of this book discuss the rules applicable to the principal organs of a company – members and directors – as well as the Company Secretary and auditor of a company.

11.0 MEMEBERS OF A COMPANY

11.1 Introduction

The framework for the governance of companies under section 144 of the Companies Act, 2019 (Act 992) provides that one of the principal organs of a company is members in a general meeting. In addition, Act 992 requires every company incorporated under the Act to have at least one member or shareholder. Section 6 of Act 992 states *“One or more persons may form an incorporated company under the Act.”* Section 13(2) of the Act which provides for particulars required for incorporation of a company requires the particulars of the subscriber, who is a person who indicates his or her intention to become a member of the company when incorporated. This is evidenced by section 33(1) of the Act which requires the subscriber to be registered as a member upon incorporation. The minimum number of members required is one. The Act provides a limit on the maximum number of members of a private company but does not provide any such limit on a public company. Section 7 of Act 992 provides that the maximum number of members that a private company must have to be fifty. This number includes debenture holders. Therefore, the number of members that a company can have reduces from fifty anytime the company issue debentures. For a company with shares, the members are the shareholders. Every member of a company with shares must hold at least one share. Section 33(4) of the Act provides that *“In the case of a company with shares, each member is a shareholder of the company and shall hold at least one share.”*

It is, therefore, mandatory for all companies to have a member. Section 41 of the Act provides that *“If at any time a company ceases to have a member and it carries on business without at least one member, every person who is a director of the company during the time that it so carries on business is jointly and severally liable for the payment of all the debts and liabilities of the company incurred during that period.”* Given the mandatory nature of having a member, the Act permits the lifting of the veil of incorporation where the company carries on business at a time that there is no member. The failure to have a member does not affect the legal status of the company. However, the company must not engage in any business at the time it does not have a member.

The failure to have a member is one of the grounds for official liquidation of a company under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015). Section 84 of Act 1015 provides that *“(2) The Court may order the official winding-up of a company on a petition presented where (b) the company does not have members”*. A petition can, therefore, be presented for the official winding-up of a company on the grounds that the company has no member.

11.2 Acquiring membership of a company

The Companies Act, 2019 does not define a “member” or “shareholder” of a company. The Companies Act provides for how one can acquire membership of a company. A person can become a member of a company in four ways under the Companies Act – by subscription, agreement, transfer of shares and transmission of shares by operation of law. The Act provides for requirements for each manner in which one can become a member or shareholder. The acquisition may be done through subscription, agreement, transfer or transmission by operation of law. These will be discussed below.

11.2.1 Subscription

Every company is required to have a member the moment the company is incorporated. This requirement is satisfied by at least one person giving an indication to become a member of the company before the incorporation of the company. This is done through subscription by subscribers. In that sense, the first members of a company are those who become a member of the company by subscription. Section 33(1) of Act 992 provides that *“The subscribers to the documents for the incorporation of a company are members of the company and upon incorporation shall be entered as members in the register of members referred to in section 35.”* Subscriber is defined under the First Schedule of Act 992. The First Schedule provides that *““subscriber” in relation to a body corporate means a person who applies for the incorporation of a company.”* In essence, a person who applies for the incorporation of a company is deemed to be a member of the company upon incorporation. The person is, therefore, required to be entered in the register of members as a member of the company.

The definition should not be interpreted to mean that once a person submits the application, the person must necessarily be deemed a member. The content of the application under section 13(2) of Act 992 provides the disclosure of particulars of subscribers of a company. The application must state in relation to the subscriber the full name and former names, date and place of birth, telephone number, nationality and proof of identity, residential, postal and email address (if any), and place of work and position held. It is, therefore, those whose particulars are disclosed as subscribers on the application that will be deemed subscribers of the company.

In addition, section 13(3) of Act 992 further provides that *“The application shall be signed by the subscriber or each of the subscriber if more than one, for shares of the company by writing opposite the name of the subscriber, the number of shares the subscriber, takes and the cash price payable for the shares and the subscriber shall take at least one share.”* Section 28 of Act 992 also provides that *“The constitution of a company shall be signed by one or more subscribers in the presence of a witness, who shall attest to the signing.”* A subscriber is therefore not a person who simply submits

the applications but a person whose particulars are disclosed in the application as a subscriber and who signed the application and the registered constitution if any.

By being named in the application and signing the application, a subscriber indicates his or her intention to become a member of the company upon the incorporation of the company. As indicated earlier on, subscribers are the first members of a company, who indicate their intention to become members prior to the incorporation of the company. They are generally the original or founding members of the company.

*In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd*⁶⁴⁸ - Northern Engineering Co. Ltd was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000 shares. It was established that all the shares were subscribed to and allotted to its four subscribers—each holding 25 per centum of the shares. It was later alleged that there was an increase in the shares to 100,000 and shares were issued to additional eight shareholders. The court stated the position on subscribers per Taylor J @ pgs. 501 and 502 as follows:

"The relevant provisions of the Companies Code regulating membership of a company are section 30(1)-(6) and they read:

"30. (1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code. ..."

It seems to me that having regard to the provisions of section 30 of the Code, entry in the register is at least some prima facie evidence of the fact of membership and the extent of shareholding. The effect of the corresponding English provision of section 30(1) of the Code was considered in Evans's Case (1867) 2 Ch. App. 427 and it was there held that as a general proposition, registration ipso facto makes a subscriber automatically a member of the company and holder of the shares for which he has signed and in my opinion the subscriber continues to be a shareholder and a member even if the company makes default by omitting to perform its statutory obligation of putting the subscriber's name in the register or allotting the shares to him. It seems to me that even if the company refuses deliberately to issue share certificates to subscribers to the regulations, the said subscribers at least in the case of a private company are nevertheless by virtue of section 30(1) of our Code, members and shareholders of the company."

*Adehyeman Gardens Ltd v. Assibey*⁶⁴⁹ - Adehyeman Gardens Ltd was incorporated with 1,000,000 shares. The regulations of the company showed there were four subscribers including Mr. Peter Osei

⁶⁴⁸ [1979] GLR 477.

⁶⁴⁹ [2003 – 2004] SCGLR 1016.

Assibey who had subscribed to 200,000 shares. It was alleged that Mr. Assibey did not pay for his shares. Correspondences showed he was later referred to as a nominal shareholder as he has not paid for the shares. He was subsequently offered 20 percent shares and asked to pay for it at current value. In an action on his status as a shareholder, which was before the Supreme Court, Sophia Akuffo JSC stated @ pgs. 1024 to 1026 as follows:

“For the purposes of this appeal, our starting point must be section 30(1)-(5) of the Companies Code, (1963) (Act 179), which deals with the constitution of membership of a company and provides as follows:

- “30(1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code.*
- (2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company.*
- (3) Every member shall have such rights, duties and liabilities as are by this Code and the Regulations of the company conferred and imposed upon members.*
- (4) In the case of a company with shares each member shall be a shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company.*
- (5) Membership of a company with shares shall continue until a valid transfer of all the shares held by the member is registered by the company, or until all such shares are transmitted by operation of law to another person or forfeited for non-payment of calls under a provision in the Regulations, or until the member dies.”*

Accordingly, counsel for the respondent is correct in his submission that under the Code, there are two kinds of members of a company: those who become members at the inception of a company subscribing to its regulations and those who, after the company comes into existence, agree to become members. The membership of a subscriber is by legal prescription and, in the absence of a valid forfeiture, is not predicated on full or partial payment of the consideration for the shares taken. Indeed, even in the case of a non-subscribing member of a company, his membership is not dependent on whether or not he is fully paid-up.

From his submission, counsel for the appellants appears to be under the impression that, legally, the company may classify its members into those whose shares have been paid for and those whose shares have not been paid for. Thus, according to counsel, the respondent is, at best, an allottee of shares, since he has not paid for any of his shares. Such an impression is entirely misguided. Although section 46 of the Code makes it possible for the regulations of a company to make provisions for

different classes of shares, such differentiation does not relate to membership, but rather to the rights and liabilities to be enjoyed by members holding such classified shares (see section 46 of the Code and regulation 9 of the regulations). Admittedly also, under sections 31 and 160, a shareholder's right to attend and vote at meetings of a company may be affected by his paid-up status; and under regulation 28 a company has a lien on unpaid shares and dividends in respect thereof. However, such limitations on rights can occur only after a valid call has been made and the shareholder has failed to pay, or other sums presently payable by the shareholder in respect of his shares remain unpaid. Certainly, nowhere in the Code or exhibit 1 [Regulations of the company] is there created any class of members known as "allottee" or "nominal" shareholders; and in view of the clear provisions of section 30, it is doubtful if a company's regulations could legally create such borderline memberships. Consequently, under the law, there is nothing anomalous about a person being considered a shareholder of a company merely because such a person has not yet fully paid for his shares.

*Furthermore, contrary to what may be implied from the first ground of appeal, the issue of share certificates is not a pre-condition to membership in a company. Section 53 of the Code requires every company to deliver a share certificate to the registered holder, within two months of the issue of shares or registration of transfer of shares. This is the company's obligation, and, by virtue of section 53(3), the company, and any defaulting officer to the company, liable to penalty in the event of the non-compliance. Therefore, the fact that the respondent has not been issued with a share certificate cannot be a valid ground for challenging his membership of the company. Rather, it is a reflection of the failure by the company and its officers to comply with the dictates of the Code. Moreover, under section 54 of the Code, the function of a share certificate is to serve as "prima facie evidence of the title to the shares of the person named therein." This means that other evidence may be adduced by a person claiming to be a shareholder to establish the number of shares he has in the company. Therefore, the mere fact that a person claiming to be a shareholder of a company has not been issued with any share certificates, is not material to that person's legal status as a member and shareholders. In the case of a subscriber, by the combined effect of sections 21 and 30 of the Code, subscription to the regulations of the company serves an identical evidentiary purpose. In a similar vein, there is also the need to reiterate that registration of the name of a subscriber in the company's register of members is also not a condition precedent to membership: see *In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd [1979] GLR 477.* Section 21 of the Code shows that the regulations of a company is no mean document. It is the registration of the regulations that brings the company into*

existence as a body corporate: see section 14(d) of the Code. Once registered, the regulations have, inter alia, the effect of a contract under seal between: (i) the company its members; (ii) the company and its officers; (iii) the members and the officers; (iv) the members of the company inter se; and (v) the officers of the company inter se. as a subscriber, therefore, the respondent's status as a shareholder, as well as the consideration payable by him therefor, is contractual. He does not need to be issued with a certificate for his membership to take legal effect.

Consequently, there is, no doubt whatsoever that, since the respondent is a subscriber to the regulations of the company (as evidenced by exhibit 1), he, pursuant to section 30(1), became a member of the company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became a shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5)."

*In Re London, Hamburgh, and Continental Exchange Bank. Evans's Case*⁶⁵⁰ - Evans signed the memorandum of association of a company as the holder of ten shares and acted for a short time as a director of the company. Other directors were then appointed, and Evans never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up. Evans applied to have his name taken off the list of contributories of the London, Hamburgh, & Continental Exchange Bank, Limited.

Sir G.J. Turner, L.J. stated @ pgs. 429 and 430:

"I feel very little doubt in this case. Mr. Evans originally subscribed to the memorandum of association, and became one of the first directors, and, therefore, his first duty was to take care that his name was entered upon the register, because the 23rd section of the Act says that "The subscribers of the memorandum of association of any company, under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of shareholders." It was, therefore, the plain duty of Mr. Evans to enter his own name on the register. This, however, he did not do, but went on leaving the matter exactly as it stood. Then, can he take advantage of his own neglect? for if he had entered his name on the register he could only have got rid of his liability by a regular transfer, and it is impossible to say that he transferred the shares. If, indeed, all the shares had been allotted to others, a question might have arisen; but 4000 shares only were allotted subject to confirmation, and this never took place; therefore there are still

⁶⁵⁰ (1867) L.R. 2 Ch.App. 427.

4000 shares not allotted, and, for the shares in respect of which he must be considered allottee, he must be placed upon the list."

Lord Cairns, L.J. stated @ pg. 430 that:

"I regret, so far as it is proper to express regret, that we must come to this conclusion, because, no doubt, Mr. Evans has acted bona fide, and considered that after the 10th of June, 1863, he had nothing more to do with the company, and he never availed himself of his rights, or received a dividend. At the same time the provisions of the Act are intended to meet this case, and must be strictly pursued. It is plain that the original subscribers are, by the Act of Parliament, deemed to have taken the shares set opposite their names, which could not then be parted with except in a proper manner, and by proper authority. It was the duty of Mr. Evans, and his co-directors, at once to have entered upon the register of shareholders the names of the directors, as owners of shares, and then they could be relieved from liability only by a transfer, and the substitution of other names, in the way pointed out by the Act; but nothing of this kind was done. It is said that the shares which Mr. Evans would have had, were allotted to other people, but it seems that the allotment was not final, and that there were left at all times shares sufficient to answer the right of Mr. Evans. I think that his right was never taken away from him, and that his liability was never gotten rid of. Though, in form, the register need not now be rectified, the list of contributories will be made out as if it were rectified: that is, with ten shares against the name of Mr. Evans. This motion must, therefore, be dismissed, with costs."

*Re Florence Land and Public Works Co, Nicol's Case*⁶⁵¹ - Fry LJ stated @ pg. 445 that

"Even though the Act makes the entry on the Register obligatory, it does not appear to me that entry on the Register is a condition precedent because until the company is formed no register can be made and until there are some members the company cannot be formed."

From the above cases, it is an established principle that being a member of a company through ownership of shares is not dependent on payment for the shares. A person can be a shareholder without paying for the shares. Similarly, a person continues to be a shareholder notwithstanding that he has failed or defaulted in the payment for the shares. Until the shares are validly forfeited or transferred, the person will continue to be a shareholder. The Adehyeman's case also established that the entry of the subscriber's name in the register of members or the issue of the share certificate is not a precondition for membership and does not affect the legal status of the subscriber as a

⁶⁵¹ (1885) 29 Ch D 421.

shareholder. The entry of the particulars of the subscriber in the register of members or the issue of the share certificate is for evidential purposes. Therefore, if the legal status can be established in other ways, the failure to enter the name in the register of member or issue of the share certificate will not affect the status of the subscriber as a shareholder or member of the company.

For a company limited by guarantee, a person will be a shareholder by subscription when the person's particulars are submitted as particulars and the person subscribes to the constitution. The person may also provide undertake to contribute the assets of the company in the event of winding up towards the satisfaction of the liabilities of the company. The Fourth Schedule of Act 992, the Constitution of a Company Limited by Guarantee provides in clause 8 that *“(1) The subscribers to this constitution and any other persons who the Council admits to ordinary membership shall be members of the Society [company].”*

11.2.2 Agreement

The second category of members is those who become members of the company based on agreement with the company after the company is incorporated. Section 33 provides *“(2) Any other person who agrees with the company to become a member of the company and whose name is entered in the register of members is a member of the company.”* The main basis of membership here is the member enters into an agreement with the company to become a member. There must therefore be a valid agreement with the company for the person to become a member. In the case of a company that has shares, the agreement with the company to become a member of the company requires the person to acquire shares in the company. The agreement with the company will be a share purchase agreement. The agreement must be between the prospective shareholder as the purchaser and the company as the seller. The shares are issued by the company to the purchaser for valuable consideration which may be in cash or in-kind.⁶⁵² The consideration must be payable to the company.⁶⁵³

For the issue of shares by the company pursuant to an agreement with a prospective shareholder, the requirement of section 189 of Act 992 must be complied with. Under the section, the directors of the company have the power to issue shares to raise capital for the company. The exercise of the power is subject to approval from shareholders by ordinary resolution. Section 189(1)(a)(i) of the Act provides that:

“(1) Subject to this Act, the directors of a company with shares shall not, without the approval of

(a) an ordinary resolution of the company,

⁶⁵² Section 44(1) of Act 992.

⁶⁵³ Section 45(1) of Act 992.

- (i) *issue new or unissued shares, other than treasury shares, in the company unless the shares have first been offered on the same terms and conditions to all the existing shareholders or to all the holders of the shares of the class or classes being issued in proportion as nearly as may be to their existing holdings”.*

The section impliedly gives directors the power to issue shares to raise capital for the company. However, the section subjects the power of directors to issue new or unissued shares of the company to two limitations. First, the directors in issuing new or unissued shares of the company must issue the shares to existing shareholders or class of shareholders in proportion to their current shareholding on the same terms and conditions the directors will offer to issue the shares to third parties. This limitation restricts the power of directors in relation to the persons the directors can issue the shares. The second limitation is that in the event directors decides to issue the new and unissued shares to persons other than existing shareholders, the directors must seek approval from the existing shareholders which approval must be by ordinary resolution. It should be noted that where directors first offer to issue the shares to existing shareholders but such offer has not been taken over by existing shareholders, in issuing the same shares to non-shareholders, no approval by ordinary resolution is required from existing shareholders but it must be issued on the same terms and conditions that was first offered to the existing shareholders.

*In re West Coast Dyeing Industry Ltd; Adams and another v. Tandoh*⁶⁵⁴ - an action by Adams for remedy of oppression was challenged by Tandoh on the ground that Adams had no locus as he was not a shareholder of the company but was a nominee of Tandoh. It was argued that no shares were allocated to Adams, neither had he paid for any shares. On that issue, Abban JA stated @ pg. 567 to 577 that:

“Another aspect of the matter is that the appellant, not being a subscriber or original member, any shares intended to be allocated to him ought to have been offered in writing first to the existing members of the company in accordance with regulation 10(1) and (2) of the regulations of the company (exhibit AA), and as required by section 202(1)(a) and (b) of Act 179. It was only after the existing shareholders of the company had declined the offer that those shares could be issued to the appellant. There was no scintilla of evidence that this mandatory provision of section 202(1)(a) and (b) and incorporated in the company’s said regulations was ever complied with before the respondent purported to allocate the shares to the appellant either in the appellant’s own right or as the respondent’s nominee. There was little wonder therefore that no share-certificate was ever issued to the appellant in compliance with section 53(1)-(3) of Act 179. And in view of the non-

⁶⁵⁴ [1984-86] 2 GLR 561.

compliance with the provisions of the said section 202, it would have been unlawful on the part of the company to issue any share-certificate to the appellant or to register him as a shareholder in the register of the company. In other words, it would have been of no legal consequence whatsoever, whether or not the appellant's name was in the company's register and whether or not he was issued with a share-certificate. Thus, in fact and in law the appellant was not and had never been a member of the company."

For a company limited by guarantee, this will be based on an agreement pursuant to the constitution of the company and a resolution of the members to confer membership on the person. Different categories of membership are permitted for companies limited by guarantee. The Fourth Schedule of Act 992 which has the default constitution of a company limited by guarantee provides for ordinary members, associate members and honorary membership. Each of these categories of membership is dependent on an agreement to be a member subject to the ordinary resolution of the Council, which is the Board of Directors.

In both instances of a company with shares and a company limited by guarantee, the requirement of section 33(2) of Act 992 is that the person must first have an agreement with the company to become a member and, secondly, have the name entered in the register of members. Two conditions are, therefore, required to be satisfied for a person to become a member of a company by agreement. First, there must be an agreement between the prospective member and the company by which the person either agrees to purchase the shares of the company in the event of a company with shares or to agree to become a member which must be conferred by the Council on the member, in the case of a company limited by guarantee. There are conflicting authorities as to whether the first condition without the second makes a person a member. That is, where there is an agreement between the company and a person who is to be a member of the company, but the name of such a person has not been entered into the register of members, is that person a member of the company? Section 33(2) of Act 992 provides that the two conditions must be satisfied. The section provides that: *"(2) Any other person who agrees with the company to become a member of the company and whose name is entered in the register of members is a member of the company."*

*Conte v. Kpeglo and another*⁶⁵⁵ - the liquidator appointed by the court for winding up J. Conte Ltd. called upon the High Court to settle the list of contributories as provided by section 103 of the Companies Ordinance. The difficulty arose since the only admissible evidence as to the contributories was the minutes' book, all other documents having been lost or cancelled. The first respondent claimed that the majority of the shareholders and directors of J. Conte Ltd. had voted for him 10,000 shares valued at £G1 each, free of charge for services he had rendered to the company. Basing its decision on the oral evidence of the first respondent and a letter he had received from the

⁶⁵⁵ [1964] GLR 311.

appellant, the High Court declared that the first respondent had been allotted these 10,000 shares, thus giving him 10,001 shares in the final disposition of the contributories of the company. On appeal, it was submitted inter alia that the trial judge erred in holding that the letter supported a finding that the 10,000 shares had been allotted. This letter could only be evidence of an offer of shares and there was no evidence of an acceptance. In the alternative, if the letter operated as an issue of shares, then the first respondent should have been called upon to make payment for them in accordance with section 107 of the Companies Ordinance. In reply, it was submitted that since the letter was written by a layman, then the word "allotted" should be interpreted in its ordinary meaning as signifying a complete and performed contract. Held - allowing the appeal: (1) an allotment of shares is an appropriation by the directors or the managing body of a company to a particular person. This may take the form of an offer of shares to the allottee or an acceptance of an application for shares by the allottee, but an allotment by itself does not necessarily create the status of membership. The allotment may be subject to conditions. (2) The wording of the letter could amount to either an offer of shares by the company to the first respondent or an acceptance by them of an application for shares. With respect to the first alternative, there was no evidence of an acceptance by the first respondent, and with respect to the second alternative, there was no evidence of payment or completion of conditions by the first respondent. Ollennu JSC stated @ pgs. 314 to 316 that:

"We do not share the views of counsel for the first defendant. The letter, exhibit D, purports to have been written in compliance with the requirements of company law with respect to allotment of shares in the company; therefore technical words used in it must be given their ordinary technical meaning; and it is with that construction that we have to consider the evidential value of the letter, exhibit D.

It is evident from the ruling that the ground upon which the learned judge of the High Court accepted the evidence of the first defendant is, according to him, that that evidence is supported by the letter exhibit D, that he is "allotted" twenty per cent. of the whole shares of J. Conte Ltd.

What then is meant by the use of the term "allotment" when used in company law with respect to shares? We find guidance on this in Gower's Modern Company Law (2nd ed.) at p. 348. There the learned author, discussing the subject of how a person becomes a shareholder in a company, points out that the process involves two distinct legal operations: (a) an agreement and (b) entry of the name on the register. He says that "both must be present before the person concerned becomes a member and shareholder."

The agreement involves one of the following: (i) an original allotment of shares, i.e. appropriation of shares accompanied by a form of application, which is filled in and submitted to the company by an applicant for shares, (ii) allotment at any other time upon application for shares, or (iii) allotment made by the company upon its

own resolution, and not in response to any preceding application: See *Palmer's Company Precedents*, (17th ed.), Part 1, pp. 142-143.

As to original allotment, Gower (*supra*) points out at p. 348 that the publication of a prospectus "is not an offer" by the company, "but a mere invitation to submit offers by completing and returning the application form . . ." He states further at p. 349:

"The board of directors then consider the various applications and decide whether or not to accept them or some of them, and whether for the full amount or only part—in the case of a public issue the prospectus will normally have stated the policy to be adopted in the event of over-subscription. Their decision to accept is known as allotment, but it has no legal effect until notified to the applicant. This notification will be by dispatch of allotment letters which will often be renounceable for a limited time. Once the allotment letter has been dispatched the agreement is complete.

But the allottee is still not a shareholder. He has not yet been entered on the register—indeed particular shares identified by number have probably not been appropriated to him. This will not occur until he is duly placed on the register, and if the allotment letter is renounceable he himself may never become a shareholder."

Of the second class of allotment, i.e. allotment made upon application, again the application is an offer by the applicant, the acceptance by the company in such a case is, as Palmer says (*supra*) at p. 143, ordinarily evidenced by what is termed "allotment." He then cites the definition of allotment given by Chitty J., in *Nicol's Case*²:

"What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances... It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person

who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract."

Again in Spitzel v. Chinese Corporation Ltd., (1899) 80 L.T. 347; 15 T.L.R. 281; 43 S.J. 350; 6 Mans. 355 Stirling J., also defined and distinguished two things: "allotment" and "issue" of shares. He said:

"In the first place, I have to consider what meaning is to be attached to these two words [allotment and issue]. First of all, What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership. The allotment may be, and probably generally is [where it is an offer], such as to give a title to the shares the moment the allottee communicates his acceptance of it to the company whose directors make the allotment; but it seems to me that the allotment may be subject to a condition—as, for example, that the allottee should not only indicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to A. B. on the terms that the title of A. B. should not arise until he had paid a sum of money to the company, and this being so, a contract may provide, as I think, that allotment shall be subject to conditions."

Applying the principles laid down in these two authoritative definitions, we would say that at its very best, the interpretation of the letter, exhibit D, most favourable to the first defendant is, that it is either an offer by the company of shares to the first defendant, or an acceptance by them of an application for shares by the first defendant made in his letter referred to in the exhibit. In either case, it has to be accepted by the first defendant to create a binding contract between him and the company to issue shares to him, but until he pays for them, or fulfils any other conditions attached to it, no particular shares identified by number can be appropriated to him, consequently he would not be entitled to be recognised as owning more than the one share he is proved by the minutes of the company as holding, and his name cannot be entered on the register.

Thus the natural inference to be drawn from the statement in exhibit D that, "you are allotted 20 % of the whole shares," is that the company were prepared to issue such shares to him if he had accepted and paid for them. There is nothing in exhibit D from which it can be inferred that the offer to the first defendant in this case could not have attached to it the conditions usually attached to such offer, e.g. payment of cash for the same.

The learned judge of the High Court therefore erred in holding that exhibit D supported the oral evidence of the first defendant and concluding that 10,000 shares at £G1 each had been allotted to the first defendant on the condition that they should be free of charge for services rendered to the company.

Now there is no evidence that this offer, if made in the normal course of business, as it should be, was accepted by the first defendant to create a binding contract. That being the case the question of an order by the court under section 107 of the Companies Ordinance, requiring the first defendant to pay cash for those shares does not arise. For that reason also, it is unnecessary to deal with the other points raised by counsel for the plaintiff."

In the above case, the court seeks to indicate that the allottee of shares is not a shareholder until his name has been entered in the register of members and the allottee has paid for the shares. There are conflicting positions in subsequent cases.

In *Adehyeman Gardens Ltd v. Assibey*,⁶⁵⁶ Sophia Akuffo JSC stated @ pg. 1016 that:

"In a similar vein, there is also the need to reiterate that registration of the name of a subscriber in the company's register of members is also not a condition precedent to membership: see In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd [1979] GLR 477."

*In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd*⁶⁵⁷ - Northern Engineering Co. Ltd. was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000 shares. It was established that all the shares were subscribed to and allotted to its four subscribers—each holding 25 per centum of the shares. It was later alleged that there was an increase in the shares to 100,000 and shares were issued to additional eight shareholders. On the issue of whether the eight persons were shareholders, Taylor J stated @ pgs. 501 and 502 as follows:

"The relevant provisions of the Companies Code regulating membership of a company are section 30(1)-(6) and they read:

⁶⁵⁶ [2003 – 2004] SCGLR 1016.

⁶⁵⁷ [1979] GLR 477.

"... (2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company..."

... The position of persons like the eight respondents who have agreed to become members is regulated by the provisions of section 30(2) of the Code. Commenting on the corresponding section of the English enactment, i.e. section 23 of the Companies Act, 1862, Fry L.J. in Nicol's Case (1885) 29 Ch.D. 421 at p. 447, C.A. said that the section "makes the placing of the name of a shareholder on the register a condition precedent to membership." I agree with this interpretation and I adopt it here."

For a clear position, one must examine the requirements of the register and the purpose of entry of names into the register of members. This is provided in section 35 of Act 992 which provides for the requirement of the register as follows:

"(1) ... a company shall keep in the country a register of the members and shall enter in the register

(a) in respect of members of the company

- (i) the names and addresses of the members and, in the case of a company having shares, a statement of the shares held by each member, and of the amount paid, or agreed to be considered as paid, on the shares of each member, and of the amount remaining payable on the shares;*
- (ii) the date at which a person was entered in the register as member;*
- (iii) the nature of the interest of each member; and*
- (iv) the date at which a person ceased to be a member;"*

Section 39 of Act 992 provides for the purpose of the register as *"(1) The register of members is prima facie evidence of the matters which by this Act are directed or authorised to be inserted in the register."*

By section 35 of the Act, the requirement of the register is to enter the particulars of members in the register. A person must, therefore, become a member or shareholder prior to the entry of his or her particulars in the register. The entry of the name and particulars in the register is, therefore, not what makes the person a member. The section expressly provides that the company must keep a register of members and *"shall enter in respect of members of the company ..."*. The section, therefore, presupposes that the person is a member prior to the entry of the particulars of the member in the register. A reasonable conclusion, therefore, is that the register is to contain the names of persons who are already members and not to confer membership. This position is supported by section 39 of the Act which states the purpose of the register as a prima facie evidence of particulars entered in

the register. The register only evidences the particulars entered in the register. The entry is, therefore, for evidential purposes and not to confer membership. Provided a person can prove ownership in another manner where the name is not entered into the register of members, the failure to enter the particulars in the register cannot, therefore, defeat the membership of the person. Further support for this position can also be found in section 38 of the Act which permits a member to apply to the court to rectify the register in the event of omission of the particulars of such member in the register.

It is respectfully submitted that upon the conclusion of an agreement with the company to become a member, the person will be deemed a member in accordance with the agreement. The entry of the name in the register is to evidence the membership and not to confer membership. Section 33(2) of Act 992 must therefore be understood that the agreement is what makes a person a member, such membership is evidence by the entry into the register of members. A person whose name is not entered in the register of members will not cease to be a member for the simple reason that the company failed to enter the required particulars in the register. The person can enforce the agreement by which he or she becomes a member and apply to the court for rectification of the register by the entry of the required particulars of that member in the register of members.

11.2.3 Transfer of shares

A person can become a shareholder of a company through the transfer of shares by an existing shareholder to that person. Section 98(1) of Act 992 provides *“(1) Except as expressly provided in the registered constitution of a company, shares are transferable without restriction by a written transfer in common form.”* Under the section, shares are transferable without restriction unless the registered constitution restricts the right to transfer the shares. A shareholder is therefore free to transfer his shares to another person without any restriction unless there is a restriction in the registered constitution. The only requirement is that the transfer must be in writing. Subject to having a written instrument evidencing the transfer, the shareholder, unless otherwise stated in the registered constitution can transfer his shares to any person and for any consideration or as a gift just like any other asset of the holder.

The only restriction to be observed on the right of transfer are those stated in the registered constitution. Section 98(2) of Act 992 provides that *“(2) Subject to section 322, the registered constitution of a company may impose restrictions on the transferability of shares, including power for the directors to refuse to register a transfer and provisions for compulsory acquisition or rights of first refusal in favour of other members or officers of the company.”* The Act, therefore, permits the registered constitution to contain a restriction on the right of a shareholder to transfer shares and the ability of the company to compulsorily acquire the shares of a shareholder. It should be noted

that restrictions on the right to transfer shares are only provided in the registered constitution of a private company.⁶⁵⁸ A public company cannot have restriction on the transferability of shares.

Sections 322 of the Act expressly provides that:

“(1) Despite subsection (2) of section 98, the constitution of a public company shall not impose a restriction on the right to transfer shares of the company and if the constitution purports to impose that restriction, it shall be void.

(2) Subsection (1) shall not,

(a) prohibit a restriction on the right to transfer shares on which there is an unpaid liability; or

(b) preclude a company from refusing to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction to be of unsound mind.”

The position of the law, therefore, is that shares of public companies are transferable without restriction, whilst the Act requires at least one restriction on the right of shareholders of a private company to transfer shares.

Section 98 of Act 992 further provides as follows:

“(3) A restriction shall not be imposed under subsection (2) on the transferability of any shares after the shares have been issued unless the holders of the shares consent in writing to the transfer.

(4) Despite subsection (1), a company may refuse to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction in the Republic to be an infant or a person of unsound mind.”

Even for a private company, no restriction can be imposed after the issue of the shares without the consent of the shareholder. Neither does the failure to state specific restrictions prohibiting transfer to infant or persons of unsound mind permit such transfer.

As earlier indicated, the requirement of the transfer under section 98(1) of the Act is that the transfer must be in writing. Shares cannot, therefore, be transferred by verbal agreement. There must be a written instrument or document evidencing the transfer of the shares from the transferor to the transferee.⁶⁵⁹ The share may be transferred for “free” or for consideration. The shareholder may transfer all or some of the shares held by the transferor to the transferee. The transferee will only be recognised by the company as a shareholder upon registration of the name of the transferee in the register of members or shareholders.

⁶⁵⁸ Sections 7 and 322 of Act 992.

⁶⁵⁹ Section 98(1) of Act 992.

*Ofori v. Ecobank Ghana Ltd and Others*⁶⁶⁰ - this case involves the acquisition of shares of Cal Bank Ltd on the Ghana Stock Exchange. After the transfer of shares and instruction to transfer the money to the seller, which was concluded through the stock exchange, there was intervention by the Bank of Ghana which led to the issue as to whether the transaction was concluded in accordance with the securities rules. Pwamang JSC on the issue of the essence of the entry of name in the register of member stated as follows:

“With due respect to the trial judge, we are unable to agree with her that entry in the register is not sufficient proof of transfer of shares of a company. Section 95(1) of the Companies Act, 1963 (Act 179) that she referred to is not the relevant provision. It is rather sections 30, 36 and 98 that govern the issue. They are as follows:

Section 30-Membership of Companies—Constitution of Membership.

- (1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code.*
- (2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company.*
- (3) Every member shall have such rights, duties and liabilities as are by this Code and the Regulations of the company conferred and imposed upon members.*
- (4) In the case of a company with shares each member shall be a shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company.*
- (5) Membership of a company with shares shall continue until a valid transfer of all the shares held by the member is registered by the company, or until all such shares are transmitted by operation of law to another person or forfeited for non-payment of calls under a provision in the Regulations, or until the member dies.*
- (6) Membership of a company limited by guarantee shall continue until the member dies, or validly retires or is excluded from membership in accordance with a provision to that effect in the Regulations.*

36. Register to be evidence

The register of members is prima facie evidence of any of the matters which are, by this Act, directed or authorised to be inserted in the register.”

98. Registration of transfers

- (1) Subject to sections 99 and 100, a notice of a trust, express, implied or constructive or of any equitable, contingent, future, or partial interest in a share or debenture*

⁶⁶⁰ (J4/11/2016) [2018] GHASC 49 (25 July 2018).

or a fractional part of a share or debenture shall not be entered in the register of members or debenture holders or receivable by the company.

- (2) *For the purposes of subsection (1), the company shall not be bound by, or be compelled in any way to recognise, any other rights in respect of a share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered in the register in respect of the share or debenture the transferor, so far as concerns company, remains the holder of the share or debenture.*

In the case of Lugutera v Northern Engineering Co. Ltd [1979] GLR 477 at page 502 Taylor J (as he then was) said as follows;

"The position of persons like the eight respondents who have agreed to become members is regulated by the provisions of section 30(2) of the Code. Commenting on the corresponding section of the English enactment, i.e. section 23 of the Companies Act, 1862, Fry L.J. in Nicol's Case (1885) 29 Ch. D 421 at p. 447, C.A. said that the section "makes the placing of the name of a shareholder on the register a condition precedent to membership." I agree with this interpretation and I adopt it here."

Therefore, as has been expressly provided for by section 98(2) of Act 179, it is the entry of the name of a transferee of shares in the register of members that confirms that he is the new owner of the shares stated against his name from the date of that entry.

Sophia Akuffo, JSC (as she then was) in the case of Adehyeman Gardens Ltd v Assibey [2003-2004] SCGLR1016 at p. 1026, approved of the above holding of Taylor J and added as follows;

"the mere fact that a person claiming to be a shareholder of a company has not been issued with any share certificates, is not material to that person's legal status as a member and shareholder."

The combined effect of sections 30 (2) & (5), 36, 98(2) of Act 179 and the decisions referred to above is that ownership of shares is determined by the entries in the register of members so when shares have been transferred the title of the buyer to the shares is vested from the time the purchaser's name is entered in the register of members."

Further, section 101 of Act 992 provides:

- "(2) For the purposes of subsection (1), the company is not bound by, or is not compelled in any way to recognise, any other rights in respect of a share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered*

in the register in respect of the share or debenture, the transferor remains, so far as concerns the company, the holder of the share or debenture."

For the transfer of shares, the recognition of the transferee is dependent on the entry of the particulars of the transferee in the register of members. Until that is done, the transferor, notwithstanding the agreement of transfer between the transferor and the transferee, continues to be recognised by the company as the shareholder. This position should be distinguished from the position of a person becoming a member by agreement where the agreement is entered into with the company. The application of section 101 of the Act is not applicable to the position of becoming a shareholder by agreement with the company and must be restricted to the transfer of shares from an existing shareholder transferor to a transferee. In addition, it must be pointed out that section 101(2) of the Act expressly limits the non-recognition to the company when it stated: "... ***so far as concerns the company ...***".

As indicated above, section 98 of Act 992 requires the transfer of shares to be done through a written instrument. For the recognition of a transferee as a shareholder, the particulars of the transferee must be entered into the register of members. The combined effect of sections 98 and 101 of the Act is that two documents must be submitted for a valid transfer of shares leading to recognition of the transferee as the holder of shares. These two documents are the share transfer instrument and the share certificate of the transferor.⁶⁶¹ The share transfer instrument and the share certificate must be lodged with the company for registration.⁶⁶²

Section 101 of Act 992 provides:

- "(3) Despite anything contained in the constitution of a company or in a contract, that company shall not register a transfer of shares or debentures unless a proper instrument of transfer duly stamped, if chargeable to stamp duty, has been delivered to the company.***
- (5) Unless otherwise provided in the constitution of a company or the terms of the debenture, the company may refuse to register a transfer if the transfer is not accompanied by the appropriate share certificate, debenture stock certificate, or the company is bound to issue a renewal or copy of that certificate in accordance with subsection (2) of section 55 or section 85."***

Subsection (6) of section 101 of Act 992 provides that ***"Transfer may be lodged for registration by the transferor or transferee"***. That is the requirement of submitting the share transfer instrument and the share certificate can either be done by either the transferor or the transferee. It is in the interest of the transferee to ensure that the particulars of the transferee are entered into the register of

⁶⁶¹ Section 101(3) & (5) of Act 992.

⁶⁶² Section 101(5) of Act 992.

members for the transferee to be recognised as the holder of the shares. Failure to do so will lead to the non-recognition of the transferee as the holder and the continued recognition of the transferor as the holder of the shares.

The company has two months upon receipt of the share transfer instrument and the share certificate to notify the transferor and transferee of its decision not to enter the particulars of the transferee in the register of members. Section 101(7) of Act 992 provides that *“(7) Where a company refuses to register a transfer, the company shall, within two months after the date on which the transfer is lodged with the company, send to the transferee and transferor notice of the refusal.”* There is a penalty imposed on the company and officers in default for failure to notify the transferor and transferee within the two months of the refusal. Section 101(8) of Act 992 provides *“Where a company defaults in complying with subsection (7), that company and every officer shall of the company that is in default is liable to pay to the Registrar an administrative penalty of five hundred penalty units.”*

It must be emphasized that the transfer of shares must be in accordance with the constitution of the company to be valid. In the case of a private company, any restriction imposed on the transfer of shares must be complied with in order for there to be a valid transfer of shares.

Share transfer instrument must also be stamped as exempt under the Stamp Duty Act, 2005 (Act 689).

11.2.4 Transmission of shares by operation of law

Transmission of shares by operation of law deals with two situations of determining a shareholder upon the death of a shareholder or in the event of the declaration of a shareholder as bankrupt. Section 102 of Act 992 deals with the transmission of shares by operation of law upon the death of a shareholder or declaration of a shareholder as bankrupt or insolvent. Section 102 of Act 992 provides:

- “(1) In the case of the death of a shareholder or debenture holder,
 - (a) the survivors, where the deceased was a joint holder, and
 - (b) the legal personal representatives of the deceased where the deceased was a sole holder or last survivor of joint holdersshall be the only persons recognised by the company as shareholders or debenture holders.*
- (2) A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy or the holder, or by operation of law may, on the evidence being produced that the company may properly require, be registered personally as the holder of the share or debenture or transfer the same to any other person,*

and the transfer shall be as valid as if that person had been registered as a holder at the time of execution."

The death of a shareholder terminates the shareholding of the shareholder in a company. Section 33(6) of Act 992 provides that *"(6) Membership of a company with shares continues until (c) the member of the company dies."* Once a shareholder dies, the Companies Act provides who becomes a shareholder in his stead. Section 102 provides that upon the death of an existing shareholder, the shares transmit by operation of law to surviving shareholders in the event of joint shareholding, and in the case of a sole shareholder, to the legal personal representative of the shareholder. The legal personal representative of a deceased shareholder is dependent on whether the deceased shareholder dies testate or intestate. Where the deceased dies testate, the legal personal representative is the executor of the will of the deceased shareholder and where the shareholder dies intestate, the legal personal representative is the administrator of the estate of the deceased shareholder.

*Politis and Another v. Plastico Ltd*⁶⁶³ – the fact of which are in the judgment of Amissah JA @ pgs. 10 to 12 as follows:

"The applicants herein are personal representatives of one Dr. Dimitra Politis who while she lived was the holder of the majority shares in, and one of the two directors of, a company by the name of Plastico Ltd. On 23 December 1966, the applicants obtained an order from this court that the company should rectify its register of members by placing the names of the applicants, obviously in substitution of the late Dr. Politis, on the register. The applicants have now brought this application under section 217 of the Companies Code, 1963 (Act 179), for an order declaring certain acts of the company, or, of the director surviving Dr. Politis, null and void. Mr. Amissah-Aidoo who represents the company and one other respondent to this application has raised the preliminary objection that the applicants qua administrators of the late Dr. Politis have no locus standi to bring this application. The only, and presumably the best authority he has for this proposition is a sentence from Halsbury's Laws of England (3rd ed.), Vol. 6, p. 256, para. 533, which reads as follows:

"Although the legal representatives of a deceased member do not become members unless themselves registered, a transfer of the share or other interest of a deceased member by his personal representative is as valid as if he were a member at the time of the execution of the transfer."

... was to convince the court that a personal representative administering an estate of which shares in a company form a part, was not a member of the company until he was registered. Counsel

⁶⁶³ [1967] GLR 9.

need not have gone as far as delving into the tomes of Halsbury for the learning that he conveyed to the court. Much nearer home in our own, perhaps less well-known, Companies Code, the position of the personal representative is provided for in a little more detail than in the sentence of Halsbury which the researches of counsel disclosed. Section 99 of the Companies Code, 1963 (Act 179), is as follows:

- "99. (1) In the case of the death of a shareholder or debentureholder the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder or last survivor of joint holders, shall be the only persons recognised by the company as shareholders or debentureholders.*
- (2) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law may, upon such evidence being produced as the company may properly require, be registered himself as the holder of the share or debenture or transfer the same to some other person and such transfer shall be as valid as if he had been registered as a holder at the time of execution of the transfer:*

Provided that the company shall have the same right, if any, to decline registration of a transfer by such person as it would have had in the case of a transfer by the registered holder but shall have no right to refuse registration of the person himself.

- (3) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law shall, prior to registration of himself or a transferee, be entitled to the same dividends, interest and other advantages as if he were the registered holder and, in the case of a share, to the same rights and remedies as if he were a member of the company, except that he shall not, before being registered as a member in respect of the share, be entitled to attend and vote at any meeting of the company:*

Provided that the company may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share or debenture and if the notice is not complied with within ninety days, the company may thereafter suspend payment of all dividends, interest or other moneys payable in respect of the share or

debenture until the requirements of the notice have been complied with."

Neither counsel chose to place before me the reason why the applicants came to court on the earlier occasion for an order for the rectification of the register of members. But it would appear from section 99(2) quoted above that, upon the production of such evidence as the company may require, a personal representative is entitled to automatic registration as the holder of the shares of the deceased and therefore as a full member of the company."

*Republic v. High Court, Accra; Ex parte Appiah and others*⁶⁶⁴ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate filed included house no. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had an interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all moneys received in respect of the estate of the Deceased, the court on the issue of devolution of the deceased shares stated per Appiah JSC @ page 425 that: *"Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later distribute them to the beneficiaries who then would have their name entered in the register of the company as members. Consequently, the first plaintiff and first defendant having been appointed the administrators of the estate, hold whatever interest the deceased had in the company in trust for the beneficiaries."*

The second situation provided under section 102 of the Act is in relation to the declaration of bankruptcy or insolvency of a shareholder. In that event, the shares of the bankrupt or insolvent shareholder transmit by operation of law to his receiver or trustee in bankruptcy.

By the requirement of the Act, upon the death of a sole shareholder or a shareholder being declared insolvent, the shares of the shareholder automatically transmits by operation of law to the legal personal representative, a receiver or trustee in bankruptcy of the shareholder of that deceased. Two things, therefore, occur upon the death of a shareholder or declaration of a shareholder as insolvent. First, the deceased or insolvent shareholder automatically ceases to be a shareholder.⁶⁶⁵ Secondly, the legal personal representative of the deceased or the trustee in bankruptcy of the shareholder declared insolvent will be automatically recognised as the new shareholder by the company. The legal personal representative or the trustee or receiver in bankruptcy must, however, provide

⁶⁶⁴ [1999-2000] 2 GLR 420.

⁶⁶⁵ Section 33(6) of Act 992.

evidence of the position as the legal personal representative or trustee in bankruptcy. Upon the provision of such evidence, the Act requires that person to be registered as a shareholder. The legal personal representative or trustee in bankruptcy can transfer the shares without first being registered as a shareholder. Section 102(2) of Act 992 provides that *“(2) A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy or the holder, or by operation of law may, on the evidence being produced that the company may properly require, be registered personally as the holder of the share or debenture or transfer the same to any other person, and the transfer shall be as valid as if that person had been registered as a holder at the time of execution.”*

As indicated above in relation to the transfer of shares, the company has the right to refuse registration. The same right is conferred on the company to refuse to register transfer by a legal personal representative or trustee in bankruptcy. However, the company cannot refuse to register the legal personal representative or, the trustee or receiver in bankruptcy on whom ownership of the shares devolved by operation of law as the holder of the shares. Section 102(3) of Act 992 provides that:

“(3) The company has the right to decline registration of a transfer under subsection (2) as it would have had in the case of a transfer by a registered holder but does not have a right to refuse registration personally of that person.”

The law requires that such a person enjoys the right attached to the shares as a shareholder notwithstanding the non-registration of the person as a shareholder, except that the person is not entitled to attend and vote at meetings of the company until he is registered as a member. Section 102(4) of Act 992 provides that *“(4) A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law is entitled, before registration personally of that person or transferee, to the same dividends, interest and other advantages as if that person were the registered holder and, in the case of a share, to the same rights and remedies as if that person were a member of the company, but that person is not entitled before being registered as a member in respect of the share, to attend and vote at a meeting of the company.”* The person will, therefore, be entitled to claim dividends that have accumulated prior to the person assuming the position of the legal personal representative, or receiver or trustee in bankruptcy even if he elects not to be registered as the shareholder.

Section 102(5) of Act 992 however provides that *“(5) For the purposes of subsection (4), the company may at any time give notice requiring that person to elect to be registered personally or to transfer the share or debenture, and if the notice is not complied with within ninety days, the company may suspend payment of the dividends, interest or any other moneys payable in respect of the share or debenture until the requirements of the notice have been complied with.”* The legal personal

representative or the trustee in bankruptcy will, therefore, be unable to receive payments from the company unless he opts to be registered as a shareholder or transfer the shares. This is to avoid a situation where a person continues to receive monetary benefits from the company without stepping into the shoes of the deceased holder of the shares by being registered as a shareholder or transferring to a transferee to be so recognised.

In *Politis and Another v. Plastico Ltd (No.2)*,⁶⁶⁶ Amissah JA stated @ pgs. 32 to 33 that:

“At the time that the new shares were supposed to have been issued, that is on 12 December 1966, the applicants had already been granted letters of administration of the estate of Dr. Politis. And as I have said in my earlier ruling (p.9 supra) [Politis and Another v. Plastico Ltd [1967] GLR 9] on the preliminary objection, they were entitled, by virtue of section 99(3) of the Code, to the same dividends, interest and other advantages as if they were the registered holders of the shares and also had the same rights and remedies as if they were members of the company, save that they were before registration not entitled to attend and vote at meetings of the company. However, a look at the entries concerning the applicants in the register shows that not only have they not benefited from this new issue, but even the particulars of these shares which devolved on them as a result of the death of Dr. Politis are not entered.”

In order to protect persons other than the legal personal representative that may have an interest in the shares upon the death of the shareholder or declaration of the shareholder as bankrupt, section 100 of Act 992 provides that such a person is permitted to serve on the company copies of notice and affidavit in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I. 47). The Company is required upon the services of the notice to enter the notice in the register of members and no payment or transfer of shares shall be done contrary to the terms of the notice unless the notice expires.⁶⁶⁷ The company is liable to compensate the affected person if it fails to comply with the requirement of entering the notice and not effecting any payment or transfer of shares contrary to the notice.⁶⁶⁸

The requirements above are not applicable to shares regulated under a scheme set up under the Central Securities Depository Act, 2007 (Act 733).

11.3 Rights of members of a company

Members of a company acquire membership, especially in relation to companies with shares, to obtain returns on investment. In some instances, it may be to have control and direct the affairs of

⁶⁶⁶ [1967] GLR 24.

⁶⁶⁷ Section 103(1) of Act 992.

⁶⁶⁸ Section 103(3) of Act 992.

the company. For companies limited by guarantee, the reason may be to undertake some charitable activities or public good without the need to obtain returns in the form of profit. Members are entitled to rights attached to their membership. In relation to companies with share, an investor acquires shares in a company for the purposes of enjoying the rights attached to the shares the principal of which is to obtain a reasonable return on their investment. The Companies Act and the constitution of the company provide for the rights conferred on members of a company. Section 33 of Act 992 provides that *“(3) A member has the rights ... that are by this Act and where applicable, by the registered constitution of the company conferred ... on the members.”* The Companies Act and the constitution of the company are the two source documents that determine the scope of rights conferred on the member of a company. In some instances, agreements may be entered into between the company and the members to supplement the rights conferred on members by the Act and the constitution of the company. Different rights are conferred on members of different types of companies.

However, there are some basic rights that the Act provides for in relation to companies incorporated under the Act. A discussion of some of these rights will suffice.

(a) Right to attend general meetings

Section 34 of Act 992 provides that:

- “(1) Subject to subsection (2), and section 52, a member has the right to attend a general meeting of the company and to speak and vote on a resolution before the meeting.*
- (2) Despite subsection (1), a registered constitution of a company may provide that a member is not entitled to attend and vote at a general meeting unless the calls or any other sums of money presently payable by that member in respect of shares in the company have been paid.”*

Every member of any type of company upon becoming a member of a company has the right to attend general meetings of the company, and to speak and vote on resolutions before that meeting. This right is applicable to all members without any restriction unless such restriction is stated in the constitution of the company. Thus, under the Companies Act, there is no restriction on the right of members to attend general meetings, speak and vote on resolutions before that meeting. However, two restrictions are permitted under the registered constitution of the company. The first restriction permitted in the registered constitution of the company is the prohibition on members who fail to pay for shares acquired after calls have been made or the amount becomes due and payable from attending a general meeting.⁶⁶⁹ The second restriction is in relation to holders of preference shares.

⁶⁶⁹ Section 34(2) of Act 992.

Section 52 of Act 992 permits the suspension of the right to attend, speak and vote on resolutions of preference shareholders under the registered constitution subject to specific conditions.

Section 52 of Act 992 provides:

“(1) Despite section 34, the right of holders of preference shares to attend and vote at a general meeting of the company may be suspended on conditions.

(2) Despite a provision to the contrary in the constitution of a company, preference shares carry the right to attend general meetings and on a poll at those meetings to at least one vote per share in the following circumstances, but not otherwise:

- (a) on a resolution during the period that the preferential dividend or a part of the preferential dividend or a part of the preferential dividend remains in arrears and unpaid, the period starting from a date not more than twelve months, or a lesser period that the constitution of a company may provide, after the due date of the dividend;*
- (b) on a resolution which varies the rights attached to those shares;*
- (c) on a resolution to remove an auditor of the company or to appoint another person in place of that auditor; or*
- (d) on a resolution for the winding up of the company or during the winding up of the company.*

(3) Apart from the circumstances in section 34 and subject to subsection (1) and (2) of this section, preference shares carry the right on a poll at a general meeting of the company to one vote, only, in respect of each share.”

Shareholders, therefore, generally have the right to vote notwithstanding the type of shares held by the shareholder. The right can only be taken away under the constitution of the company in circumstances permitted under the Act. For all shares, the right can be taken away under section 34(2) of the Act where the payment for the shares is due and the shareholder failed to pay the amount. For preference shares, the right can be taken away under conditions stated in the constitution of the company. However, the rights of the preference shareholders are automatically restored in relation to resolutions relating to the four circumstances stated under section 52(2) of the Act. That is when the preference dividend is in arrears and unpaid within a time stated after the due date; variation of rights attached to the preference shares; removal or appointment of auditors of the company; decision to wind up the company and all decisions during winding up of the company.

(b) Right to share in the profit of companies with shares

Persons who invest in companies with shares by way of acquisition of shares of the company will generally do so to obtain a reasonable return on their investment either as dividend or appreciation in the value of the shares. Dividends are the part of profit declared to be shared among the

shareholders. Shareholders, therefore, have the right to share the part of profit called dividend when declared. The definition of shares makes it clear the entitlement of the shareholder to share in the distribution of income of the company.⁶⁷⁰ The distribution of the income is the dividend, which can be in cash or by capitalisation issue. It is, therefore, an inherent right of the holder of shares to receive dividend when declared. The Companies Act, 2019 provides that dividend can only be declared when the company is a going concern (not in winding up), has made profit for the financial year and payment of the dividend will not adversely affect the discharge of the debts and liabilities of the company.⁶⁷¹ Unless otherwise stated in the registered constitution, after the preparation of the accounts of the company and arriving at profit after tax, the directors will recommend an amount to the members for declaration of dividend taking into account the ability of the company to discharge liabilities that will be due. Shareholders declare either the amount recommended by the director or an amount less as the dividend to be shared among the shareholders.⁶⁷² The shareholders cannot declare more than the recommended amount. Dividend is only payable to shareholders when declared by the ordinary resolution of the shareholders. Without the recommendation of the directors, shareholders cannot declare dividend and cannot compel the directors of a company to recommend a declaration of dividend. However, the constitution of the company may provide for the payment of dividend without reference to the resolution of shareholders.⁶⁷³ The registered constitution of a company may restrict payment of dividend to only shareholders that have paid for the shares held by the shareholders. Unless so restricted in the registered constitution of the company, the payment for shares is not a condition for the payment of dividend declared under Act 992.

The Act expressly prohibits the payment of dividend by companies limited by guarantee. Section 75 of Act 992 provides:

- “(1) A company limited by guarantee shall not at any time pay a dividend or make a distribution or return of the assets of the company to members of the company.*
- (2) Where a payment, distribution or return is made in contravention of subsection (1), a member to whom it is made shall restore same to the company with interest at the yearly interest of ninety-one day government treasury bill, and every officer of the company who is in default is liable to pay to the Registrar, an administrative penalty five hundred penalty units.”*

⁶⁷⁰ First Schedule of Act 992.

⁶⁷¹ Sections 72 and 76 of Act 992.

⁶⁷² Section 76(1) of Act 992.

⁶⁷³ Section 76(5) of Act 992.

Shareholders have the right to dividend when recommended by the directors and declared by the ordinary resolution of the company. However, members of a company are prohibited from receiving dividend.

(c) Right to share in the distribution of the net assets of the company

Shareholders are entitled to dividends lawfully declared only when the company is a going concern. A company in liquidation cannot declare and pay dividend to shareholders. However, shareholders have the right to share in the distribution of the net assets of the company when it winds up. That is after the liquidator has fully satisfied all the liabilities of the company, shareholders are entitled to share the remaining assets. Net assets refer to the total assets of the company less the total liabilities of the company.

A company may go through a voluntary liquidation dealt with under Part V of Act 992 or compulsory liquidation under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015). In the process of liquidation, a liquidator, appointed who under the winding up process, gathers the assets of the company, realises the assets and uses the proceeds to satisfy the liabilities of the company. Net assets, which is assets left after payment of all the liabilities of the company, are shared among the shareholders of the company. This is the return of the assets to shareholders upon liquidation.

In addition, there are few instances permitted under Act 992 where a going concern company can return or distribute assets of the company to the shareholders. Section 72 of Act 992 which deals with dividend also permits the return of assets to the shareholders. This is however subject to limitations in relation to the concept of capital maintenance. The return of the assets is subject to the requirement that the value of the assets to be returned does not exceed the profits for the preceding financial year and the return shall not affect the ability of the company to discharge its liability. The return must also be recommended by the directors subject to approval by the shareholder. The Act also permits the return of assets subject to the approval of the Court under section 78 of Act 992.

(d) Right to have particulars entered in the register of members

Members of a company have the right to have their names entered in the register of members.⁶⁷⁴ Section 35 of Act 992 expressly provides for the entry of the stated particular of members in the register of members. Section 36 of Act 992 provides for the right to inspect the register of member and have copies provided to the members. The company under section 37 of Act 992 has the power to close the register for a period of not more than thirty days in each year upon giving reasonable notice. A person aggrieved or a member may make an application to the court for rectification of the

⁶⁷⁴ Sections 33, 101 and 103 of Act 992.

register where the person's name has been entered or omitted without just cause or the particulars not correctly entered. Section 39 of Act 992 provides that *“(1) The register of members is prima facie evidence of the matters which by this Act are directed or authorised to be inserted in the register.”*

In respect of transfer of shares, a company is not bound to register a notice of trust, contingent, future or partial interest in shares or fractional part of shares.⁶⁷⁵ The only interest to be registered is the absolute right to the entirety of the shares.⁶⁷⁶ The company is only required to register the interest in the register upon submission of a duly stamped instrument of transfer and the share certificate.⁶⁷⁷ The company is also required to register the interest where shares are transmitted by operation of law.⁶⁷⁸ The transfer must be lodged for registration by either the transferor or transferee.⁶⁷⁹ The company is required to inform the transferor or the transferee within two months if the company refuses to register to transfer.⁶⁸⁰ A company in breach of the requirement to inform the transferor and transferee within the two months is liable to pay an administrative penalty to the Registrar. These requirements are not applicable to shares transferred through a scheme under the Central Securities Depository Act, 2007 (Act 733).

(e) Right to take action for wrong against the company

As a general rule, a company, as a legal person, is the proper plaintiff to take action for a wrong committed against the company.⁶⁸¹ However, the Act created a number of exceptions by conferring on members of the company the right to take an action in the name of the member or the company for a wrong committed against the company. Section 144(5) of Act 992 permits member to institute legal actions in the name of and on behalf of the company if the directors fail to take action where a wrong has been committed against the company. Under section 200 of the Act, members can, pursuant to ordinary resolution, take action in the name of the company against a director for breach of the fiduciary duties imposed on the directors under the Act. In addition, where members unable to pass an ordinary resolution, a member can take action in the name of that member to enforce remedies available for breach of director's fiduciary duties. Section 201 of the Act also permits members to apply to the court for leave to take a derivative action in the name of the company. Section 218 of the Act confers a right on members to take action for injunction or declaration for acts that are illegal or irregular. Section 219 of the Act gives members a wide ambit to maintain an action for what is generally term as “oppression”. In short, one right conferred on members of a company is the right to maintain an action for a wrong that may affect the company which otherwise a person

⁶⁷⁵ Section 101(1) of Act 992.

⁶⁷⁶ Section 101(2) of Act 992.

⁶⁷⁷ Section 101(3) and (5) of Act 992.

⁶⁷⁸ Section 101(3) of Act 992.

⁶⁷⁹ Section 101(6) of Act 992.

⁶⁸⁰ Section 101(7) of Act 992.

⁶⁸¹ *Foss v. Harbottle* (1843) 2 Hare 461, 67 ER 189.

will not be able to maintain even though the person may indirectly be affected by the wrong committed against the company as an artificial person.

As indicated, there are many rights conferred on members under the Companies Act, 2019 and the constitution of the company. Determination of the scope of such rights is subject to review of these two documents.

11.4 Liabilities and duties of members of a company

As the saying goes, rights come with responsibility or liability. The Companies Act, 2019 and the constitution of the company confer rights on members as well as some liabilities. Section 33(3) of Act 992 provides that *“(3) A member has ... duties and liabilities that are by this Act and where applicable, by the registered constitution of the company ... imposed on the members.”* The liabilities are stated in both the Companies Act, 2019 and the constitution of the company. Members are required to discharge the duties and liabilities imposed on them under both Act 992 and the constitution of the company.

(a) Observation of the terms of the constitution

Section 29(1) of Act 992 provides that the constitution of the company upon incorporation becomes a contract binding among the company, members and officers. Members are therefore under obligation to perform obligations and duties imposed on them under the terms of the constitution. As a contract, the constitution provides for terms that require performance by the members. Members are obliged to perform such obligations. Failure to do so will amount to a breach of the terms of the contract. The members, therefore, have a duty to observe and perform the obligations under the constitution.

*Adehyeman Gardens Ltd v. Assibey*⁶⁸² - Sophia A.B. Akuffo, JSC commenting on the issue of the effect of subscribing to the Regulations (constitution) of a company stated @ pg. 1026 as follows:

“Section 21 of the Code shows that the Regulations of a company is no mean document. ... Once registered, the Regulations have (inter alia) the effect of a contract under seal between:-

- i. the company and its members*
- ii. the company and its officers*
- iii. the members and the officers of the company*
- iv. the members of the company inter se and*
- v. the officers of the company inter se*

⁶⁸² [2003-2004] 2 SCGLR 1016.

As a subscriber, therefore, the Respondent's shareholding, as well as the consideration payable by him therefore, is contractual."

(b) Payment for shares acquired

The general position of the law is that shareholders of a company are liable to pay for the shares they acquired in the company in accordance with the terms of the issue or agreement under which the shares have been acquired. Section 45 of Act 992 provides that *"(1) Except on a capitalisation issue pursuant to subsection (1) of section 77, shares shall not be issued otherwise than for valuable consideration paid or payable to the company and unless otherwise agreed, shares shall be paid for in cash."* Shareholders are therefore under obligation to pay for the shares they have acquired. Section 40 of Act 992 provides *"(1) Before winding up of a company, a member of a company with shares is liable to contribute the balance of the amount payable in respect of the shares held by that member in accordance with the terms of the agreement under which the shares were issued or in accordance with a call validly made by the company."* Payment for the shares may be due in accordance with the terms of agreement or issue, and where not stated, in accordance with a call validly made by the company. A call in this context means a demand made by a company on a shareholder to pay for the shares held by the shareholder. The call must be pursuant to a resolution of the directors. Where the shareholders fail to pay for the shares, the company can bring an action to recover the amount or forfeit the shares for non-payment if the constitution so permit. Such liability cannot be varied by the contract or cannot be written off by the company.

Section 40 of Act 992 provides in *"(2) Where a contribution has become due and payable in accordance with subsection (1), or where, under the terms of an agreement with the company, a member has undertaken personal liability to make future payments in respect of shares issued to that member, the liability of the member shall continue although the shares held by the member are subsequently transferred or forfeited but the liability of a member shall cease if and when the company receives payment in full of all the moneys in respect of the shares."*

Subject to a person making payment for the shares or discharging personal liability for future payment, the shareholder is not liable to contribute to the company except in winding up.⁶⁸³

(c) Contribution to the assets of a company when winding up

Members of a company, and in some limited instances past members of the company, are liable to contribute to the assets of the company in the event of the company being wound up. Section 40 of Act 992 provides:

⁶⁸³ Section 40(3) of Act 992.

- “(3) Subject to subsections (1) and (2), a member or past member is not liable to contribute to the assets of the company except in the event of the company being wound up.*
- (4) In the event of a company being wound up, every present or past member is liable to contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the costs, charges and expenses of the winding up and for the adjustment of the rights of the members and past members among themselves but subject to the following qualifications:*
- (a) a past member is not liable to contribute if that member has ceased to be a member for a period of not less than one year before commencement of the winding up;*
 - (b) a past member is not liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this section;*
 - (c) in the case of a company limited by shares, a contribution shall not be required from a member or past member exceeding the amount of money unpaid on the shares in respect of which that member is liable as a present or past member;*
 - (d) in the case of a company limited by guarantee, a contribution shall not be required from a member or past member exceeding the amount of money undertaken to be contributed by that member to the assets of the company in the event of the company being wound up; or*
 - (e) a sum of money due from the company to a member or past member, in the character of a member, by way of dividends or otherwise shall not be set-off against the amount of money for which that member is liable to contribute in accordance with this section, but that amount of money shall be taken into account for the purposes of final adjustment of the rights of the members and former members amongst themselves.*
- (5) For the purposes of this section, “past member” includes the estate of a deceased member and where a person dies after becoming liable as a member or past member, the liability is enforceable against the estate of that member.*
- (6) Except as otherwise provided in this section, a member or past member of a company is not liable as a member or past member for any of the debts and liabilities of the company.”*

The section imposed obligations on shareholders and members of a company. The section requires that in the event a company is winding up, members, past and present, of the company are under obligation to contribute to the assets of the company. The purpose of the contribution is to discharge the liabilities of the company including the cost, charges and expenses of the winding up. The contribution is to be made to the liquidator of the company. In practice, such contribution may not be required if the company has enough assets to satisfy its liability. However, the contribution from the shareholders may be included in determination of settlement among the shareholders.

In relation to a past member, the contribution is required when two conditions are satisfied. First, the current member is unable to contribute to the assets of the company. Thus, if the current member is able to or is in the position to contribute to the assets of the company, the past member will not be required to contribute to the assets of the company. Secondly, the contribution will be required from the past member only if the period between when the past member ceased to be a member and the date of the winding up is not more than one year. That is where the time from which the past member ceased to be a member of the company is less than one year. A past member cannot be required to contribute if it has been more than a year since the past member ceased to be a member of the company.

The amount of contribution required from a past or present member of the company depends on the type of company. In the case of a company limited by shares, the contribution of a past or present member is limited to the unpaid liability on the shares held by the member or was held by the member. The member cannot be required to contribute above the unpaid liability on the shares. In the case of a company limited by guarantee, the member is required to contribute up to the amount undertaken to contribute to the company in the event of winding up. In the case of an unlimited company, the member will be required to contribute the full amount required to satisfy the liability of the company. In all these cases, it should be borne in mind that the liability is the liability of the company. The member cannot, therefore, be sued personally for the liability. The member can, however, be required under a court action to make the required contribution to the company or directly to the judgment creditor.

11.5 Cessation of membership of a company

Relationships do come to an end. Similarly, a member of a company may cease to be a member. The law does not require a person to remain a member of a company in perpetuity even though a company enjoys perpetual succession. The Act, therefore, provides for a number of ways where a member or shareholder may cease to be a member or shareholder of a company. The manner in which a person ceases or terminates his membership in a company depends on the type of company. The manner of termination of membership in a company is discussed below.

(a) Transfer of shares

One way in which a member of a company with shares may terminate or cease to be a member of the company is through the transfer of all the shares held by the member in the company. The Act requires that a member of a company with shares must take at least one share.⁶⁸⁴ The holder of the share is a member of the company.⁶⁸⁵ Once a person holds shares and is deemed a member, the person can cease to be a member by transferring the share held to another person. For the member to cease to be a member, three conditions must occur. First, the transfer must be in relation to all the shares held by the shareholder. Secondly, the transfer of all the shares must be a valid transfer of all the shares of a shareholder of a company. Thirdly, the valid transfer of all the shares must be registered by the company. Upon the satisfaction of the three conditions, the membership of the person in the company will terminate. Section 33(6) of Act 992 provides *“(6) Membership of a company with shares continues until (a) a valid transfer of the shares held by the member is registered by the company.”* The section thus requires that the member must validly transfer all the shares held by the member, and such transfer must be registered for the membership to be terminated.

Section 98 of Act 992 deals with transferability of shares. Valid transfer of shares requires that the conditions of transfer as stated in the Act and the constitution of the company must be complied with. Section 98(1) of Act 992 provides *“(1) Except as expressly provided in the registered constitution of a company, shares are transferable without restriction by a written transfer in common form.”* Under the section, shares are transferable without restriction unless the registered constitution restricts the right to transfer the shares. The only requirement is that the transfer must be in writing. Subject to having a written instrument evidencing the transfer, the shareholder, unless otherwise stated in the registered constitution can terminate his membership in the company through the transfer of all his shares to any person and for any consideration or as a gift just like any other asset of the holder.

The only restriction to be observed on the right of transfer are those stated in the registered constitution. Section 98(2) of Act 992 provides that *“(2) Subject to section 322, the registered constitution of a company may impose restrictions on the transferability of shares, including power for the directors to refuse to register a transfer and provisions for compulsory acquisition or rights of first refusal in favour of other members or officers of the company.”* The Act, therefore, permits the registered constitution to contain a restriction on the right of a shareholder to transfer shares. It should be noted that restriction on the right to transfer shares are only provided in the registered constitution of a private company.⁶⁸⁶ Section 322 of the Act expressly provides that:

⁶⁸⁴ Section 33(4) of Act 992.

⁶⁸⁵ Section 33(5) of Act 992.

⁶⁸⁶ Sections 7 and 322 of Act 992.

“(1) Despite subsection (2) of section 98, the constitution of a public company shall not impose a restriction on the right to transfer shares of the company and if the constitution purports to impose that restriction, it shall be void.

(2) Subsection (1) shall not,

(a) prohibit a restriction on the right to transfer shares on which there is an unpaid liability; or

(b) preclude a company from refusing to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction to be of unsound mind.”

The position of the law, therefore, is that shares of public companies are transferable without restriction, whilst the Act requires at least one restriction on the right of shareholders to transfer shares of a private company. Section 98 of Act 992 further provides as follows:

“(3) A restriction shall not be imposed under subsection (2) on the transferability of any shares after the shares have been issued unless the holders of the shares consent in writing to the transfer.

(4) Despite subsection (1), a company may refuse to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction in the Republic to be an infant or a person of unsound mind.”

Even for a private company, no restriction can be imposed after the issue of the shares without the consent of the shareholder. Neither does the failure to state specific restriction prohibiting transfer to infant or persons of unsound mind permit such transfer.

As earlier indicated, the requirement of the transfer under section 98(1) of the Act is that the transfer must be in writing. Share cannot, therefore, be transferred by verbal agreement. There must be a written instrument (document) evidencing the transfer of the shares from the transferor to the transferee⁶⁸⁷. For a share transfer to make a person a shareholder, it must be registered with the company⁶⁸⁸. Section 101 of Act 992 provides:

“(2) For the purposes of subsection (1), the company is not bound or is not compelled in any way to recognise, any other rights in respect of share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered in the register in respect of the share or debenture, the transferor remains, so far as concerns the company, the holder of the share or debenture.”

⁶⁸⁷ Section 98(1) of Act 992.

⁶⁸⁸ Section 101(2) of Act 992.

Two documents are required for the purpose of registering a share transfer. These two documents are the instrument of transfer and the share certificate of the transferor⁶⁸⁹. These two documents are required to be lodged with the company for registration⁶⁹⁰.

Section 101 of Act 992 provides:

“(3) Despite anything contained in the constitution of a company or in a contract, that company shall not register a transfer of shares or debentures unless a proper instrument of transfer duly stamped, if chargeable to stamp duty, has been delivered to the company.

(5) Unless otherwise provided in the constitution of a company or the terms of the debenture, the company may refuse to register transfer if the transfer is not accompanied by the appropriate share certificate, debenture stock certificate, or the company is bound to issue a renewal or copy of that certificate in accordance with subsection (2) of section 55 or section 85.”

Subsection (6) of section 101 of Act 992 provides that *“Transfer may be lodged for registration by the transferor or transferee”*. That is the requirement of submitting the share transfer instrument and the share certificate can either be done by the transferor or the transferee. The non-registration of a transfer will lead to the non-recognition of the transferee by the company. This means that unless the share transfer is registered with the company, the company will continue to recognise the transferor as holder of the transferred shares in question. It is therefore in the interest of the transferee to see to it that the transfer is registered.

On receipt of the documents for registration, the company may either proceed to register the transfer or decline to register it. Where a company refuses to register a transfer, the law requires it, within two months after the date on which the transfer was lodged with it, to send to the transferee and transferor a notice of the refusal⁶⁹¹. Where the company fails to comply with this requirement, the company and every officer of the company who is in default are liable to pay a fine⁶⁹². Section 101(8) of Act 992 provides *“Where a company defaults in complying with subsection (7), that company and every officer shall of the company that is in default is liable to pay to the Registrar an administrative penalty of five hundred penalty units.”*

In order to terminate the membership of a shareholder in a company, the shareholder must transfer all of his shares by a written instrument in a manner permitted by the registered constitution of the company. The transfer must then be lodged with the company and registered for the membership to be terminated. Once that is done, the member ceases to be a member of the company.

⁶⁸⁹ Section 101(3) & (5) of Act 992.

⁶⁹⁰ Section 101(1) of Act 992.

⁶⁹¹ Section 101(7) of Act 992.

⁶⁹² Section 101(8) of Act 992.

(b) Transmission of shares by operations of law

A second means of terminating the membership of a company with shares is the transmission of the shares by operation of law. Section 33(6) of Act 992 provides that “(6) *Membership of a company with shares continues until (b) the shares are transmitted by operation of law to another*”. Shares are transmitted by law when as a result of the death or insolvency of a shareholder, the shares held devolved to surviving shareholders in terms of joint shareholders, or to a legal personal representative in terms of a sole shareholder, or to a receiver or trustee in bankruptcy in the event of the declaration of the shareholder as insolvent or bankrupt.⁶⁹³

Section 102 of Act 992 provides:

- “(1) In the case of the death of a shareholder or debenture holder,*
(a) the survivors, where the deceased was a joint holder, and
(b) the legal personal representatives of the deceased where the deceased
was a sole holder or last survivor of joint holders
shall be the only persons recognised by the company as shareholders or debenture holders.
- (2) A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy or the holder, or by operation of law may, on the evidence being produced that the company may properly require, be registered personally as the holder of the share or debenture or transfer the same to any other person, and the transfer shall be as valid as if that person had been registered as a holder at the time of execution.”*

Once a shareholder dies, the deceased shareholder automatically ceases to be a member of the Company. Act 992 provides who becomes the new shareholder in his stead. Section 102 provides that upon the death of an existing shareholder, the shares transmit by operation of law to surviving shareholders in the event of joint shareholding, and in the case of a sole shareholder, to the legal personal representative of the shareholder. The legal personal representative of a deceased shareholder will depend on whether the deceased died testate or intestate. Where the deceased died testate, the legal personal representative will be the executor of the deceased shareholder’s will and where the shareholder died intestate, the legal personal representative will be the administrator of the estate of the deceased shareholder.

In *Politis and Another v. Plastico Ltd*,⁶⁹⁴ Amissah JA quoting the corresponding section in the now repealed Companies Act, 1963 stated @ pg. 12 that:

⁶⁹³ Section 102 of Act 992.

⁶⁹⁴ [1967] GLR 9.

“But it would appear from section 99 (2) quoted above that, upon the production of such evidence as the company may require, a personal representative is entitled to automatic registration as the holder of the shares of the deceased and therefore as a full member of the company.”

The second situation provided under section 102 of the Act is in relation to the declaration of bankruptcy or insolvency of a shareholder. Upon declaration of a holder of shares as bankrupt or insolvent, that holder will cease to be a member of the company. The shares of the bankrupt or insolvent shareholder transmit by operation of law to the receiver or trustee in bankruptcy of the shareholder.

By the requirement of the Act, once any of the above events occur, the person on whom the ownership of shares devolves by reason of that person being a legal personal representative, a receiver or trustee in bankruptcy of the shareholder may, on providing evidence of that fact to the company, be registered personally as the holder of those shares or transfer the shares to some other person and the transfer will be as valid as though that person had been registered as the holder at the time of the execution of the transfer.⁶⁹⁵ Even though the company maintains the right to refuse registration as it would have done for transfer of shares, the company does not have the right to refuse to register a legal personal representative, a receiver or trustee in bankruptcy of a shareholder personally as the owner of the shares that have devolved on him as such.⁶⁹⁶ The law requires that such a person enjoys the right attached to the shares as a shareholder notwithstanding the non-registration of the person as a shareholder, except that the person is not entitled to attend and vote at meetings of the company until he is registered as a member.

(c) Forfeiture

A person's membership of a company can also be terminated when the company forfeits his shares for his non-payment of calls. Section 33(6) provides that *“(6) Membership of a company with shares continues until (b) the shares are ... forfeited for non-payment of calls”*. Calls in this context are a written demand made by a company on a shareholder who has not fully paid for the shares held to pay the outstanding amount on the shares. Section 61 of Act 992 provides *“(3) A company may forfeit the shares issued with an unpaid liability for non-payment of the sums of money due and payable on those shares.”* That is, there are unpaid liabilities on the shares held by the shareholder. Once the shareholder is required to pay the unpaid liability on the shares by a valid call made by the company, failure to pay permits the company to forfeit the shares for non-payment of the amount owed on the shares.

⁶⁹⁵ Section 102(2) of Act 992.

⁶⁹⁶ Section 102(3) of Act 992.

In *Adehyeman Gardens Ltd v Assibey*,⁶⁹⁷ the Supreme Court explained the requirement for forfeiture of shares. Sophia Akuffo JSC stated @ pgs. 1026 to 1027 as follows:

“Consequently, there is, no doubt whatsoever that, since the respondent is a subscriber to the regulations of the company (as evidenced by exhibit 1), he, pursuant to section 30(1), became a member of the company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5).

By the terms of the Code, until all of his shares are forfeited for non-payment of a validly made call (or until the occurrence of any of the other said eventualities), a subscriber remains a fully-fledged member and shareholder of the company, even if he has not paid a pesewa for his shares. The Code does not prescribe any mode for forfeiture of shares and rather leaves this to be spelt out in the regulations of the company. In respect of the company herein, the relevant provisions are regulations 15-27 which prescribe the processes that must be followed. Firstly there must be a call on the shares. For such a call to be valid:

- (a) the call must be authorised by a resolution of the board of directors and the date of the resolution is deemed to be the date of the call;*
- (b) the shareholder must be given not less than fourteen days’ notice “specifying the time or times and place of payment” as well as the amount called upon the shares; and*
- (c) if the terms of the allotment or issue of any shares stipulate a particular date for payment of such shares or any part thereof, then a call is deemed to have been duly made and the payment is deemed to be payable on such fixed date.*

If the shareholder fails to pay on the due date for the shares on which a call had been made (or shares on which a call is deemed by the regulations to have been made), then the forfeiture procedure, set out in the regulations, comes into effect. Even then, there are prescribed steps a company must take before shares are forfeited. These are:

- (a) the board of directors must serve on the defaulting shareholder a notice requiring payment of the amount, together with any interest due thereon under regulation 18;*
- (b) the notice must name a date on or before which payment must be made, which payment date should be not less than 14 days from the date of service of the notice;*

⁶⁹⁷ [2003-2004] 2 SCGLR 1016.

- (c) *the notice must also state that, in the event of non-payment on or before the payment date, the shares upon which the call was made will be liable to forfeiture; and*
- (d) *if no payment is made in accordance with the notice, the shares affected by the call may be forfeited, but such forfeiture must be by resolution of the board of directors.*

There is nothing on the record to show that there was any agreement made at any time between the first appellant and the respondent whereby the respondent became liable to pay for his shares on any fixed date. As a result, it is only by a formal call that any amount may become due on any of his shares."

The Second Schedule of Act 992, Constitution for a Private Company Limited by Shares, provides for forfeiture in regulations 18 to 23 provides for the forfeiture procedure as follows:

- "18. Where a shareholder fails to pay any call or instalment of a call, including a sum which is a call under clause 15, the board of directors may at any time after the failure during the time that a part of the call or instalments remains unpaid, serve a notice on the member requiring payment of so much of the call or instalments as is unpaid, together with the interest which may have accrued.*
- 19. The notice shall state a further day not earlier than the expiration of fourteen days from the date of service of the notice on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the times appointed, the shares in respect of which the call was made will be liable to be forfeited.*
- 20. If the requirements of the notice are not complied with, a share in respect of which the notice was given may, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.*
- 21. A forfeited share may be cancelled by alteration of this constitution or may be retained as a treasury share until sold or otherwise disposed of on the terms and in the manner that the board of directors considers fit.*
- 22. A person whose shares have been forfeited ceases to be a member in respect of the forfeited shares and is bound to surrender to the company for cancellation the share certificates in respect of the shares so forfeited but shall, despite that, remain liable to pay to the company the moneys which, at the date of the forfeiture, were payable by that person to the company in respect of the shares, but that liability shall cease if and when the company receives payment in full of the moneys in respect of the shares.*
- 23. A statutory declaration in writing that the declarant is a director or the Company Secretary and that a share in the company has been duly forfeited*

on the date stated in the declaration, is conclusive evidence of the facts stated in the declaration as against the person claiming to be entitled to the share."

Similar provisions are stated in clauses 17 to 22 of the Third Schedule of Act 992 which provides for the constitution for a public company limited by shares. The default constitution of a private company with shares thus permits forfeiture unless the terms are deleted or amended in the registered constitution. A shareholder upon forfeiture of the shares will cease to be a shareholder or member of the company in relation to the forfeited shares. In the event all the shares of the shareholders are forfeited, the shareholder will cease to be a member of the company. The requirement for the procedure for forfeiture to be triggered is that there is a valid call made.⁶⁹⁸ However, where the constitution provides for a fixed date for payment, payment is due on the fixed date and failure to pay on the fixed date will trigger the procedure for a valid forfeiture of the shares by the company.

When shares are duly forfeited, they revert to the company and unless and until reissued they become treasury shares. Per the decision in the Adehyeman's case, the procedure for forfeiture requires a valid call to be made. This requires a resolution of the directors authorizing the call. Pursuant to the resolution, a notice must be served on the member requiring the member to pay the unpaid liability on the shares within fourteen days of the notice. Where the member fails to pay the amount, the steps of the forfeiture commence. There may be instances where a formal call may not be required. That is if the terms of allotment or issue of the shares state a fixed date for payment. A call is deemed to be made and the payment is due on the fixed date. Failure to pay on the fixed date will trigger forfeiture. The forfeiture procedure requires a second notice to the shareholder requiring payment of the outstanding amount on the shares plus interest. The notice must also expressly indicate that if the shareholder fails to pay within fourteen days from the date of services of the notice, the shares will be forfeited for non-payment of unpaid liability. The forfeiture is effected by a resolution passed by the board of directors.

(d) Termination by Death, Retirement and Exclusion

Section 33(6) Act 992 provides "***(6) Membership of a company with shares continues until (c) the member of the company dies.***" Subsection (7) provides "***Membership of a company limited by guarantee continues until the member dies, or validly retires or is excluded from membership.***" The death of a member terminates his membership of the company where the company is one with share or limited by guarantee.⁶⁹⁹ For a company with shares, the termination of a member is automatically link to the devolution of such shares to surviving shareholder in terms of joint shareholding or a

⁶⁹⁸ Clauses 11 to 17 of Second Schedule of Act 992, and clauses 10 to 16 of the Third Schedule of Act 992 deal with what amount to a valid call by a company.

⁶⁹⁹ Section 33(6) and (7) of Act 992.

legal personal representative in the event of sole shareholding. For a company limited by guarantee, not only does membership terminates upon the death of the member but it is not linked to any automatic devolution of such membership. In addition, unlike a company with shares, membership in a company limited by guarantee may terminate through the retirement of a member or exclusion of the member. For a company with shares, a shareholder cannot retire from the company. That 'retirement' must be accompanied by the valid transfer of the shares of that shareholder. The shareholder will cease to be a shareholder by valid transfer of all his shares which is registered by the company, and not just 'retirement'. Similarly, a shareholder cannot be excluded from the company unless the shares a validly forfeited for non-payment of unpaid liability on the shares. Once a shareholder has fully paid for the shares, the right of forfeiture is not available. A shareholder cannot, therefore, be excluded from a company with share whether the shareholder has paid for the shares or not. Forfeiture should not be equated to exclusion.

For a company limited by guarantee, a member can retire from the company by due notice to the company in accordance with the registered constitution of the company. Retirement is thus an option open to the member to decide to cease to be a member of a company limited by guarantee. Whilst the member can retire, other members can also exclude one of their number from membership in accordance with the registered constitution. This can loosely be termed as firing or dismissing a member from the company. For a member to validly retire or to be validly excluded from the company, it must be done in accordance with the constitution of the company.

12.0 GENERAL MEETINGS

12.1 Introduction

The governance system created under the Companies Act, 2019 (Act 992) provides that members or shareholders in a general meeting constitutes a principal organ of the company.⁷⁰⁰ Act 992 seems to mandate that members or shareholders of a company in acting for the company must act through general meetings. In such general meetings, members or shareholders constitute an organ of the company and can take decisions or engage in acts as an organ of the company. Section 147 of Act 992 provides that *“(1) An act of the members in a general meeting ... is the act of the company; and accordingly, the company is criminally and civilly liable for that act to the same extent as if the company were a natural person.”* For an act to be deemed to be the act of a company per section 147(1) of the Act, the act must be an act of members or shareholders in a general meeting. For the purposes of holding the company liable, the persons taking the decision or acting must therefore be members or shareholders, which is dealt with under the preceding chapter. Secondly, the members or shareholders must be acting in a duly convened and validly held general meeting. Members or shareholders in a general meeting is therefore a meeting of the company. It may be for this reason that Act 992, in various sections, refers to a general meeting of a company rather than a general meeting of members. The meeting is a meeting of the company as the acts and decisions of members in a general meeting are deemed to be acts or decisions of the company. Decisions made or resolutions passed by members are decisions or resolutions of the company.

However, for such acts and decisions to be that of a company, not only must the persons in the meeting be members or shareholders, but the meeting must also be validly convened and held. The Act and the constitution of a company regulate the convening and holding of a general meeting. The validity of a general meeting is dependent on compliance with all the requirements of a general meeting as prescribed by the Act and the constitution of the company. Section 169 of Act 992 provides that: *“Except as otherwise provided by the constitution of a company, the provisions specified in the Eighth Schedule shall govern the proceedings at meetings of a company except to the extent that, the registered constitution of the company makes provision for the matter that are expressed in that Schedule to be subject to the registered constitution of the company.”* A general meeting must therefore be held in accordance with the Act and the registered constitution provided the Act permits the specific matters to be dealt with in a contrary manner in the registered constitution.

Even though members or shareholders are required to act in a general meeting, it is not in all instances where members and shareholders must act in a general meeting. There are instances where members of a company may act without a meeting. In such instances, unless expressly provided in

⁷⁰⁰ Sections 144 and 147 of Act 992.

the Act, the members or shareholders must act unanimously. This is discussed under informal decision making. That notwithstanding, general meetings of members or shareholders remain the formal and lawful process where members or shareholders come together to deliberate and take decisions based on majority vote which decision or act is deemed to be the decision or act of the company. The company is criminally and civilly liable for such act or decision of the members or shareholders in general meeting.

There are two types of general meetings permitted under the Companies Act, 2019 for members or shareholders. Under the Act, members or shareholders may have an annual general meeting or an extraordinary general meeting.

12.2 Annual General Meeting (AGM)

As the name implied, annual general meetings are general meetings that the company is to hold annually. Section 157 of Act 992 provides for the company to hold an annual general meeting which is mandatory except if dispensed with in accordance with the Act. Section 157 of Act 992 provides that:

- “(1) Except as provided in subsection (4), a company shall*
 - (a) in each year hold a general meeting as the annual general meeting of the company in addition to any other meetings in that year, and*
 - (b) specify the meeting as the annual general meeting in the notice calling the meeting.*
- (2) Not more than fifteen months shall elapse between the date of one annual general meeting and the next.*
- (3) If a company holds the first annual general meeting within eighteen months of incorporation, the company is not required to hold the annual general meeting the year of incorporation or the following year.*
- (4) The annual general meeting shall be held not earlier than twenty-one days after the financial statements, the consolidated financial statements, and the reports of the directors and auditors on the financial statements of the company have been dispatched to members and debenture holders of the company in accordance with section 122; the financial statements, and reports shall be laid before the annual general meeting for consideration.*
- (5) If the auditors of the company and the members of the company entitled to attend and vote at an annual general meeting agree in writing, that an annual general meeting shall be dispensed with in any year, it shall not be necessary for that company to hold an annual general meeting that year.*
- (6) If the annual general meeting is not held in accordance with subsection (5), the Registrar may, on a motion by the Registrar or on the application of an officer*

or a member of the company, call, or direct the calling of, an annual general meeting of the company, and may give ancillary or consequential directions that the Registrar thinks fit, including directions modifying or supplementing, in relation to the venue, calling, holding, and conducting of that meeting, the operation of

- (a) section 159,*
 - (b) paragraphs 1 to 3 of the Eighth Schedule,*
 - (c) paragraphs 8, 9, 12, 13, of the Eighth Schedule,*
 - (d) paragraphs 15 to 19 of the Eighth Schedule, and*
 - (e) the constitution of the company where applicable*
- (7) Where a meeting held in pursuance of subsection (6) is not held in the year in which the default in holding the annual general meeting of the company occurred, the meeting so held shall be treated as the annual general meeting for that year, but shall not be treated as the annual general meeting for the year in which the meeting is held unless, at that meeting, the company resolves that it shall be so treated.*
- (8) Where a company passes a resolution pursuant to subsection (5) or (7), a copy of the resolution shall, within twenty-eight days of the passage of the resolution, be forwarded to the Registrar for registration.*
- (9) If an annual general meeting of the company is not held in*
- (a) in accordance with subsection (1),*
 - (b) compliance with the directions of the Registrar under subsection (6), or*
 - (c) compliance with subsection (4), (7) or (8) of this section, the company and every officer of the company that is in default is liable*
- to pay to the Registrar an administrative penalty of one hundred and fifty penalty units."*

Act 992 mandates that a company must hold an annual general meeting every year which unless otherwise stated is a period of twelve months from January to December. Even though the meeting is to be held every year, the Act requires that the time between two consecutive annual general meetings shall not be more than fifteen months. Therefore, if a company held an annual general in April of a particular year, the annual general meeting cannot be held not later than June of the next year (which is the fifteenth month after the meeting of April). A company can hold a general meeting in December of a particular year and hold the next annual general meeting in January of the next year, which is a month apart. The requirement is the consecutive annual general meetings must not be fifteen months apart.

The Act also provides that a newly incorporated company is not required necessarily to hold a meeting in the year of incorporation or the following year provided that the meeting is held within

eighteen months from the date of incorporation. Thus, if a company is incorporated in October of Year 1, the company need not hold an annual general meeting in Year 1 or Year 2 after incorporation. The company has up to eighteen months from October of Year 1 to hold the meeting, which expires in April of Year 3.

A company is permitted under the Act to hold as many general meetings as the company requires. However, a company is required to hold only one annual general meeting in a year satisfying the time requirements described in the preceding paragraphs. For a meeting to be held as an annual general meeting, three conditions must be satisfied. First, the annual general meeting must be the only annual general meeting for that year. The Act does not permit a company to hold more than one annual general meeting for a particular year. Secondly, the notice convening the annual general meeting must designate the meeting as an annual general meeting of the company. Thirdly, an annual general meeting can only be held at least twenty-one days after dispatched of financial statements of the company and reports of directors and auditors on the financial statements are dispatched to members and debenture holders of the company. It has, however, been held that failure to consider the financial statements and reports at the annual general meeting does not invalidate the meeting.⁷⁰¹

A company must ensure these three conditions are complied with for a meeting to be validly deemed an annual general meeting. A company must, therefore, in each year and not more than fifteen years from the last annual general meeting, hold a meeting designated as an annual general meeting per the notice for the meeting, which must be held at least not less than twenty-one days after circulation of the financial statements and reports of directors and auditors on the financial statements to members and debenture holders of the company. A newly incorporated company has eighteen months to hold its first annual general meeting. Any other general meetings of the company or a general meeting not complying with these requirements may be deemed an extraordinary general meeting provided the general meetings complied with requirements under Act 992 including section 158 of the Act which deals with an extraordinary general meeting.

A breach of the conditions may not necessarily invalidate a general meeting as an annual general meeting. The issue was considered in the case below in relation to the third condition.

In *Eshun v. Poku*⁷⁰², the financial statements and reports of directors and auditors were not submitted prior to the purported annual general meeting at which new executives were elected. The court held that the meeting was not invalidated as an annual general meeting. Lutterodt J. stated @ pgs. 577 to 579 as follows:

⁷⁰¹ *Eshun v. Poku* [1989-90] 2 GLR 572.

⁷⁰² [1989-90] 2 GLR 572.

"The A.G.M. no doubt affords protection to members. Indeed, no one would deny that it is meant for their good, for this meeting gives them a glorious opportunity of meeting the directors, and as the learned author Gower in his book The Principles of Modern Company Law (3rd ed.) at p. 475 puts it:

"... for it is the one occasion when they can be sure of having an opportunity of meeting the directors and of questioning them on the accounts, on their reports, and on the company's position and prospects ... Most of these things could, of course, be done at an extraordinary meeting, but the members who want to raise these matters may not be able to insist upon the convening of an extraordinary meeting. The annual general meeting is valuable to them because the directors must hold it whether they want to or not."

In the instance case, at this meeting, although the questioning and probing of these reports were the prerogative of the members, they felt the elections were more important. Instead of insisting on having them by the next adjourned date or next extraordinary meeting, the record reveals their pleasure. They rather suspended same, and even empowered the incoming administration to look into these matters on their behalf. I would not think this stand or position they took by resolution is ultra vires and so were null and void.

But, assuming I am in error and the position of the law is that there ought to have been these reports and they ought to have been considered by the members present, and that this requirement of the law can never be waived, the most important matter is that neither the A.G.M. that was held nor the other business held would be invalidated or nullified because these other matters were not considered. The natural question is why? First, nothing in Act 179 shows that the consideration of the accounts, directors' reports, etc. is a condition precedent to the holding of an A.G.M. or to the holding of elections, another important business of an A.G.M. Section 149(7) reads:

"149. (7) If default is made in holding an annual general meeting of the company in accordance with subsection (1) of this section, or in complying with any directions of the Registrar under subsection (4) of this section, or in complying with subsection (2), (5) or (6) of this section, the company, and every officer of the company who is in default shall be liable to a fine not exceeding fifty pounds."

While it is true subsection (7) makes it a criminal offence where section 149(1) is not complied with, I see nothing showing that a meeting held without the consideration of the reports and accounts is no meeting, in other words that it is null and void. In any case, section 162(1) which I quote would confirm my finding:

“162. (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the regulations of this Code, the Court may, on the application of any director or member of the company, or of the Registrar, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit; . . .”

In my opinion, if it were the intention of the law-makers that any meeting held without the consideration of the account is negated, they would have expressly stated that fact. I do not think they would have vested members with the power to apply to the courts to order a meeting to make up for what is lacking. The point I wish to make is that this section also, quite apart from section 150 which empowers directors to call for extraordinary general meetings, would all show that an A.G.M. itself is not invalidated because all the relevant reports and documents were not laid before it. In my view therefore, the resolutions that the elections be held in spite of the fact that the accounts have not been considered, is not null and void. Indeed the elections themselves are independent of any other matters to be considered at an A.G.M. and the sole ground that the accounts were not gone into would not invalidate the elections. It would follow that the plaintiffs would not be entitled to relief (3) of their claim.”

The convening of an annual general meeting by the company is mandatory unless dispensed with in accordance with the Act. The Act provides for only one instance where a company may not hold an annual general meeting in a year. The Act permits the members and auditors to dispense with holding an annual general meeting in a particular year by written resolution signed by the auditors of the company and all members of the company entitled to attend the annual general meeting.⁷⁰³ Not all members are entitled to sign the written resolution to dispense with an annual general meeting but only those who are entitled to attend the annual general meeting. Therefore, if a member is prohibited from attending an annual general meeting, for example, for failing to pay for the shares taken, the consent of such member is not required to the written resolution to dispense with the annual general meeting. The consent of the auditor of the company is also required for the annual general meeting to be dispensed with. The written resolution to dispense with an annual general meeting must be delivered to the Registrar for registration within twenty-eight days of the date of resolution.⁷⁰⁴

⁷⁰³ Section 157(5) of Act 992.

⁷⁰⁴ Section 157(8) of Act 992.

The Act provides that “...a company shall...” hold an annual general meeting.⁷⁰⁵ The person responsible for holding an annual general meeting is thus the company. However, that begs the question as to who acts on behalf of the company in doing so. The directors of the company have the duty to hold an annual general meeting of the company. Even though the general meeting is a meeting of members, the directors must act on behalf of the company in holding the annual general meeting. Where the directors fail to hold the annual general meeting, the Act empowers the Registrar to either hold or direct the holding of the annual general meeting.⁷⁰⁶ The Registrar may act on her own or upon being petitioned by a member or officer of the company.⁷⁰⁷ The Registrar thus has the power to assume the powers of directors as it relates to the annual general meeting by calling and conducting an annual general meeting. Alternatively, the Registrar may direct the directors to call the annual general meeting. If pursuant to the default of the company to hold an annual general meeting, the Registrar holds an annual general or pursuant to her order an annual general meeting is held but not in the year of default, the annual general meeting so held is counted as an annual general meeting of the year of default and not the year in which the annual general meeting is held.⁷⁰⁸ However, the members holding that annual general meeting may opt for the annual general meeting to be counted as the annual general meeting of the year in which the meeting is held, and not for the year of default.⁷⁰⁹ The resolution of members opting for the annual general meeting to be counted for the year in which it is held rather than the year of default must be delivered to the Registrar for registration.⁷¹⁰

In order to ensure the company complies with the mandatory requirement to hold an annual general meeting in accordance with the requirements of the Act, the Act imposed administrative penalties on the company and officers who are in default. The administrative penalties are payable where the company fails to hold the annual general meeting on its own or upon direction by the Registrar or fails to comply with requirements relating to the dispatch of financial statements and reports prior to holding the annual general meeting, or submit the resolutions required to be registered to the Registrar within the time indicate.

A member or shareholders, or an officer of a company may also petition the court for an order for the company to convene an annual general meeting. Section 162 of Act 992 provides:

“(1) If for a good reason it is impracticable to call a meeting of a company in a manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the constitution of the company, the Court may on the application of a director, a member of the

⁷⁰⁵ Section 157(1) of Act 992.

⁷⁰⁶ Section 157(6) of Act 992.

⁷⁰⁷ Ibid.

⁷⁰⁸ Section 157(7) of Act 992.

⁷⁰⁹ Ibid.

⁷¹⁰ Section 157(8) of Act 992.

company or the Registrar order a meeting of the company to be called, held and conducted in the manner that the Court considers fit.

- (2) Where that order is made, the Court may give any ancillary or consequential directions that the court considers expedient.*
- (3) A meeting called, held and conducted in accordance with the order is, for the purpose of this Act, a meeting of the company duly called, held and conducted."*

The member, director or the Registrar can apply to the Court to order the convening and conducting a general meeting of the company where for good reason it is impracticable for an annual general meeting to be called and conducted according to the Act and the constitution of the company. The Court is permitted to make such orders where there is a good reason why the meeting cannot practicably be called and conducted in the manner prescribed by the constitution of the company can be called, held and conducted.

12.3 Extraordinary General Meeting (EGM)

Section 157 of Act 992 which deals with the annual general meeting permits the company to hold additional meetings to the annual general meeting. These additional general meetings are extraordinary general meetings. It should be noted that the extraordinary general meetings need not be held only after the holding of an annual general meeting. Any number of extraordinary general meetings may be held before an annual general meeting and after an annual general meeting. It is also often seen in practice that these general meetings are termed emergency general meetings. Technically, there is nothing like emergency general meetings under Act 992. The emergency nature of the general meeting has nothing to do with whether it is an annual general meeting or an extraordinary general meeting. Broadly speaking, extraordinary general meetings cover all general meetings that have not been specifically designated as an annual general meeting of the company. Section 158 of Act 992 provides for Extraordinary General Meetings. The section provides:

- "(1) An extraordinary general meeting may be convened by the directors whenever the directors think fit.*
- (2) If at any time there are not within the Republic sufficient directors capable of acting to form a quorum, a director may convene a meeting.*
- (3) An extraordinary general meeting of a private company may be requisitioned in accordance with section 299 and an extraordinary general meeting of a public company may be requisitioned in accordance with section 324."*

As stated, a company can hold as many extraordinary general meetings as it deems necessary in addition to holding an annual general meeting. The Act permits directors to convene extraordinary general meeting whenever the directors deem it necessary for the members or shareholders of the company to meet to act for or take decisions on behalf of the company. The directors, therefore,

retain the discretion to convene or not convene an extraordinary general meeting. However, since the general meeting is for members or shareholders to act or decide on behalf of the company, the Act permits members or shareholders to also requisition for an extraordinary general meeting. That is a formal written request by members or shareholders to the company to convene a general meeting.

The decision of directors to convene an extraordinary general meeting must be taken in the manner all other decisions of directors must be taken as provided in section 188 of Act 992 and the constitution of the company. Per section 188(2) of the Act, directors must act in a meeting or by a written resolution of the directors. In a meeting, the directors can only act where there is a quorum and the decision must be by a simple majority of directors voting in the meeting provided there is a quorum. The directors may also make a decision by written resolution signed by all the directors. A decision to convene an extraordinary general meeting must comply with the requirements for decision making of the board of directors. However, the Act permits directors to act in convening an extraordinary general meeting even where there is no quorum provided the reason for not attaining the quorum is the absence of other directors from the jurisdiction.⁷¹¹ Directors may act without a meeting through a resolution in writing signed by all the directors.⁷¹² A decision to convene an extraordinary general meeting may therefore be made by a resolution in writing signed by all the directors.

Members or shareholders of a private company or public company may requisition the convening of an extraordinary general meeting by the directors in accordance with sections 299 and 324 of the Act respectively.⁷¹³ Where members or shareholders of a company are of the view that it is necessary for the members or shareholders to meet, but the directors refuse or fail to call an extraordinary general meeting as they do not think it fit to do so, members or shareholders have the right to requisition for the extraordinary general meeting. Section 299 of Act 992 which provides for the rights of members or shareholders of a private company to requisition for an extraordinary general meeting provides:

- “(1) The directors of a private company, despite a provision in the constitution of that private company, shall duly convene an extraordinary general meeting of the company on the requisition of*
- (a) two or more members of the company or a single member holding not less than one-tenth of the shares of the company; or*
 - (b) in the case of a company limited by guarantee, one-tenth of the total voting rights of the members of the company.*

⁷¹¹ Section 158(2) of Act 992.

⁷¹² Section 188(2)(j) of Act 992.

⁷¹³ Section 158(3) of Act 992.

- (2) The requisition shall state the nature of the business to be transacted at the meeting and shall be signed by the requisitionists and sent to or delivered at the registered office of the company.*
- (3) If the directors do not, within seven days from the date of receipt of the requisition at the registered office of the company, proceed duly to convene a meeting for a date not later than twenty-eight days after the receipt of the requisition, the requisitionists or any of them may themselves convene a meeting, but a meeting so convened shall be held within four months from that date.*
- (4) The reasonable expenses incurred by the requisitionists by reason of the failure of the directors to duly convene a meeting shall be repaid to the requisitionists by the company out of the fees or other remuneration of the directors who were in default.*
- (5) For the purposes of this section, the directors have not proceeded duly to convene a meeting if they do not, within seven days after the receipt of the requisition at the registered office, cause notices of the meeting, to transact the business specified in the requisition, to be given in accordance with paragraph 1 to 3 of the Eighth Schedule."*

A similar provision is provided in relation to a public company under Section 324 of Act 992 as follows:

- "(1) The directors of a public company, despite anything in the constitution of that company, shall on the requisition of members of the company holding not less than one-twentieth of the shares of the company, or, in the case of a company limited by guarantee, a member of the company representing not less than one-twentieth of the total voting rights of the members of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.*
- (2) The requisition shall*
 - (a) state the nature of the business to be transacted at the meeting, and*
 - (b) be signed by the requisitionists and sent to or deposited at the registered office of the company.*
- (3) The requisition may consist of several documents in the like form each signed by one or more requisitionists.*
- (4) If the directors do not, within twenty-eight days from the date of receipt of the requisition at the registered office of the company, proceed duly to convene a meeting for a date not later than twenty-eight days after the receipt, the requisitionists, or any of them, may themselves convene a meeting but a meeting so convened shall not be held after the expiration of four months from that date.*

- (5) *The reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and the sum of the money so repaid shall be retained by the company out of the fees or other remuneration of any of the directors who were in defaults.*
- (6) *For the purposes of this section, the directors have not proceeded duly to convene a meeting if they do not, within twenty-eight days of the receipt of the requisition at the registered office, give notice of the meeting to transact the business specified in the requisition in accordance with paragraphs 1 to 3 of the Eighth Schedule."*

Members or shareholders, therefore, have the right to requisition for an extraordinary general meeting notwithstanding a provision in the constitution to the contrary. However, not all members or shareholders can validly requisition for an extraordinary general meeting. For a private company with shares, a single shareholder requisitioning for an extraordinary general meeting must hold at least ten percent of the issued shares. If the requisitionists are two or more shareholders, no share qualification is required. For a private company limited by guarantee, the requisitionist whether one or more members must have ten percent of the voting rights of the members. For a public company with shares, the requisitionist, whether one or more shareholder, must have five percent of the total issued shares of the company. For a public company limited by guarantee, the requisitionist, whether one or more of the members, must also hold five percent of the voting rights of the total membership.

The requisition as stated is a formal notice to the company to convene an extraordinary general meeting. The Act requires the members or shareholders requisitioning for the extraordinary general meeting to state the nature of the business to be transacted at the extraordinary general meeting.⁷¹⁴ The requisition must be signed by the members or shareholders requisitioning the meeting.⁷¹⁵ The requisition must be sent or delivered to the registered office of the company.⁷¹⁶ The requisition submitted may be a single document signed by the requisitionists or different documents in the same form signed by the requisitionists. For the purposes of determining the requirement of qualification of shareholders or members in terms of percentage of shareholder or voting rights respectively, it is submitted that where different documents are submitted, the totality must be considered provided the requisition consists of similar form but not necessarily on same nature of business.

On receipt of the requisition at the registered office of the company, the directors have seven and twenty-eight days for a private company and public company respectively to proceed to duly

⁷¹⁴ Sections 299(2) and 324(2)(a) of Act 992 in relation to a private company and a public company respectively.

⁷¹⁵ Sections 299(2) and 324(2)(b) of Act 992 in relation to a private company and a public company respectively.

⁷¹⁶ Ibid.

convene an extraordinary general meeting.⁷¹⁷ That is for a private company, the directors must send out the notice for an extraordinary general meeting within seven days of receipt of the requisition at the registered office of the company, whilst for a public company, the notice for the extraordinary general meeting must be sent within twenty-eight days. In sending the notice, the date of the extraordinary general meeting must not be more than twenty-eight days from the date of receipt of the requisition.⁷¹⁸ This interpretation may, however, produce an absurd result. It will mean that for a public company, when the requisition is received in the registered office, the directors have twenty-eight days to decide and send out notices for an extraordinary general meeting. On the twenty-seventh day, the directors in sending out the notice for the extraordinary general meeting must hold the meeting on the next day, which is the twenty-eighth day. Sections 299(3) and 324(4) of Act 992 are substantially a reproduction of sections 271 and 297 of the repealed Companies Act, 1963 respectively where the word “thereafter” was used in relation to the period when the extraordinary general meeting must be held. The confusion in sections 299 and 324 of Act 992 must be in relation to the wrong interpretation placed on “thereafter”. It is suggested that the right interpretation on when the directors must convene the extraordinary general meeting upon receipt of the requisition must be twenty-eight days after sending the notice of the extraordinary general meeting. The notice of the extraordinary general meeting must be sent within seven or twenty-eight days for a private company or public company respectively of receipt of the requisition. The meeting must then be held within twenty-eight days of the notice in the case of both private and public companies.

Where the directors fail to convene the extraordinary general meeting by sending out the notices within the seven or twenty-eights for a private company or public company respectively to convene a meeting within twenty-eight days of the date of the notice, the Act permits the requisitionists or any of them to convene the meeting. The requisitionists must convene the meeting within four months of the date of the requisition.⁷¹⁹ The reasonable expenses incurred by the requisitionists in convening the meeting is recoverable from the company.⁷²⁰ The amount paid by the company must be set off against fees and remuneration due to the directors in default.⁷²¹ Therefore, whilst there is no administrative penalty imposed on the company and directors in default, the directors are indirectly punished through deduction of the expenses from their remuneration which would not have been the case if the directors convene the extraordinary general meeting upon receipt of the requisition. It should be noted that the directors are deemed to fail to convene the extraordinary general meeting if the directors fail to send notice convening an extraordinary general meeting within seven days for a private company or twenty-eight days for a public company.⁷²²

⁷¹⁷ Sections 299(3) and 324(4) of Act 992 in relation to a private company and a public company respectively.

⁷¹⁸ *Ibid.*

⁷¹⁹ Section 299(3) and 324(4) of Act 992 in relation to a private company and a public company respectively.

⁷²⁰ Sections 299(4) and 324(5) of Act 992 in relation to a private company and a public company respectively.

⁷²¹ *Ibid.*

⁷²² Sections 299(5) and 324 of Act 992 in relation to a private company and a public company respectively.

*In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others*⁷²³ the Court stated as per Taylor J @ pgs. 492 and 493 that:

"The uncontroverted facts contained in the complaint of the applicant raise several issues but for my present purpose I think two are inter alia of immediate significance. The first is who is entitled to call an extraordinary general meeting of the company. The second is what length of notice is necessary to make the meeting a legal one. The answer to the first question is contained in the provisions of section 271 of Act 179 which provides:

- "271. (1) The directors of a private company, notwithstanding any provision in its Regulations shall, on the requisition of any two or more members of the company or a single member holding not less than one-tenth of the shares of the company, or, in the case of a company limited by guarantee, one-tenth of the total voting rights of all members, forthwith proceed duly to convene an extraordinary general meeting of the company.*
- (2) The requisition shall state the nature of the business to be transacted at the meeting and shall be signed by the requisitionists and sent to or deposited at the registered office of the company.*
- (3) If the directors do not, within seven days from the date of receipt of the requisition at the registered office of the company, proceed duly to convene a meeting for a date not later than twenty-eight days thereafter, the requisitionists or any of them may themselves convene a meeting but any meeting so convened shall not be held after the expiration of four months from the said date.*
- (4) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any fees or other remuneration of such of the directors as were in default.*
- (5) For the purposes of this section, the directors shall be deemed not to have proceeded duly to convene a meeting if they do not, within seven days after the receipt of the requisition at the registered office, cause notices of the meeting to transact the business specified in the requisition to be given in accordance with sections 152 to 155 of this Code."*

It is I think clear from this provision that only the directors of the company are entitled to convene an extraordinary general meeting. A shareholder qua

⁷²³ [1979] GLR 477.

*shareholder without any prior requisitioning of the directors in terms of section 271 of the Code, has no statutory right to convene an extraordinary general meeting. All that a shareholder as a member can do is to prevail on the directors by requisition to convene one and it is only after failure to secure one that the member may then convene one in accordance with the provisions of section 271(3) of the Code. In this particular case the meeting was convened by the secretary apparently on his own without any directive from the directors. It seems to me very essential that secretaries of companies should be alive to the nature of their duties and responsibilities. In *George Whitechurch Ltd. v. Cavanagh* [1902] A.C. 117 at p. 124, H.L., Lord Macgathen described these duties as "of a limited and of a somewhat humble character" and the great common law judge Lord Esher M.R. in *Barnett, Hoares, & Co. v. South London Tramways Co.* (1887) 18 Q.B.D. 815, C.A. spelt out the status of a company secretary. He said at p. 817:*

"A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can anyone assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry ..."

*Quite clearly by the provisions of section 271 of Act 179 the secretary of the N.E.C. has no legal power to summon an extraordinary general meeting on his own authority. This has in fact been the case under the English Companies Act, 1900 (63 & 64 Vict., c. 48), s. 13 as was held in *In re State of Wyoming Syndicate* [1901] 2 Ch. 341 and our Companies Code merely codified the English position."*

*Politis & Another v. Plastico Ltd (No. 2)*⁷²⁴ - Plastico Ltd. was formed in June 1963 by Dr. Dimitra Politis and George Michaelides who were the only shareholders and directors of the company. In October 1966, Dr. Politis died in Greece. On 17 October, Michaelides, the surviving shareholder director, purporting to hold a meeting of the company with the secretary in attendance appointed Mr. A. C. Kuma as a director of the company and allocated to him one of his, Michaelides' shares. No notices were issued for the meeting and there was no quorum at the meeting as required by the company's regulations. In relation to the meeting, Amissah J.A. stated @ pg. 27 as follows:

"On these facts, Mr. Moore on behalf of the applicants contended that such a meeting had to be summoned in accordance with sections 150 and 271 of the Companies Code, 1963 (Act 179), but that this was not done. For our purposes the provisions which need mention are in subsections (2) and (5) of section 271. Section 271(2) requires that the requisition for a meeting of the company which must state the nature of the business to be transacted must be signed by the requisitionists. Section 271(5) requires notices of the meeting to transact the business specified in the requisition to be given. According to counsel's submissions

⁷²⁴ [1967] GLR 24.

there is nothing in the minutes of the meeting or anywhere else to show the member at whose instance the meeting was called. Neither were notices issued. Against this, counsel for the company (with whose arguments Mr. Kuma who appeared in person associated himself) submitted that the question of notice did not arise when there was only one person to transact the business of the meeting. At the time of the meeting there was no notification to the company that there was a legal personal representative of the deceased, and even if there was, he need not have been notified as he was not a member of the company. The meeting, counsel for the company submitted, further was not a general meeting of the company but an extraordinary meeting of the surviving director. In my view, the meeting, whatever it was, was not a meeting of the company. It lacked the required notice even though this is explainable on the ground that there was no one else to give the notice to. Further article 5 of the articles of association of the company requires that two should form a quorum at a company meeting. If this purported to be a company meeting for the transaction of company business, it was void because there was no quorum."

In *Asafu-Adjaye v. Agyekum and Others*⁷²⁵ - in an action for oppression by a shareholder-director, the director applied and was granted an injunction restraining the holding of a general meeting by the members under section 217 of Companies Act, 1963 (Act 179). On appeal, it was held that section 217 of the Companies Code, 1963 (Act 179) was a useful weapon to restrain a company by an injunction from doing certain acts or declaring such acts to be of no effect. But the scope of those provisions was clear. They could only be effectuated if the act, transaction or resolution complained of was illegal or beyond the power or capacity of the company or infringed any provisions of its regulations. There was nothing irregular or unlawful about the notice convening the meeting of 6 January 1984. It complied with section 185(2) of the Code as to the requisite notice of 35 days. Apart from the mandatory requirement to call an annual general meeting, the power to call general meetings was a fiduciary discretion vested in directors of a company or in any member who requisitioned it. Where directors had properly called for a meeting of the shareholders, it would be contrary to the principles on which the court acted in controlling persons in the exercise of fiduciary powers to make at the instance of a member (or some only of the members) of the company an order directing the directors not to exercise their discretion in calling the meeting. In the absence of any illegality or of any infraction of the company's regulations it was wrong to stigmatise the proposed meeting by declaring it null and void. Osei-Hwere JA stated @ pgs. 391 to 392 that:

"But the scope of these provisions are clear. They can only be effectuated if the act, transaction or resolution complained of is illegal or beyond the power or capacity of the company or infringes any provisions of its regulations. On what basis then did the court act when it declared the meeting called for 6 January 1984 as null and void? There was nothing irregular or unlawful about the notice convening the

⁷²⁵ [1984-86] 1 GLR 382.

meeting. It complied with section 185(2) of Act 179 as to the requisite notice of 35 days. Counsel for the respondent could not point at any illegality or irregularity of the proposed meeting except that the meeting was to be held at the chairman's house at Achimota and not on the company's premises. The venue of the general meeting of a company at a place other than the company's premises can in no way strike at the essential validity of the meeting because section 151 of Act 179 simply says that all general meetings must be held in Ghana, unless the company's regulations otherwise provide.

Apart from the mandatory requirement to call an annual general meeting, the power to call general meetings is a fiduciary discretion vested in directors of a company or in any member who requisitions it. Where directors have properly called for a meeting of the shareholders, it would be contrary to the principles on which the court acted in controlling persons in the exercise of fiduciary powers to make at the instance of a member (or some only of the members) of the company an order directing the directors not to exercise their discretion in calling the meeting. In the absence of any illegality or of any infraction of the company's regulations it was wrong to stigmatise the proposed meeting by declaring it null and void. Put shortly, the respondent failed to establish any of those matters as to enable him to invoke the equitable jurisdiction of the court to grant the injunction and the declaration under section 217."

A member, director or Registrar can petition the Court to call and conduct an extraordinary general meeting of the company pursuant to section 162 of the Act. Section 162 of Act 992 provides:

"(1) If for a good reason it is impracticable to call a meeting of a company in a manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the constitution of the company, the Court may on the application of a director, a member of the company or the Registrar order a meeting of the company to be called, held and conducted in the manner that the Court considers fit."

The ground for the court to exercise the discretion to order a general meeting is that it is impracticable due to good reason for the general meeting to be called or conducted in accordance with the Act. The application must be by any director, member or the Registrar.

*Re Sticky Fingers Restaurant Ltd*⁷²⁶ - the company, which ran a successful restaurant business, had an issued share capital of 100 ordinary shares of which 66 were held by W and 34 by M. W and M were the only directors of the company and were in dispute. No effective meetings of the board or the company could be held because of the quorum provisions in the company's articles and M's refusal to attend any such meetings. The restaurant was managed by a manageress and L was

⁷²⁶ [1992] BCLC 84.

authorised to sign cheques required in the course of business. Board meetings were needed to deal with the accounts, statutory returns and VAT, amongst other things. M claimed to be entitled pursuant to two agreements to control the day to day running of the company; and when W complained of financial irregularities and sought M's resignation as a director, M presented a petition under section 459 of the Companies Act 1985 seeking an order that W purchases his shares. In these proceedings, W sought an order under section 371 of the 1985 Act convening a meeting at which one member would constitute a quorum for the purpose of considering resolutions for the appointment of two new directors. It was held that M's refusal to attend meetings should not prevent the company from dealing with its accounts, VAT, etc. The discretion under section 371 of the 1985 Act should be exercised to enable an effective board to be brought into being but not to give W the opportunity of harming M pending the outcome of the section 459 petition by causing him to be dismissed as a director or excluded from participation in the company's affairs. Accordingly, the order sought would be made subject to the proviso that each of the directors appointed pursuant to it would be restrained from acting as a director until he had delivered to M's solicitors an undertaking that pending the outcome of the petition, he would not exercise his rights to exclude M from his directorship; or interfere in M's day to day conduct of the business; or effect any alteration in the constitution or capital of the company. Mervyn Davies J stated as follows:

"I now set out s 371 of the Companies Act 1985, so far as is material:

'Power of court to order meeting

- (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting in manner prescribed by the articles or this Act, the court may, either of its own motion or on the application – (a) of any director of the company, or (b) of any member of the company who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in any manner the court thinks fit.*
- (2) Where such an order is made, the court may give such ancillary or consequential directions as it thinks expedient; and these may include a direction that one member of the company present in person or by proxy be deemed to constitute a meeting ...'*

I turn to the consideration of the discretion conferred by s 371. It seems to me that discretion ought to be exercised so as to enable an effective board to be brought into being. It cannot be right that Mr. Mitchell's quorum tactics should be allowed to stop the company having its accounts, VAT difficulties, etc. dealt with. It may be many months before the s 459 petition is heard. On the other hand, it would not be right for Mr. Wyman, by using s 371 for the purposes of constituting an effective board, to be given the opportunity of harming Mr. Mitchell, e.g. by causing him to be dismissed as a director, or by being excluded from any participation in the affairs of the company pending the outcome of the petition proceedings.

I think the right course to take is to accede to paras 1, 2 and 2a of the application (see above), but to qualify the order in this way. The order will provide that any director appointed pursuant to the order will be restrained from acting as such director, unless and until there is delivered to Mr. Mitchell's solicitors an undertaking signed by the director to the effect that, pending the outcome of the s 459 petition proceedings, he will not (a) at any meeting vote in such fashion as to dismiss Mr. Mitchell from his directorship, or to exclude him from his rights and duties as such director, or to diminish such rights or duties in any way, and (b) interfere with Mr. Mitchell's day to day conduct of the restaurant business so long as Mr. Mitchell conducts such business as he has done in the past, and (c) vote to effect any alteration in the constitution or capital of the company."

*Adryx Mining and Metals Ltd. v. Ashanti Goldfields Company Ltd.*⁷²⁷ – the applicants, whose total shareholding represented 4.2% of the issued share capital of the respondent company, applied to the Court to invoke the jurisdiction of the High Court under section 162 of the Companies Code 1963, Act 179 for an order for convening an extraordinary general meeting of the respondent company for the purpose of passing ordinary resolutions for the election of a new board of directors and the removal of the existing one. The respondents challenged the membership of all the applicants, except the 2nd applicant. As of 30/12/98, the 1st applicants were members of Ashanti Goldfields Company Ltd and had total shares of 2,142,540 per share certificates numbers 0007135 and 0007136 of Ashanti Goldfields Company Ltd. The shares were subsequently transferred under the Global Depository Systems and registered in the nominee's name in the International Share Register. It was held per RK Apaloo J. that:

"S. 162 (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the Regulations or this Code, the Court may, on the application of any director or member of the company, or the Registrar order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit; and where any such order is made may give such ancillary or consequential directions as it thinks expedient.

(2) Any meeting called, held and conducted in accordance with an order under the foregoing subsection shall for all purposes be deemed to be a meeting of the company duly called, held and conducted".

The Section itself gives power to the Court to make an order for a meeting and contains the ingredients or conditions for making such an order. The conditions are: (1) It must be impracticable to call a meeting; (2) And/or to conduct the meeting of the Company in the manner prescribed by the Regulations or this Code. Section 162 further identifies persons who are entitled to come to Court for the order. These are

⁷²⁷ [09/02/00] SUIT NO. MISC. 32/2000.

Any Director, or member of the Company or the Registrar. To fit into the purview of Section 162, the Applicants claim they are members and that it is impracticable to call a meeting ... That meeting to all intents and purposes is an extraordinary general meeting. The Annual General Meeting has been provided for in Section 149(1) and any general meeting convened for consideration of resolutions at which members are entitled to attend and vote is held to be an extraordinary general meeting. ...

Having declared the 2nd Applicants as members of Ashanti, I shall proceed now to consider the meaning of the phrase "impracticable to call a meeting". The word "impracticable" has received judicial interpretation in other Courts exercising analogous jurisdiction as ours and both Counsel have been good enough to furnish me with authorities on the subject. In the Edinburgh Workmen's Houses Improvement Company [1935] Session cases 56, where the Scottish Court of Session faced with the same wording, ordered a meeting of the company for special resolutions to be proposed and passed, the facts disclose that between 1875 and 1896, the Company had purchased certain of its own shares which was ultra vires of the Company to do. Two Extraordinary General Meetings of the company were convened to be held the same day for the purpose of considering and passing special resolutions. The quorum necessary for the transaction of business at these meetings was thirteen shareholders. Only two Judgments of the Superior Courts 8 Copyright DataCenta Ltd. shareholders were in fact present at the meetings but they proceeded to pass the resolutions. All the proxies received, 21 in number were in favour of the second resolution. The Petitioner prayed the Court to order a meeting to consider the resolutions and that the necessary quorum should be only 5 shareholders personally present. In Re: Whitchurch Insurance Consultants Ltd. [1993] BCLC 1359, the two directors were husband and wife whose personal and business relationship had broken down and therefore, the two could not meet at an extraordinary general meeting to consider a resolution removing the wife as a director. The Court held that it was impracticable to convene a meeting. It has been urged before me that the words in Section 162 must be given their natural meaning and that if the law maker had wanted a condition precedent to exist before an application for the Court order, the law maker would have stated so clearly ... I hold further that "impracticable" used in Section 162 of the Code need not necessarily be given a restrictive meaning, limited only and associated with a failure to convene an EGM. I am of the view that the word must be interpreted liberally to give effect to its natural meaning. Impracticable means incapable of being done according to Chambers 21st Century Dictionary.

From the foregoing, it is my opinion that Professor Gower wanted Ghana to depart from the English tradition and create new avenues for ourselves. He indeed

recognised the power of the Court to order a meeting but realised how preposterous it will appear if a Court on its own makes an order to convene an EGM. He added that he wanted the Applicants for the order "to be done by as wide a range of persons as possible" and the applicant could be "any member" to quote his words. My conclusion therefore is, that a member qua member can apply for the order. There are no qualifications attached to the membership. I shall accordingly reject the argument that for an Applicant to come before this Court for this relief, he must qualify in terms of Section 271 to call or requisition an extraordinary general meeting. In my view, a qualification of this nature would have been added to the text simply by words such as "subject to the qualification contained in Section 271 a member may apply to the Court.

...The Applicants believe the present Board as constituted cannot handle the crises even though the Respondents claim to be skilful and competent. These and other concerns of the Applicants articulated in this Court must be considered by the Court. Counsel for the Respondents has argued that the Court has no business running Ashanti. That is of course true. Judges are not businessmen and therefore cannot pretend to be running any business concern. A shareholder has expressed reservations about how competently a company he has sunk in his money is being run and I believe, he ought to be heard and given the appropriate forum to address his concerns. That forum in my view is the EGM. According to the Applicants, it is this same Board that is handling the crises and since they claim they are competent, the Directors may not be too keen to convene an EGM. In any case, the Directors may not convene an EGM at all as provisions have been made for an AGM on 26/4/2000. In my view, as a distressed company requiring assistance now and urgently, Ashanti may not be Ashanti as known today by 26/4/2000 if the present crises continues without a shift in policy. I find as a fact based on the foregoing that it is impracticable to call a meeting of Ashanti in any manner in which meetings of that company may be called and pursuant to the powers vested in the High Court under Section 162 of the Companies Code, I order that an Extraordinary General Meeting of Ashanti be called and convened in Accra within 21 days hereof to consider the following resolution."

The section gives the Court the discretion to order or convene an extraordinary general meeting. Since this is a discretion given to the court, the discretion will be exercised by the court looking at the particular circumstances of each case. It is, therefore, not mandatory for the court to order or convene an extraordinary general meeting once it is established to be impractical to call or conduct a meeting in the manner in which the meeting is to be called or conducted. The decision of the court is based on consideration of all the circumstances.

12.4 Mechanics for convening and conducting general meetings

The Companies Act, 2019 regulates in detail all aspect of a general meeting. The first grounds for a person unhappy or aggrieved by a decision of members or shareholders of a company in a general meeting is to challenge the validity of the general meeting as to whether it was convened and conducted in compliance with all the provisions of the Act. It is, therefore, important that in convening and conducting a general meeting, the provisions of the Act are strictly adhered to unless such provisions are expressly modified in the constitution of the company, and such modification is permitted by the Act. Section 169 of Act 992 provides that *“Except as otherwise provided by the constitution of a company, the provisions specified in the Eighth Schedule shall govern the proceedings at meetings of a company except to the extent that, the registered constitution of the company makes provision for the matters that are expressed in that Schedule to be subject to the registered constitution of the company.”* The principal document that regulates general meetings of a company is the Act. The Act permits the constitution of a company to modify some of the rules in the Act on general meetings. Such modifications as expressly stated in the constitution of the company will override the provisions of the Act, only where the Act expressly permits that modification.

Act 992 provides for rules on convening general meetings and the requirements of notices. The Act also provides for rules on conducting a general meeting including voting and decision making at the meeting and provides for keeping minutes of such meetings. The requirements under the Act on convening and conducting a general meeting is discussed. It should be noted that unless otherwise expressly provided, the requirements apply to both an annual general meeting and an extraordinary general meeting and relate to both private and public companies.

12.4.1 Venue of general meetings

Section 159 of Act 992 provides for where members of a company incorporated under the Act can hold their annual general meeting. Section 159 of the Act provides that *“Unless the constitution of a company otherwise provides, the general meetings shall be held in the Republic.”* Per the Act, all general meetings must be held in Ghana unless the constitution otherwise provides that meeting can be held outside Ghana. The registered constitution of the company need not state a specific jurisdiction where the members may meet but must only provide that the meeting can be held outside Ghana and indicate how such venue is to be determined. However, it is advisable to be expressly prescriptive in the constitution of the company to avoid a dispute over choice of venue.

In *Asafu-Adjaye v. Agyekum and Others*⁷²⁸, Osei-Hwere JA stated in relation to the venue for a general meeting as follows:

⁷²⁸ [1984-86] 1 GLR 382.

“Counsel for the respondent could not point at any illegality or irregularity of the proposed meeting except that the meeting was to be held at the chairman’s house at Achimota and not on the company’s premises. The venue of the general meeting of a company at a place other than the company’s premises can in no way strike at the essential validity of the meeting because section 151 of Act 179 simply says that all general meetings must be held in Ghana, unless the company’s regulations otherwise provide.”

Related to the above, is whether the requirement for a meeting to be held in Ghana or outside Ghana when permitted by the constitution restricts general meetings to physical meetings. In other words, can a valid general meeting be a telephone or audio-visual meeting? The Act is silent on this. However, the permission granted under the Act for a company to hold general meetings outside the jurisdiction can be extended to audio-visual meetings. Such a meeting must be permitted by the constitution of the company. The constitution must, therefore, provide for holding general meetings via audio-visual means without necessarily having members physically present at the same location. In that instance, the protocols on the identification of members present in the meeting must be clearly set out and proper security measures provided to avoid authorised access to the general meeting. It is important to emphasise that such an audio-visual meeting must still satisfy all the requirements of a general meeting.

*Byng v. London Life Association*⁷²⁹ - in this case, a meeting was held at a venue that could not accommodate all the members of the company. The arrangement was made for an audio-visual link for members who could not enter the meeting room. In an action challenging the validity of the meeting, it was argued that the definition of a meeting should be restricted to physical face to face meeting. On that issue, the Court of Appeal per Sir Nicolas Browne-Wilkinson V-C held @ pgs. 564 to 565 as follows:

“Was there a meeting?

The first difficulty is to identify what, if anything, was the meeting. Was it the assembly of the members in the cinema alone (from which all those in the overflow rooms and foyer were excluded) or was it the conglomerate assembly of those in the cinema plus those in the overflow rooms and foyer?

Counsel’s first submission for the plaintiff under this head was made with a view to showing that the conglomerate assembly in the cinema, the overflow rooms and the foyer could not constitute a meeting. He submitted that for there to be a meeting at all everyone must be in the same place, face to face. If this submission were correct, even if the audio-visual links had worked perfectly, there would still have been no meeting at the Barbican on 19 October since all the members attending would not have been face to face but scattered between different rooms. In support

⁷²⁹ (1989) 1 All ER 560; [1990] 1 Ch 170.

of this submission counsel relied on the definition of the word 'meet' in the Shorter Oxford English Dictionary, viz 'To come face to face with or into the company of [another person]'. He also relies on the fact that the requirement in the Companies Act 1985, s 378 that an extraordinary resolution has to be passed at a general meeting has a long statutory history dating back to times long before the invention of audio-visual links. This, he submits, shows that a meeting for the purpose of the Act requires that everyone shall be physically present in the same room or space.

*I do not accept this submission. The rationale behind the requirement for meetings in the 1985 Act is that the members shall be able to attend in person so as to debate and vote on matters affecting the company. Until recently this could only be achieved by everyone being physically present in the same room face to face. Given modern technological advances, the same result can now be achieved without all the members coming face to face; without being physically in the same room they can be electronically in each other's presence so as to hear and be heard and to see and be seen. The fact that such a meeting could not have been foreseen at the time the first statutory requirements for meetings were laid down, does not require us to hold that such a meeting is not within the meaning of the word 'meeting' in the 1985 Act. Thus, communication by telephone has been held to be a 'telegraph' within the meaning of the Telegraph Acts 1863 and 1869, notwithstanding that the telephone had not been invented or contemplated when those Acts were passed: see *A-G v Edison Telephone Co of London Ltd* (1880) 6 QBD 244.*

I have no doubt therefore that, in cases where the original venue proves inadequate to accommodate all those wishing to attend, valid general meetings of a company can be properly held using overflow rooms provided, first, that all due steps are taken to direct to the overflow rooms those unable to get into the main meeting and, second, that there are adequate audio-visual links to enable those in all the rooms to see and hear what is going on in the other rooms. Were the law otherwise, with the present tendency towards companies with very large numbers of shareholders and corresponding uncertainty as to how many shareholders will attend meetings, the organisation of such meetings might prove to be impossible."

At the time of the outbreak of covid-19 pandemic, the Registrar issued a notice to permit companies to have general meetings through online meeting platforms such as zoom, Microsoft teams, google meet, Webex and others. Meetings cannot, therefore, be restricted to a face-to-face physical meeting. It is advised that the constitutions of companies should expressly permit such online meetings to avoid a challenge by members aggrieved by decisions taking at such general meetings.

12.4.2 Notice of general meetings

Except with an adjourned general meeting, all general meetings of a company must be convened by notice in writing to the prescribed persons under the Act. The Act specifies the period for which notice must be given, the content of the notice, the person to whom the notice must be given and the manner in which the notice must be given. Paragraph 1 of the Eighth Schedule of Act 992 provides:

“1. Notice of meeting

- (a) Meetings, other than adjourned meetings, shall be convened by notice in writing to the persons who are, under subparagraph (f), entitled to receive notice of general meetings.*
- (b) Subject to subparagraphs (c) and (d), at least twenty-one days notice, or in the case of a special resolution under section [(82)] of the [Corporate Insolvency and Restructuring Act, 2020 (Act 1015)], seven days notice inclusive of the day for which notice is given, shall be given.*
- (c) The registered constitution of a company may provide for a period of notice longer, but not shorter, than that specified in subparagraph (b).*
- (d) A meeting of a company shall, although it is called by a shorter notice than that specified in subparagraph (b), or in the registered constitution of the company, be deemed to have been duly called if it is so agreed,*
 - (i) in the case of a meeting called as the annual general meeting, by the members entitled to attend and vote at that meeting, and*
 - (ii) in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, which is a majority holding not less than ninety-five percent of the shares giving a right to attend and vote at the meeting or, in the case of a company limited by guarantee, by a ninety-five percent majority in number of the members.*
- (e) Where the members are entitled to vote only on some resolutions to be moved at the meeting and not on others, those members shall be taken into account for the purposes of subparagraph (d) in respect of the former resolutions, and not in respect of the latter.*
- (f) The persons entitled to receive notice of general meetings, are,*
 - (i) member;*
 - (ii) person on whom the ownership of a share devolves by reason of that person being a legal personal*

- representative, receiver or trustee in bankruptcy, of a member;*
(iii) director of the company; and
(iv) auditor for the time being of the company."

The general position, therefore, is that all general meetings must be convened by notice in writing to the persons listed under paragraph 1(f) of the Eighth Schedule of the Act, except with adjourned meetings.⁷³⁰ Even with adjourned meetings, paragraph 13(b) of the Eighth Schedule of the Act provides that the notice is not required only in instances the period of adjournment is not more than thirty days from the date of the original meeting. Adjournment for more than thirty days requires a notice to be given just like the original meeting.⁷³¹ The period of a notice required for a valid general meeting is a minimum of twenty-one days from the day the notice is given.⁷³² The twenty-one days is from the day the notice is given and not the date when the notice is issued.⁷³³ In counting the twenty-one days, the day on which the notice is served on the member is not counted, but the day of the meeting is counted.⁷³⁴ Gower explained the position on the same section under section 152(2) of the repealed Companies Act, 1963 as follows:

*"It seems that prima facie 21 days' notice means 'clear days- (i.e., excluding both the day of service and that of the meeting - Re Hector Whaling [1936] Ch. 208) but I have followed Art. 41 of the present Table A under which the day of the meeting can be included: see subsection (2)."*⁷³⁵

Since the purpose of the meeting is to afford an opportunity for persons given the notice to attend, it is assumed that a minimum of twenty-one days provides an adequate opportunity for such preparation to attend. However, the Act makes provision for the registered constitution of the company to provide a longer period if members or shareholders of a company are of the view that the twenty-one days' notice is not adequate. The Act prohibits a shorter notice period in the registered constitution but permits a longer notice period beyond twenty-one days.⁷³⁶ The Act, however, permits members to agree to a shorter notice period than the twenty-one days or the longer period stated in the registered constitution of the company. In the case of an annual general meeting, all members or shareholders entitled to attend and vote at the meeting must agree to the shorter notice period.⁷³⁷ There must be a unanimous agreement by members entitled to attend and vote an

⁷³⁰ Paragraph 1(a) of Eighth Schedule of Act 992.

⁷³¹ Paragraph 13(b) of Eighth Schedule of Act 992.

⁷³² Paragraph 1(b) of Eighth Schedule of Act 992.

⁷³³ Ibid.

⁷³⁴ Ibid.

⁷³⁵ Final Report of the Commission of Enquiry into the Working an Administration at the Present Company Law of Ghana (1962).

⁷³⁶ Paragraph 1(c) of Eighth Schedule of Act 992.

⁷³⁷ Paragraph 1(d)(i) of Eighth Schedule of Act 992.

annual general meeting to validly have an annual general meeting for which the notice period is less than twenty-one days or shorter than the longer period stated in the registered constitution of the company. For an extraordinary general meeting, agreement by a majority of members entitled to attend and vote at the general meeting being ninety-five percent of the shares or voting rights of the company is required to have a valid extraordinary general meeting of which shorter notice than the required twenty-one days or longer days stated in the registered constitution of the company.⁷³⁸ Impliedly, all members entitled to attend and vote at an annual general meeting can dispense with the minimum notice period, whilst ninety-five percent majority holding the shares of the company or voting right entitled to attend and vote at the extraordinary general meeting can do likewise.

In computing whether the required members entitled to attend and vote at the general meeting have agreed to dispense with the minimum notice period, the Act provides that where members are entitled to attend and vote on particular resolutions, their consent to dispense with the minimum notice period must be limited to only the matters that the members are entitled to vote on.⁷³⁹

In *In the matter of Northern Engineering Co. Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others*⁷⁴⁰, a general meeting was challenged and one of the issues to determine was on whether the length of notice is necessary to make the meeting a legal one. The court per Taylor J. stated in relation to general meetings @ pgs. 493 to 495 as follows:

"The provisions of section 150 of the Companies Code, 1963, as reproduced hereunder are in point:

- "150. (1) Extraordinary general meetings may be convened by the directors whenever they think fit.*
- (2) If at any time there are not within Ghana sufficient directors capable of acting to form a quorum, any director may convene a meeting.*
- (3) An extraordinary general meeting of a private company may be requisitioned in accordance with section 271 of this Code and an extraordinary general meeting of a public company may be requisitioned in accordance with section 297 of this Code."*

Although the meeting was called by the secretary, I shall assume for the purpose of this case that it was called by the managing director in his capacity as a director pursuant to the only relevant provisions of the Code so enabling, namely, section 150(1). At the relevant time the board of directors was made up of three persons, namely Ziblim Andan, C.K.A. Djokotoe and the applicant and under the provisions of section 200 of the Code and regulation 66 of the N.E.C. regulations the number of

⁷³⁸ Paragraph 1(d)(ii) of Eighth Schedule of Act 992.

⁷³⁹ Paragraph 1(e) of Eighth Schedule of Act 992.

⁷⁴⁰ [1979] GLR 477.

directors capable of forming a quorum is two. Mr. Ziblim Andan and Mr. Djokotoe were apparently in Ghana. Under the circumstances it seems to me that the managing director on his own had no legal authority to convene a meeting of the shareholders of the company. So whether as secretary, director or member it seems Mr. C.K.A. Djokotoe had no authority to convene the meeting.

Assuming, however, that this is merely an irregularity, does the length of the period of notice of the meeting given vitiate both the notice and the meeting? The matter would seem to be provided for in section 152 of the Code as follows:

"152. (1) Meetings, other than adjourned meetings, shall be convened by notice in writing to the persons who are, under section 154 of this Code, entitled to receive notice of general meetings.

(2) Subject to subsections (3) and (4) of this section, twenty-one days notice at the least or in the case of a special resolution under section 2 of the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180), seven days notice exclusive of the day on which the notice is served, but inclusive of the day for which notice is given, shall be given.

(3) The company's Regulations may provide for a period of notice longer, but not shorter, than that specified in subsection (2) of this section.

(4) A meeting of a company shall, notwithstanding that it is called by shorter notice than that specified in subsection (2) of this section, or in the company's Regulations, be deemed to have been duly called if it is so agreed,

(a) in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat; and

(b) in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority holding not less than ninety-five per centum of the shares giving a right to attend and vote at the meeting or, in the case of a company limited by guarantee, by a ninety-five per centum majority in number of the members:

Provided that where any members are entitled to vote only on some resolutions to be moved at the meeting and not on others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolutions and not in respect of the latter."

The notice in writing in this case dated 7 June 1977 was for a meeting scheduled for 11 June 1977. It was sent to Nairobi in Kenya outside Ghana and it was presumably despatched by airmail. Section 155 (4) and (5) of the Code provides:

- (4) Where a notice is sent by post, service shall be deemed to be effected by properly addressing, pre-paying, and posting a letter containing the notice and to have been effected at the expiration of forty-eight hours after the letter containing the same is posted.*
- (5) The letter need not be registered but where it is sent to an address outside Ghana it shall be despatched by air mail."*

There was no indication in the affidavit evidence as to the date the letter was posted, but assuming it was posted at Tamale on 7 June 1977 then by the provision of section 155 of the Code its contents must be presumed to have come to the notice of the applicant at Nairobi 48 hours after 7 June 1977. This means that by law he received the letter on 9 June 1977. The letter therefore gave him two days' notice of the meeting. By virtue of section 152(2) of the Code he was entitled to 21 days' notice and although this statutory period can be shortened, it can only be so abridged as section 152(4)(b) of the Code provides by the agreement of the majority of the members holding not less than 95 per centum of the shares of the company entitling them to attend and vote. The only member of the company who attended the meeting was Mr. C.K.A. Djokotoe and he had only 25 per centum of the shares. Even if the other two members had attended between them they would have commanded 75 per centum of the shares with the applicant having 25 per centum. They cannot therefore agree to a shorter notice.

In any case the applicant holds 25 per centum of the shares of the N.E.C. Assuming that all the persons who attended had had shares transferred to them and were shareholders; between them they would be holding only 75 per centum of the shares and since this would be less than 95 per centum of the shareholding, they would have no legal power to agree to a shorter notice having regard to section 152(4)(b) of the Code.

It would seem therefore that the notice dated 7 June 1977 summoning the extraordinary general meeting of the N.E.C. for 11 June 1977 and the proceedings of the said meeting held on the said 11 June 1977 are invalid and it is for these reasons I have dwelt upon that I declared the said notice and the proceedings invalid.

Although he is not a lawyer, in his address, Mr. C.K.A. Djokotoe, the acting managing director, persuaded no doubt by the arguments of Mr. Gbeho, counsel for the applicant, and impressed by the clear provisions of the Companies Code, conceded in my opinion quite honourably and of course rightly that the notice of 7 June 1977 for the meeting of 11 June 1977 and the proceedings of the said meeting are invalid."

In *Politis & Another v. Plastico Ltd (No. 2)*⁷⁴¹ – it was held that a meeting held without a notice was void. Amissah J.A. stated @ pg. 27 as follows:

“On these facts, Mr. Moore on behalf of the applicants contended that such a meeting had to be summoned in accordance with sections 150 and 271 of the Companies Code, 1963 (Act 179), but that this was not done. For our purposes the provisions which need mention are in subsections (2) and (5) of section 271. Section 271(2) requires that the requisition for a meeting of the company which must state the nature of the business to be transacted must be signed by the requisitionists. Section 271(5) requires notices of the meeting to transact the business specified in the requisition to be given. According to counsel’s submissions there is nothing in the minutes of the meeting or anywhere else to show the member at whose instance the meeting was called. Neither were notices issued. Against this, counsel for the company (with whose arguments Mr. Kuma who appeared in person associated himself) submitted that the question of notice did not arise when there was only one person to transact the business of the meeting. At the time of the meeting there was no notification to the company that there was a legal personal representative of the deceased, and even if there was, he need not have been notified as he was not a member of the company. The meeting, counsel for the company submitted, further was not a general meeting of the company but an extraordinary meeting of the surviving director. In my view, the meeting, whatever it was, was not a meeting of the company. It lacked the required notice even though this is explainable on the ground that there was no one else to give the notice to. Further article 5 of the articles of association of the company requires that two should form a quorum at a company meeting. If this purported to be a company meeting for the transaction of company business, it was void because there was no quorum.”

The persons entitled to notice of general meeting are the members, legal personal representative or deceased shareholder or trustee or receiver in bankruptcy of a shareholder, directors of the company, and the current auditor of the company.⁷⁴² Even though the Company Secretary is listed as one of the persons entitled to attend general meetings under paragraph 7 of the Eighth Schedule of the Act, there is no requirement to give notice to the Company Secretary as the preparation and giving notice for a general meeting is the responsibility of the Company Secretary.⁷⁴³ The Company Secretary cannot be required to give notice to himself for a general meeting.

⁷⁴¹ [1967] GLR 24.

⁷⁴² Paragraph 1(f) of Eighth Schedule of Act 992.

⁷⁴³ Section 212 of Act 992.

12.4.3 Content of notice of a general meeting

In addition to the notice period, the Act prescribes what must be in the notice. The contents of the notice prescribed under the Act are the venue, time, date and agenda for the meeting. Paragraph 2 provides as follows:

“2. Content of notice

(a) The notice of a meeting shall specify

- (i) the place, date and hour of the meeting,*
- (ii) the general nature of the business to be transacted at the meeting in sufficient detail to enable those to whom the notice is given to decide whether to attend or not; and*
- (iii) where the meeting is to consider a special resolution, shall set out the terms of the resolution.”*

As indicated earlier, general meetings must be held in Ghana unless the registered constitution of the company provides otherwise. The place in Ghana or elsewhere as the case may be must be expressly indicated. The indication must not be a general place of the meeting such as GIMPA Faculty of Law or Holiday Inn Hotel, but the specific room in which the general meeting will be held. Therefore, the floor and room number or name must be indicated. In addition, the date of the meeting and the specific time for the commencement of the meeting must be stated.

One reason for the requirement of a notice is to enable the members to decide whether to attend the general meeting. As such, an important content of the notice of a general meeting is the agenda for the meeting, that is the general nature of the business to be transacted at the general meeting. The Act does not require the specific nature of the business. The requirement is for the general nature of the business which must provide sufficient information to inform the members of what is to be discussed. The notice must therefore state the list of matters that must be discussed. The general position is that an item that is not listed as an agenda on the notice cannot be discussed at the general meeting. The general phrase “any other business” must, therefore, not be construed to discuss any business not listed on the notice. The purpose of listing the items to be discussed on the notice is to inform the members or shareholders to decide on whether the items are of importance to them to attend the general meeting. Failure to list any item, therefore, prohibits the discussion of such item at the meeting. Paragraph 2(c) of the Eighth Schedule of Act 992 provides that *“(c) A business may not be transacted at a general meeting unless notice of it has been duly given.”*

Where a special resolution is to be considered at the general meeting, the terms of the resolution must be stated in the notice. The terms can also be attached to the notice with an indication on the notice that such terms are attached. This will be deemed to be incorporated by reference in the notice. In some instances, there may be other documents to be attached to the notice, for example,

agreements to be approved. These documents may not be sent out to the shareholders or members but with an indication of where the shareholders or members are able to obtain copies if they so desire.

*Baillie v. Oriental Telephone Electric Co. Ltd*⁷⁴⁴ - a company issued a notice convening a meeting. At the general meeting, special resolutions were passed. The special resolution permitted amendment of the article of association of the company to approve directors to keep payments received on behalf of the company. The payment was received by the directors in breach of trust. An action was instituted challenging the special resolutions on the ground that the notice did not state the amount to be approved and paid to the directors and did not contain details to inform the members of the transaction. The Plaintiff shareholder sued on his behalf and on behalf of other shareholders for a declaration that the resolutions were not binding on the grounds that there had not been sufficient notice of the meeting at which the resolutions had been passed, therefore the resolutions could not be acted upon. It was held by the Court of Appeal that the notice of the meeting did not give sufficient details of the meeting to the shareholders of the facts upon which they were asked to vote, and the resolutions were therefore not binding.

In *In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others*⁷⁴⁵, Taylor J stated @ pg. 500 that:

“Assuming, however, that a special resolution was passed at a meeting duly held, the director concedes that no notice at all was given to the applicant, who is a shareholder and a director. In Baillie v. Oriental Telephone and Electric Co., Ltd. [1915] 1 Ch. 503, C.A., a shareholder succeeded in restraining a company from acting on a special resolution of which insufficient notice had been given. A fortiori in this case where it is clearly admitted that no notice of any sort was given, the company cannot be permitted to operate on the special resolution which from all accounts would seem to be in all probability a fictitious resolution. I am aware that by virtue of section 156 of the Code, accidental omission to give notice of a meeting or non-receipt of a notice, apparently duly sent, does not invalidate a meeting. This provision, however, is clearly inapplicable where notice is deliberately withheld as in this case from a member entitled to notice: see Musselwhite v. C. H. Musselwhite & Son Ltd. [1962] Ch. 964.”

In order to simplify the statement of agenda on the notice, the Act has grouped what should generally constitute the agenda of an annual general meeting. A statement on the notice that a

⁷⁴⁴ [1915] 1 CH 503.

⁷⁴⁵ [1979] GLR 477.

meeting is to discuss the general business of an annual general meeting is taken to include the listed items. Paragraph 2(b) of the Eighth Schedule of Act 992 provides as follows:

- “(b) In the case of notice of an annual general meeting, a statement that the purpose is to transact the ordinary business of an annual general meeting is a sufficient specification that the business is,*
- (i) to declare a dividend;*
 - (ii) consideration of the financial statements and reports of the directors and auditors;*
 - (iii) the election of directors in the place of those retiring;*
 - (iv) the fixing of the remuneration of the auditors; and*
 - (v) for the removal and election of auditors and directors.”*

A statement in the notice that the annual general meeting is to transact the ordinary business of an annual general meeting, therefore, refers to the above five listed items. The notice may state additional items to be discussed to the above. There is no such umbrella statement in relation to an extraordinary general meeting as unlike an annual general meeting, extraordinary general meetings are not mandatory under the Act but are called at the discretion of the directors or when requisitioned by members.

The company may also circulate the resolutions to be moved at the general meeting. There is no obligation on the company to circulate unless requested in writing by a member entitled to attend and vote at the general meeting. The company bears the cost of such circulation. Paragraph 5 of the Eighth Schedule of Act 992 provides that:

- “(a) A company shall, at the expense of the company, on the request in writing of a member entitled to attend and vote at a general meeting, include in the notice of that general meeting, a notice of a resolution which may properly be moved and is intended to be moved at that meeting and, at the like request, include in that notice, a statement of not more than five hundred words with respect to the matter referred to in the proposed resolution or any other business to be dealt with at that meeting.*
- (b) If the proposed resolution is not passed at that meeting that resolution or one substantially to that effect shall not be moved at a general meeting within three years, unless the*
- (i) directors otherwise agree, or*
 - (ii) request within three years is supported in writing by members of the company representing not less than one-twentieth of the total voting rights of the members having at the date of the request a right to vote on the resolution to which the request relates.*

- (c) For the purposes of subparagraph (a), a company is not bound to give notice of a resolution or to circulate a statement unless the written request or requests, signed by the member or members concerned, together with the resolution and statement, are deposited at the registered office of the company not less than six weeks before the meeting.*
- (d) If, after the documents have been deposited, a general meeting is called for a date not more than six weeks after the deposit, the documents shall be deemed to have been properly deposited."*

Members also have the right to request for the circulation of statements of members on business to be discussed at the general meeting. The members are to bear the cost of such circulation unless the company resolves to bear the expenses. Paragraph 6 of the Eighth Schedule of Act 992 provides:

- "(a) At the request in writing of a member entitled to attend and vote at a general meeting, a company shall, unless the company otherwise resolves, but at the expense of that member, circulate to members of the company a statement of not more than one thousand words with respect to a business to be dealt with at that meeting.*
- (b) The statement shall be circulated to members of the company in a manner permitted for service of notice of the meeting and, so far as practicable, at the same time as notice of the meeting, or, if that is impracticable, as soon as possible after the giving of the notice of the meeting.*
- (c) A company is not bound to circulate the statement unless,*
 - (i) the written request, signed by the member concerned, together with statement, is deposited at the registered office of the company not less than ten days before the meeting; and*
 - (ii) there is also deposited with the request a sum of money reasonably sufficient to meet the expenses of the company in giving effect to the request."*

Where a member is entitled to attend and vote at a general meeting by appointing a representative called a proxy in accordance with paragraph 9 of the Eighth Schedule of the Act, the notice of the general meeting must contain a statement that the members have the right to do so and the person appointed as the proxy need not be a member.⁷⁴⁶ An administrative penalty of one hundred and fifty penalty units is imposed on every officer for failure to include the statement in the notice of a general meeting.⁷⁴⁷

⁷⁴⁶ Section 160(1) of Act 992.

⁷⁴⁷ Section 160(2) of Act 992.

12.4.4 Service of notice of a general meeting

The Act prescribes the manner in which the notice must be given to the persons entitled to receive the notice. It is important to be certain at what date the notice is given since the notice period begins to count the day after the date of the notice. Per the Act, the twenty-one days' notice period starts to count a day after giving the notice to the members. Paragraph 3 of the Eighth Schedule of Act 992 provides:

- “(a) Notice may be given by the company to a member or director personally, or by*
- (i) sending it through the post addressed to the member or director at the registered address of the member or director, or*
 - (ii) leaving it for the member or director with a person apparently over the age of sixteen years at the address, or*
 - (iii) sending it to the member or director through electronic means.”*

There are therefore four ways of giving notice of a general meeting to persons entitled⁷⁴⁸ to a notice.

- (a) The notice of the general meeting may be given to the member or director personally. Failing the personal services, the notice may be given in any of the following ways.
- (b) The notice may be sent through the post to the registered postal address of the member or director. The Act provides that *“where the notice is sent by post, service is effected by properly addressing, pre-paying, and posting a letter containing the notice and is considered to have been effected at the expiration of forty-eight hours after the letter containing the notice is posted.”*⁷⁴⁹ The notice is deemed given after forty-eight hours of properly addressing, pre-paying and posting the letter containing the notice. The notice period will, therefore, start to count the next day after the expiration of the forty-eight hours of posting.
- (c) It may also be left with a person who appears to be over the age of sixteen at the registered address, residential or work, of a member or director. The person does not necessarily need to be sixteen or over but must appear to be above sixteen. The essence of the distinction is that delivery of notice should not be invalidated on the grounds that the person is below sixteen years of age.
- (d) The notice may also be sent electronically. This will amount to an electronic transaction under the Act which is defined as a transaction through an electronic agent.⁷⁵⁰ An electronic agent is

⁷⁴⁸ These are not only members or shareholders but include directors and auditors of the company.

⁷⁴⁹ Paragraph 3(d) of Eighth Schedule of Act 992. See also the case of *In re the matter of Northern Engineering Co. Ltd; Luguterah v. Northern Engineering Co. Ltd and Others* [1979] GLR 477.

⁷⁵⁰ Section 378(8) of Act 992.

defined to mean *“a computer programme or electronic or other automated means used independently to initiate an action or respond to electronic records ...”*.⁷⁵¹ This will cover sending notice through emails, WhatsApp, text messages, among others. Since this is not notice by post and amount to instantaneous communication, it will come under section 378 of Act 992 which requires the Minister of Justice to make rules by legislative instruments to regulate such electronic transactions. Notwithstanding that, it is suggested that pending such regulations, the company may by its registered constitution provides for rules regulating sending notices by electronic means. In the absence of such specific rules by the Minister and provisions in the registered constitution of the company, and the provision of the Electronic Transactions Act, 2008 (Act 772) is applicable.

The Act also makes provisions for giving notice to legal personal representatives of deceased shareholders or trustees or receivers of bankrupt shareholders. Paragraph 3(c) of the Eighth Schedule of Act 992 provides:

- “(c) Notice may be given to a person on whom ownership of a share has devolved by reason of that person being a legal personal representative, receiver or trustee in bankruptcy of a member personally, or*
- (i) by sending the notice through the post addressed to that person by name, or*
 - (ii) by the title of representatives of the deceased or receiver or trustee of the bankrupt, or*
 - (iii) by any likely description, at the address supplied for the purpose by that person, or*
 - (iv) by leaving the notice for that person with a person apparently over the age of sixteen years at that address, or*
 - (v) until that address has been supplied, by giving the notice in a manner in which the same might have been given if the death, receivership or bankruptcy had not occurred.”*

The notice is, therefore, to be given to the legal personal representative of the deceased shareholder, or the receiver or trustee in bankruptcy as if that legal personal representative, receiver or trustee is a member provided that the notice may be given in the name of that person or the title or description provided.

The Act requires the notice to be given even where the member or shareholder, or legal personal representative, receiver or trustee is not in Ghana. Paragraph 3(e) of the Eighth Schedule of Act 992 provides *“(e) The letter need not be registered but where it is sent to an address outside Ghana the letter shall be dispatched by air mail.”* Impliedly, the notice must be sent where the address of the

⁷⁵¹ Ibid.

person entitled is outside Ghana. The requirement under the paragraph is that the notice must be sent by air mail but does not need to be registered.⁷⁵²

A notice to joint shareholders may be deemed given to all the shareholders when given to the shareholder named first in the register of members. Paragraph 3(b) of the Eighth Schedule of Act 992 provides that *“(b) Notice may be given to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the shares.”* The company is, therefore, not under obligation to give the notice to each of the shareholders that jointly hold the shares.

12.4.5 Failure to give notice of a general meeting

The Act provides that notice must be given in all instances of a general meeting except for an adjourned meeting which is held not more than thirty days of the original meeting.⁷⁵³ There cannot, therefore, be a valid general meeting without a notice. However, since the Act permits members or shareholders entitled to attend a general meeting to dispense with short notice given in breach of the twenty-one days' notice period under the Act or any longer period stated in the constitution of the company, it may be implied that where the members meet without a notice, the members can dispense without a meeting. For this to occur, all members entitled to attend and vote at the general meeting must agree to proceed with the general meeting without a notice. Even where it is held not to be a valid general meeting, members are able to make a binding decision if the members' decision is arrived at unanimously. It is, therefore, possible for members entitled to attend and vote at a general meeting to waive the requirement for a notice of a general meeting.

However, where the company gives notice but fails or omits to give notice to a member, that will amount to an infringement of the right of the member to attend, speak or vote at a general meeting since the right is predicated on the member knowing about the meeting. A member can, therefore, assert such right against the company by action in court. Such rights may be asserted by an order to restrain a general meeting from proceeding until the appropriate notice is given. If the general meeting has already been held, the member may bring an action to have the meeting declare invalid and resolution passed at the meeting set aside. In the alternative, the member may sue for breach of the constitution of the company, which constitution constitutes a contract between the member and the company. The constitution of the company upon incorporation constitutes a contract under seal between the company and each member of the company.⁷⁵⁴ The company under that contract must

⁷⁵² In re the matter of Northern Engineering Co. Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and *Luguterah v. Northern Engineering Co. Ltd and Others* [1979] GLR 477.

⁷⁵³ Paragraphs 1(a) and 13 of the Eighth Schedule of Act 992.

⁷⁵⁴ Section 29(1)(a) of Act 992.

give notice of general meetings to members. A breach of that obligation entitles the member to invoke any of the remedies for breach of contract including seeking damages for the loss suffered.

However, the Act seeks to excuse accidental failure or omission to give notice of a general meeting to a member and non-receipt of notice of a meeting by a person entitled to the notice. Paragraph 4 of the Eighth Schedule of Act 992 provides that *“The accidental omission to give notice to, or the non-receipt of notice of a meeting by, a person entitled to receive notice shall not invalidate the proceedings at that meeting.”* The emphasis is on “accidental”, therefore intentional omission to give notice of a meeting is not excused under the Act. Impliedly, failure or omission to give notice that is not accidental may be a ground to invalidate proceedings at that meeting. Where the company proved that the notice was given but was not received by the member, the non-receipt of notice of the meeting does not invalidate the proceedings of the meeting.

In *In the matter of Northern Engineering Co., Ltd and in the matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co. Ltd. and Others*⁷⁵⁵, Taylor J stated @ pg. 500 that:

“Assuming, however, that a special resolution was passed at a meeting duly held, the director concedes that no notice at all was given to the applicant, who is a shareholder and a director. In Baillie v. Oriental Telephone and Electric Co., Ltd. [1915] 1 Ch. 503, C.A., a shareholder succeeded in restraining a company from acting on a special resolution of which insufficient notice had been given. A fortiori in this case where it is clearly admitted that no notice of any sort was given, the company cannot be permitted to operate on the special resolution which from all accounts would seem to be in all probability a fictitious resolution. I am aware that by virtue of section 156 of the Code, accidental omission to give notice of a meeting or non-receipt of a notice, apparently duly sent, does not invalidate a meeting. This provision, however, is clearly inapplicable where notice is deliberately withheld as in this case from a member entitled to notice: see Musselwhite v. C. H. Musselwhite & Son Ltd. [1962] Ch. 964.”

*In re West Canadian Collieries Ltd*⁷⁵⁶ - by section 141(5) of the Companies Act, 1948: For the purposes of this section, a notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given, and the meeting held in the manner provided by this Act or the articles. The registrar of a company, in sending out to members of the company notices of a special resolution for the reduction of capital to be proposed at the annual general meeting, inadvertently omitted to send notices to nine of the members. The circumstances in which this happened were as follows: Envelopes are addressed by means of an Addressograph machine which involves a separate

⁷⁵⁵ [1979] GLR 477.

⁷⁵⁶ [1962] Ch 370.

Addressograph plate for each individual member. Prior to the calling of the annual general meeting for June 22, 1961, the last occasion on which it had been necessary, under the articles of association, to communicate with all the members with addresses within the United Kingdom had been the payment of dividend No. 45 on June 24, 1960. Amongst those members with United Kingdom addresses on the register, there were nine members holding a total of 101 shares, the largest number of shares held by any one individual being 25, the smallest number being one; dividends sent to these members at their registered addresses in past years had either been returned by the postal authorities or had not been cashed, and to prevent the warrants from falling into wrong hands, and to ensure that the warrants would be available if the correct addresses were subsequently ascertained. It was deemed advisable not to dispatch warrants to those members. To give effect to this decision, the plates appropriate to these members were extracted from those of other members with United Kingdom addresses and kept in a separate place. When the envelopes for the notice of the annual general meeting for June 22, 1961, were addressographed, the plates relating to the nine members were inadvertently not replaced with those of other United Kingdom members, with the consequence that notices of the annual general meeting were not sent to the nine members. Article 75 of the company's articles of association, which was identical in terms with article 51 of Table A, provided that the accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice should not invalidate the proceedings at that meeting. The special resolution was passed at the meeting. On a petition for confirmation of the reduction of capital, it was held that the omission to give notice of the meeting to the nine members was "accidental" within the meaning of article 75 and that, therefore, it did not invalidate the proceedings at that meeting. It must be implicit in article 75 that a meeting, the proceedings of which were to be taken to be valid notwithstanding the omission to give notice to the members, was to be deemed to have been duly convened for the purposes of the articles, including in those purposes the manner of convening the meeting, since in the absence of such an implication there could be no meeting the proceedings of which could be validated by article 75. Accordingly, the notice of the meeting had been duly given and the resolution duly passed for the purposes of section 141 of the Companies Act, 1948, and the reduction would therefore be confirmed.

*Kwame Charles Serbeh-Yiadom v. Stanbic Bank Ghana Limited*⁷⁵⁷ - the plaintiff and four others incorporated the Union Mortgage Bank (UMB) (later named Stanbic Bank (Gh) Ltd) in 1994 with 10 million shares valued at ₵1,000 each. All the five were made directors of the bank and the plaintiff and one other were the subscribers of the regulations of the company. Following differences between the plaintiff and other members of the board, an extraordinary meeting of the board was scheduled for 25 March 1997 to, inter alia, pass a resolution for the removal of the plaintiff as a director of the bank. Notice of the meeting was duly served on the plaintiff who was then in Lagos. However, when the plaintiff came down for the meeting, he learnt that the meeting had already been held on 12 March 1997. The plaintiff was not informed of any change of date for the meeting. He went to the

⁷⁵⁷ [2003-2005] 1 GLR 86.

Registrar-General's Department where he learnt, to his surprise, that a return had been filed indicating that he had been removed as a director of Union Mortgage Bank Ltd with effect from 12 March 1997. The court found on the evidence, inter alia, that the notice for the change in the date of the meeting had been posted on 10 March and had been delivered at the plaintiff's address in April, that is after the meeting. Counsel for defendant relying on Section 156 of Act 179, contended in his address that the defendant-company duly complied with the provisions of Act 179 as to the giving or service of notice of meetings. Held by the Court per Amonoo-Monney JA @ pgs. 105 to 106 that:

"Section 156 of Act 179 provides that: "The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting." Regulation 68 of the company's regulations, exhibit C, also provides that: "The office of director shall be vacated in accordance with section 184 of the Code and any director may be removed from office in accordance with section 185 of the Code." The provisions of section 185 of Act 179 are in these terms:

"185. (1) Subject to the provisions of section 300 of this Code and to the following subsections, a company may by ordinary resolution at any general meeting remove from office all or any of the directors notwithstanding anything in its Regulations or in any agreement with any director ...

(4) On receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned and such director, whether or not he is a member of the company, shall be entitled,

- (a) to be heard on the resolution at the meeting; and*
- (b) to send to the company a written statement, copies of which the company shall send with every notice of the general meeting or, if the statement is received too late, shall forthwith circulate to every person entitled under section 154 of this Code to notice of the meeting in the same manner as notices of meetings are required to be given."*

It is a salutary and well-known principle of law that a person should be given the opportunity of being heard when he is accused of any wrong doing before any action is taken against him. Sections 155 and 156 of Act 179 are general provisions that deal with service of notice for meetings generally, whiles section 185 deals specifically with the matter of removal of directors. When dealing therefore with the question of the removal of a director of a company one has to consider the combined effect of these sections of the Code. In order that proper effect may be given to section 185(4)(a) of Act 179, I am of the opinion that where, as in this case, an extraordinary general meeting of a company is held to remove a director and that director does not attend the meeting at which a resolution to remove him is to be moved, care must be taken to ascertain that he has in fact been properly made aware of the meeting. This is so because to enable him defend himself the law stipulates

that even where the director to be removed is not a member or shareholder of the company he shall nevertheless “be entitled” to be heard at the meeting ... The spirit of section 185(4)(a) of Act 179 assumes greater relevance where, as in this case, the notice of the change in the date of the meeting was sent to the address of the plaintiff in Lagos and also where the change of date of the meeting meant that the meeting was going to be held about two weeks earlier and not later than the original date notified. I am also of the opinion that the defendant-company did not fully comply with the mandatory provisions of section 185(4) of Act 179, which provides that: “On receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned ... The “copy” of what is to be sent forthwith to the director concerned is not something that emanates or originates from the company itself. The notice that informed the plaintiff of the original date of the meeting (exhibit K) is a one-sheet one-page document or letter under the hand of the secretary of the company. That letter was not received by the company from some other source and the copy that should be sent to the “director concerned” is “notice of an intended resolution to remove a director” which the company receives, obviously from the intended mover of the removal resolution who, himself, must give to the company the notice stated in section 185(2) of Act 179.

Having regard to all the circumstances of the case that I have discussed under this head of claim or relief, I hold that the defendant-company did not comply with the letter and spirit of section 185(4)(a) of Act 179 and I therefore make a declaration in favour of the plaintiff that his removal as a director of Union Mortgage Bank Ltd, now Stanbic Bank (Gh) Ltd on 12 March 1997 was wrongful and null and void...”

12.4.6 Attendance at general meetings

The Act specifies the persons entitled to attend general meeting. Even though the general meeting is a meeting of members or shareholders, the Act requires the presence of others at a general meeting. Paragraph 7 of the Eighth Schedule of Act 992 provides:

- “(a) Despite a provision in the registered constitution of a company to the contrary, the following persons are entitled to attend a general meeting of the company:*
- (i) each member of the company;*
 - (ii) each director of the company;*
 - (iii) the Company Secretary; and*
 - (iv) each auditor for the time being of the company.*
- (c) Subparagraph (b) does not preclude any person from attending a general meeting with the permission of the chairperson of the meeting.”*

The Act thus requires the presence of each member, each director, the Company Secretary and the current auditor of the company at a general meeting. The registered constitution cannot prohibit the attendance of any of the listed persons from attending a general meeting. In addition, the Act empowers the chairperson of the meeting to permit any other person to attend the general meeting. The chairperson can therefore permit attendance at the general meeting of officers of the company, experts to provide expert opinion on matters to be discussed at the general meeting, lawyer or advisors of members, community or religious leaders, and others to attend the general meeting. The chairperson can also, in the exercise of the right, permit media to cover general meetings especially of public companies for the purpose of transparency.

As noted, even though the Act provides that the members, directors, the Company Secretary and current auditors cannot be precluded by the registered constitution of the company from attending a general meeting, exemptions are made in two instances for members who fail to pay for the shares when a call is made and suspension of the right of preference shareholders. Subparagraph (b) of paragraph 7 of the Eighth Schedule of Act 992 provides that:

“(b) For the purposes of subparagraph (a),

- (i) if the constitution of a company so provides, a member is not entitled to attend unless the calls or other sums presently payable by that member in respect of shares in the company have been paid; and*
- (ii) a member who is a holder of preference shares only is not entitled to attend if the right to do so is validly suspended in accordance with section 52.”*

The Act thus recognises that notwithstanding the entitlement of members to attend general meetings, the right of members to attend and vote at general meetings can be restricted in accordance with section 34(2) of the Act in relation to all shareholders, and under section 52 in relation to preference shareholders. Under section 34 of the Act, the registered constitution of a company can restrict a shareholder's right to attend and vote at general meetings if the shareholders fail to pay sums due and payable or sum payable on calls made. Section 52 of the Act permits suspension of rights of a holder of preference shares on conditions indicated in the constitution. For preference shareholders, there are instances where the suspension is inapplicable even though stated in the constitution.⁷⁵⁸

12.5 Quorum of a general meeting

A general meeting is a meeting of members. The presence of members is required for the conduct of the meeting. Notwithstanding directors, auditors and the Company Secretary are to be in attendance, the presence of directors, auditor and the Company Secretary is not mandated for the

⁷⁵⁸ See discussion of these instances under the chapter on Members.

conduct of the meeting. In addition, not all members are to be present for the conduct of the meeting. The Act states the minimum number of members required for a general meeting to be conducted. That minimum number of members required for the conduct of a general meeting is referred to as the quorum of a general meeting. A quorum is thus the minimum number of members required for a general meeting to validly commence. The Act permits the constitution of the company to set out the quorum. However, in the absence of such quorum in the constitution of the company, the Act states the quorum. Paragraph 8 of the Eighth Schedule of Act 992 provides:

- “(a) Subject to paragraph (b), a business shall not be transacted at a general meeting unless a quorum of members is present at the time when the meeting commences, but where a quorum is present, the meeting may validly proceed with that business despite that a quorum is not present through-out.*
- (b) In dealing with a quorum under subparagraph (a), where members present are entitled to vote only on some resolutions and not on others, those members shall be counted towards a quorum in respect of the former resolutions but not in respect of the latter.”*

The Act requires quorum at the commencement of the consideration of each business listed on the notice of a general meeting. It is, therefore, important that in stating the agenda, each item listed as part of the agenda is properly stated, preferably in the order of priority with each item numbered or bulleted. Prior to the consideration of each business on the notice of a general meeting, the chairperson must count the number of members present to determine that there is a quorum. Once determined, the discussion and voting on that item can be conducted notwithstanding there is no quorum throughout that discussion and voting. Once the discussion and voting on that business are concluded, a determination must be made whether there is a quorum for commencement of discussion of the next item on the agenda. Where there is no quorum for the consideration of an item on the agenda, the members cannot proceed to discuss such an item on the agenda. In essence, a quorum must be determined for the commencement of discussion of each item on the agenda. Once so determined, the discussion of the item on the agenda can be conducted and concluded. In the determination of quorum for an item on the agenda, only members entitled to vote on that item on the agenda must be counted for a quorum.

As indicated, the Act permits the constitution to set out the quorum for a general meeting of the company. However, where the Act does not set out the quorum, the Act provides for the quorum. Paragraph 8 of the Eighth Schedule of Act 992 provides:

- “(c) Unless otherwise provided in the constitution of a company, quorum is constituted,*
 - (i) if the company has only one member, by that member being present in person or, where proxies are allowed, by proxy;*

- (ii) in any other case, by two members present in person or, where proxies are allowed, by proxy, or one member so present holding shares representing more than fifty per cent of the total voting rights of the members having a right to vote at the meeting."*

The quorum required for a general meeting is one member where the company has only one member. It is thus possible for a sole member of a company to hold a general meeting which is a meeting of the member with the directors, auditor and the Company Secretary. The member and auditor can also waive an annual general meeting to dispense with the requirement for a one-member general meeting.⁷⁵⁹ In case the company has more than one member, the quorum required is two members. It does not matter the number of members the company have. Irrespective of the number of members, once above two members, the default quorum under the Act is two. In addition, one member can also form a quorum where the company has more than two members if the member has shares representing more than fifty percent of the voting right of the company. The requirement is more than fifty percent and not fifty percent. The member may be present in person or represented by a proxy. The constitution of the company can state a quorum different from that of the Act.

The Act also states the time within which a quorum must be present which starts to run from the time indicated in the notice for a general meeting. It is, therefore, important that notice of the general meeting indicates the commencement time. Paragraph 8 of the Eighth Schedule of Act 992 provides:

- "(d) Unless otherwise provided in the constitution of the company, if a quorum is not present within half an hour after the time appointed for the meeting, the meeting if convened on the requisition of members in accordance with sections 299 and 324 of this Act, shall be dissolved, and in any other case, shall stand adjourned to the same day, in the next week, at the same time and place or to any other day, place and time that the directors may determine.*
- (e) If at the adjourned meeting a quorum is not present within half an hour after the time appointed, the member or members present shall constitute a quorum.*
- (f) Where the meeting is adjourned to the same day, place and time in the following week, notice is not required to be given, otherwise notice of the adjourned meeting shall be published in at least one daily newspaper circulating in the district in which the registered office of the company is situated."*

Unless the constitution of a company indicates a time within which a quorum must be determined, the default position under the Act is it must be determined within thirty minutes of the time indicated in the notice of a general meeting for the commencement of the general meeting. Where no quorum is present within the thirty minutes from the time of commencement, in the case of an extraordinary general meeting, the meeting stands dissolved. In the case of an annual general

⁷⁵⁹ Section 157(5) of Act 992.

meeting, the meeting is adjourned to the same day, place and time in the following week. Notice is not required for the adjourned meeting so long as it is the same day, place and time in the following week. The directors may indicate a different day, time and place for the adjourned meeting. In that event, a notice must be published in at least one newspaper circulating in the district of the registered office of the company. The number of members present during the adjourned annual general meeting after thirty minutes from commencement constitutes a quorum notwithstanding that number is less than what is ordinarily required for a quorum. In that case, the members can proceed and discuss all items on the agenda of the annual general meeting.

12.6 Proxies

Even though the Act entitles a member to attend, speak and vote at a general meeting, the member need not do so in person. A member is entitled to appoint a representative to attend, speak and vote at a general meeting on behalf of the member. A person validly appointed by a member in accordance with the Act and the constitution of the company to attend, speak and vote at a general meeting on behalf of the member is called a proxy. Paragraph 9 of Eighth Schedule of Act 992 provides that:

- “(a) A member of a company entitled to attend and vote at a meeting of the company is entitled to appoint another person, whether a member of a company or not, as a proxy to attend and vote or behalf of that member, and the proxy shall have the same rights as the member to speak at the meeting.*
- (b) Unless the registered constitution of the company otherwise provides, subparagraph (a) shall not apply in the case of a company limited by guarantee.”*

The shareholder is entitled as of right under the Act to appoint a proxy. The right does not need to be conferred under the constitution of the company. However, for a company limited by guarantee, a member has such a right only where the registered constitution of the company so expressly provides. The person appointed a proxy may be another member of the company, a director or officer of the company, or the person may not be associated with the company.

The appointment of a proxy must be done in writing. The Act specifies the specific requirement to the instrument of appointment of the proxy. Paragraph 9 of the Eighth Schedule of Act 992 provides:

- “(c) The instrument appointing the proxy shall be in writing signed personally by the appointor or the agent of the appointor duly authorised in writing or, if the appointor is a body corporate, under the seal of the body corporate or signed personally by an officer or agent duly authorised.*
- (d) An instrument appointing a proxy shall be in the form prescribed in the Second and Third Schedules, or in the form that the registered constitution of a*

company provides, but despite a provision in the constitution of the company, an instrument in the form prescribed in the Third Schedule shall be sufficient."

A member entitled to appoint a proxy must sign the instrument appointing the proxy. A representative or agent of the member empowered to do so in writing can also sign the proxy instrument on behalf of the member. In regard to a corporate member, the instrument must be issued under the seal of the corporation or signed by an officer or duly appointed agent of the company. An instrument appointing a proxy must be in the form of the template provided in the Second and Third Schedules of the Act. The registered constitution may provide for a different template. Even in that case, an instrument in the template of the Third Schedule, relating to a public company limited by shares, signed by the shareholder will be valid notwithstanding a different template provided by the constitution of the company.

An executed instrument appointing a proxy must be deposited with the company within the prescribed time under the Act for it to be valid. Paragraph 9 of Eighth Schedule of Act 992 provides:

"(e) Unless the registered constitution of the company otherwise provides, the instrument appointing a proxy and the power of attorney or other authority under which the instrument is signed or notarized copy of that power or authority, shall be deposited with the designated receiving officer

- (i) by electronic mail;***
- (ii) personally at the registered office of the company, or at any other place within the Republic as specified in the notice convening the meeting; or***
- (iii) by any other means approved by the company, not less than forty-eight hours before the time for holding the meeting or adjourned meeting, or not later than twenty-one days before the meeting or in the case of a poll, not less than twenty-four hours before the time appointed for taking of the poll and in default, the instrument of proxy shall not be treated as valid.***

(f) A provision contained in the registered constitution of a company is void in so far as it would have the effect of requiring the documents referred to in the constitution to be deposited more than forty-eight hours before the time for holding the meeting or adjourned meeting or, in the case of a poll, more than twenty-four hours before the time appointed for taking the poll."

The Act provides the instrument may be sent to the company either through electronic mail or delivered to the registered office of the company, or a place in Ghana specified in the notice of the general meeting. The company may state additional means by which the instrument may be sent to the company. The instrument must be delivered to the company not later than forty-eight hours to

the meeting. Where the vote will be conducted at the meeting by poll, the instrument must be delivered not later than twenty-four hours. The constitution of the company may specify for a lesser time permitted to deliver the notice. The constitution of the company can, however, not state the instrument to be delivered more than forty-eight hours before the general meeting, or more than twenty-four hours before the vote is conducted by poll. Any such provision in the constitution is invalid and void.

The instrument can be inspected by a member entitled to attend and vote at the meeting, or a proxy of the member provided the member has more than ten percent of the total voting right of the members entitled to vote at the meeting. The inspection can be done during business hours of the company subject to reasonable restrictions that the company may impose. Subparagraph (g) of Paragraph 9 of Eighth Schedule of the Act provides:

“(g) Where the instruments of proxy have been deposited in accordance with subparagraph (e), a person entitled, in the right of that person, or as proxy for another member or members, or partly in one way and partly in another, to more than ten percent of the total voting rights of the members entitled to vote at the meeting, shall be entitled, at any time during business hours before the conclusion of the meeting, or the taking of the poll, but subject to any reasonable restrictions that the company may impose, to inspect the deposited instruments of proxy and the original or notarized copy of powers of attorney or authority under which the instruments are signed.”

The appointment of the proxy can be terminated either by the member who appointed the proxy, the proxy or by the occurrence of stated events under the Act. Paragraph 9 of the Eighth Schedule of Act 992 provides:

“(h) The appointment of a proxy shall be terminated by the death or insanity of the appointor or by the revocation of the proxy or the authority under which the proxy was executed, and the personal attendance of a member at the meeting or the later appointment of another proxy in respect of the same share shall be deemed to be a revocation.”

The appointment of a proxy may, therefore, be terminated in one of the following ways:

- (i) the death of the member who appointed the proxy
- (ii) the insanity of the member who appointed the proxy
- (iii) revocation of the appointment by the member who appointed the proxy
- (iv) revocation of the authority pursuant to which the proxy was appointed
- (v) personal attendance of the member at the general meeting for which the proxy was appointed
- (vi) subsequent appointment of another proxy. That is the second appointment of a proxy terminates the earlier appointment.

- (vii) rejection or resignation of the proxy. Even though not expressly stated in the Act, a person appointed a proxy can reject the appointment or resign from the appointment prior to the general meeting by notice to the member who appointed the proxy. This may not have been stated due to the implied fact that a person cannot be forced to act as a proxy.

Notwithstanding termination of a proxy, unless a notice in writing of the termination is received by the company before the commencement of the meeting, a vote pursuant to the appointment of the proxy is valid. For a vote by poll, the notice in writing of the termination will be valid if delivered after the commencement of the meeting provided it is received before the vote. Subparagraph (i) of paragraph 9 of the Act provides that:

“(i) A vote taken in accordance with the terms of an instrument of proxy may be treated by the company as valid despite the termination or revocation of the appointment, so long as a notice in writing of the termination, or revocation, or of the events causing same has not been received by the company at the registered office or other place appointed for the deposit of instruments of proxy, before the commencement of the meeting or adjourned meeting or more than twenty-four hours before the poll.”

A member who appointed a proxy has the right to direct the proxy on how to vote on the matters to be considered at the general meeting. For this purpose, the Act mandates that where an invitation to appoint a person or number of persons specified in the invitation as a proxy is issued, the invitation must be issued to all members entitled to attend and vote at the meeting. The invitation must be accompanied by the forms for the appointment of the proxy which must indicate the right of the member to indicate the manner in which the proxy must vote on matters to be considered at the meeting. Paragraph 9 of the Eighth Schedule of Act 992 provides:

“(j) If, for the purpose of a meeting of a company, invitations to appoint as a proxy a person, or a number of persons specified in the invitations are issued at the expense of the company, then,

- (i) the invitations shall be sent to the members entitled to attend and vote at the meeting;*
- (ii) the invitations shall be accompanied by forms for the appointment of a proxy which shall entitle the members to direct the proxy to vote either for or against such resolutions;*
- (iii) where the instruments of proxy are duly completed and returned in accordance with the instructions in the invitation and are not revoked then, the chairperson of the meeting shall demand a poll after a vote by show of hands, unless the result on show of hands is in accordance with the directions given in the instruments of proxy and on a poll, the votes of the members concerned shall be deemed to*

be cast in accordance with the directions, in the instruments of proxy despite the absence, abstention, or purported vote of the proxy to the contrary.”

Where a member indicates how the proxy is to vote on a manner, the direction so indicated must be counted. Where the vote by show of hands does not conform to such direction as given on the instruments received, the chairperson must demand a vote by poll. Where votes are conducted by poll, the direction given by the member in the instrument of proxy must be considered notwithstanding the proxy is absent, choose not to vote or vote contrary to the direction. It is permitted for a company to send the list of persons ready to act as proxies to members to appoint from. The members are not bound to appoint such individuals. The list of persons may be other members, directors or officers of the company. The persons may lobby the members to appoint any of them as a proxy and give reasons or make representation to induce such appointment. A misrepresentation to secure an appointment of a proxy does not invalidate votes of the proxy at the meeting. However, an application can be made to the court to nullify the appointment and invalidate any act done pursuant to the appointment. Paragraph 10 of Eighth Schedule of Act 992 provides:

- “(a) The vote of a proxy shall not be rejected at a meeting on the ground that the appointment of a proxy was obtained by misrepresentation.*
- (b) The Court may, on the application of*
 - (i) the company,*
 - (ii) a member entitled to vote at the meeting, or*
 - (iii) the Registrar**annul the appointment of a proxy if satisfied that the appointment was obtained by a material misrepresentation of fact whether made fraudulently or not.*
- (c) Where an order is made, the Court may further order that holding of the meeting shall be postponed until the date that the Court may order and may give ancillary or consequential directions that the Court considers fit.”*

A member has the right to also request in writing for a form of appointment of a proxy and a list of persons available to be appointed a proxy. Subparagraph (k) of Paragraph 9 of the Act provides that:

- “(k) Where a member, not having been invited so to do, requests the company to issue that member with a form of appointment of proxy or a list of persons willing to act as proxy, the company may issue the form or list to that member without doing so to the other members entitled to attend and vote, but the form or list shall be available on request in writing to that member and any forms of appointment so issued shall comply with sub-subparagraph (ii) of subparagraph (j) and shall be deemed to be an instrument of proxy to which sub-subparagraph (iii) of subparagraph (j) applies.”*

The company upon such request must issue the member with the form and list of persons available to be appointed as a proxy. The company need not issue the form to all members entitled to attend and vote at a meeting.

The Act mandates compliance with the requirements of proxy failing which administrative penalties are imposed on every officer of the company in default. Section 161 of Act 992 provides that:

- “(1) A person shall comply with the proxy arrangement for voting and attendance of meetings in accordance with paragraph 9 of the Eighth Schedule.*
- (2) An officer of the company who knowingly authorises or permits a breach or non-observance of subparagraphs (g), (h), (i) or (k) of paragraph 9 of the Eighth Schedule, is liable to pay to the Registrar an administrative penalty of two hundred and fifty penalty units; and in the event of a refusal to permit inspection in accordance with subparagraph 9 of the Eighth Schedule, the Court may by order compel an immediate inspection.”*

12.7 Representation of corporations at a general meeting

A body corporate can be a shareholder or member of a company. The body corporate is entitled to appoint a representative for a general meeting of the company. Similarly, a body corporate that is a creditor or debenture holder of a company is also entitled to appoint a representative to attend meetings of creditors or debenture holders of the company. Paragraph 11 of Eighth Schedule of Act 992 provides:

- “(a) A body corporate, whether a company within the meaning of this Act or not, may, by resolution of its directors or other governing body, authorise a person that the body corporate considers fit to act as its representative,*
- (i) if the body corporate is a member of a company, at any meeting of the company; or*
- (ii) if the body corporate is a creditor, including a debenture holder, of a company, at a meeting of any creditors of the company held in pursuance of this Act or of the [Corporate Insolvency & Restructuring Act, 2020 (Act 1015)] or of any rules made under this Act or that Act or in pursuance of the provision contained in a debenture or trust deed.*
- (b) A person authorised under subparagraph (a), on production of a copy of the resolution by which that person was authorised, is entitled to exercise the same powers on behalf of the body corporate which that person represents as that body corporate could exercise if the body corporate were an individual shareholders, creditor or holder of debentures of that other company.*
- (c) This paragraph does not preclude a body corporate from appointing a proxy to attend and vote on its behalf.”*

The requirement under the Act is for the appointment of such a representative to be by a resolution of directors or the governing body of the body corporate. For a company under the Act, the requirement is a resolution by the directors. For a partnership, the appointment must be by the partners. A statutory corporation must do so through an authorised resolution of the governing body. A person so appointed by the resolution upon producing a copy of the resolution is entitled to exercise the same powers as the body corporate could have exercised as an individual shareholder, creditor or debenture holder. A body corporate is also permitted to appoint a proxy in accordance with the requirements under the Act. In that case, the authorised officer or agent of the company must sign the instrument appointing the proxy or the instrument must be issued under the seal of the company.⁷⁶⁰

12.8 Chairperson of general meetings

In the conduct of a general meeting, there must be a chairperson of the meeting. There are a number of duties conferred on the chairperson of a general meeting under the Act including having a second or casting vote in the event of a tie.⁷⁶¹ In practice as well, the chairperson of a general meeting directs the affairs of a general meeting in accordance with the Act and the constitution of the company. The chairperson performs a number of functions in the conduct of the meeting including opens the meeting, determines there is a quorum at the commencement of discussion of a business on the agenda, allots time for discussion, determines the order of speaking at the meeting, decides on the method of voting, declares results of the voting and signs minutes of the meeting.

There must, therefore, be a chairperson for every general meeting of the company. The Act prescribes the designated chairperson of a general meeting and in the absence of that chairperson, how one is determined to chair the meeting. Paragraph 12 of Eighth Schedule of Act 992 provides that:

- “(a) Unless otherwise provided in the constitution of a company, the chairperson of the board of directors shall preside as chairperson at a general meeting of the company.*
- (b) If the board does not have a chairperson or, if the chairperson is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act, the directors present shall elect one of their number to be chairperson of the meeting.*
- (c) If a director is not present or willing to act, the members present shall choose one of their number to be chairperson of the meeting.”*

⁷⁶⁰ Paragraph 9(c) of Eighth Schedule of Act 992.

⁷⁶¹ Paragraph 16 of Eighth Schedule of Act 992.

Unless the constitution of the company otherwise provides, a director appointed chairperson of the board of directors automatically is the chairperson of a general meeting. The constitution of the company may provide for the appointment of the chairperson for a general meeting other than the chairperson of the board of directors. However, if not provided, the default position is for the chairperson of the board of directors to chair the general meeting. If there is no chairperson of the board, the chairperson is unwilling to act as chairperson of the board or is late to a general meeting for fifteen minutes or more, the directors present can elect one of the directors present to act as a chairperson of the general meeting. If none of the directors is present or present but unwilling to act, the members are permitted to elect one of the members to chair the general meeting.

As indicated earlier, the general meeting is a meeting of members. Even though directors, current auditor and the Company Secretary are entitled to be at the general meeting, the Act permits proceeding with the general meeting without them. Therefore, the absence of directors does not affect a general meeting. In the absence of the directors, the members can elect one of their numbers to chair the meeting and proceed with the meeting provided there is a quorum.

12.9 Adjournment of a general meeting

At a general meeting, the members may not complete discussion of items on the agenda or may not have gotten a quorum to commence the discussion of the business of the general meeting or may for other reason decide to continue the meeting at a later date. The Act permits the general meeting to be postponed to a later day. For a general meeting to be validly postponed or adjourned, the requirements of the Act must be complied with. Paragraph 13 of Eighth Schedule of Act 992 provides:

“(a) The chairperson may, with the consent of the meeting at which a quorum is present, and shall if so directed by an ordinary resolution passed at the meeting, adjourn the meeting from time to time and from place to place, but a business shall not be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place and an additional business of which due notice shall be given as in the case of an original meeting.”

The chairperson, who is responsible for conducting a general meeting, may postpone a general meeting in two instances. First, the chairperson is entitled to adjourn the meeting subject to the agreement of the members provided the members constitutes a quorum. Secondly, the members may by ordinary resolution, provided there is a quorum, direct the chairperson to adjourn the general meeting. The distinction between the two situations is the first is at the discretion of the chairperson. The chairperson is the one who voluntarily makes the decision to adjourn the meeting. The decision is subject to the consent of the members. In the second instance, the members by

ordinarily resolution direct the chairperson to adjourn the meeting. When so directed by ordinary resolution, the chairperson has no discretion but to so adjourn the meeting. In both cases, there must be a quorum. Without the quorum, the members cannot consent to the chairperson's decision to adjourn or the members cannot pass an ordinary resolution to direct the chairperson to adjourn the meeting.

An adjourned meeting in the above two situations may take place at any other time or any other place in the future. A general meeting can also be adjourned any number of times. An adjourned meeting does not require a notice as the original meeting when two conditions are satisfied. The adjourned meeting is held within thirty days and the discussion is limited to the businesses listed on the notice of the original meeting. Where no notice is given, an adjourned meeting must limit the business to be discussed to the business of the original meeting. Paragraph 13(b) of Eighth Schedule of Act 992 deals with the first condition and subparagraph (a) as stated above deals with the second condition. Subparagraph (b) of Paragraph 13 provides that: *“(b) Where a meeting is adjourned for thirty days or more, notice of the adjourned meeting shall be given as in the case of an original meeting.”* However, where the meeting is adjourned for more than thirty days, notice must be given even if the business to be transacted are limited to the business of the original meeting.

Subject to the above, the registered constitution of the company may however require that notice be given of an adjourned meeting. Paragraph 13(c) of the Eighth Schedule of the Act states: *“(c) Subject to this section, and unless the registered constitution of the company otherwise provides, it is not necessary to give notice of the adjournment of a meeting at which a quorum was present, or of the business to be transacted at the adjournment.”* Where the constitution does not provide for the notice, then no notice is required where the above two conditions are satisfied.

As indicated, a key condition for a chairperson to decide to postpone a meeting subject to the consent of members or the members directing the chairperson to adjourn a meeting is that there is a quorum. At the adjourned meeting, there must be a quorum for the company to commence to discuss the business of the adjourned meeting. The Act also dealt with adjournment when there is not a quorum when it provides in Paragraph 8 of Eighth Schedule of the Act as follows:

“(d) Unless otherwise provided in the constitution of the company, if a quorum is not present within half an hour after the time appointed for the meeting, the meeting if convened on the requisition of members in accordance with sections 299 and 324 of this Act, shall be dissolved, and in any other case, shall stand adjourned to the same day, in the next week, at the same time and place or to any other day, place and time that the directors may determine.

(e) If at the adjourned meeting a quorum is not present within half an hour after the time appointed, the member or members present shall constitute a quorum.

- (f) Where the meeting is adjourned to the same day, place and time in the following week, notice is not required to be given, otherwise notice of the adjourned meeting shall be published in at least one daily newspaper circulating in the district in which the registered office of the company is situated."*

The only meeting that can be adjourned without a quorum is the annual general meeting unless the registered constitution of the company makes the same provision for an extraordinary general meeting. Extraordinary general meetings are dissolved once there is no quorum within thirty minutes of the time indicated in the notice for commencement of the meeting. An annual general meeting is automatically adjourned after thirty minutes where there is no quorum to the same day, in the next week, at the same time and venue. The directors may, however, determine otherwise in relation to the day, time and venue. At the adjourned meeting, the number of members present will form a quorum after thirty minutes notwithstanding the number set as quorum by the Act or the constitution of the company. No notice is required on the adjournment of an annual general meeting to the same day, place and time in the following week. However, notice is required if there is a change in the day, place or time. The notice is required to be published in a daily newspaper circulating in the district in which the registered office of the company is located.

12.10 Resolutions

The purpose of a general meeting is to take decisions which are deemed to be decisions of the company. The decisions taken by members in acting on behalf of the company are referred to as resolution. The members resolve on a matter and hence a resolution. Resolution of a company are therefore decisions taken on behalf of the company by members. Even though directors also take decisions on behalf of the company, any reference in Act 992 to a resolution of the company unless the context specifically otherwise indicates is a reference to the resolution of members. At a general meeting, members deliberate on businesses listed as the agenda for the meeting. After deliberation, the members must vote for or against the business. The outcome of the vote on the matter is the decision of the members and thus becomes a resolution of the company. There are two types of resolutions members can pass at a general meeting.

Paragraph 14 of Eighth Schedule of Act 992 provides:

- "(a) A resolution is an ordinary resolution when it is passed by a simple majority of votes cast by the members of the company who, being entitled so to do, vote in person or, where proxies are allowed, by proxy at a general meeting.*
- (b) A resolution is a special resolution when it is passed by not less than three-fourths of the votes cast by the members of the company who being entitled so to do, vote in person or, where proxies are allowed, by proxy at a general*

meeting of which, notice specifying the intention to propose the resolution as a special resolution, has been duly given."

Both ordinary and special resolutions are resolutions passed at a general meeting. This implies there must be a valid general meeting for such resolutions to be passed. An ordinary resolution is a resolution passed by a simple majority of votes cast by members of the company who are entitled to vote on the particular resolution, who actually voted either in person or by proxy if permitted. The simple majority here refers to fifty percent plus one of the votes cast. It is not a requirement for an ordinary resolution to be passed by votes of a simple majority of the total number of members of the company. Not all members need to attend the general meeting. The general meeting is valid once a quorum is attained. Once a quorum is attained, not all members in that meeting will vote on the matter. The simple majority is of the actual votes cast. Therefore, in a company of twenty members, where a quorum is set at five members, where there are six members, the meeting can validly proceed. On voting on a matter that requires ordinary resolution to pass, once the matter is put to vote by show of hands and only three people voted, two members for and one member against, the resolution will be deemed to be passed. The number of votes cast is three and the simple majority is two.

Special resolution refers to a resolution passed by a vote of three-fourth, that is seventy-five percent of the votes cast, of members of the company entitled to vote on a matter, who voted in person or by proxy if permitted. The same principle applicable to ordinary resolution applies to a special resolution, with the only exception being the total number of members to vote for the resolution must be at least three-quarter of the total votes validly casts for the matter. It must be emphasized again that it is not three-fourth of the total number of members or members entitled to attend the meeting or at the meeting, but the actual votes validly cast. In addition, for a valid special resolution to be passed, the notice must expressly indicate the resolution will be passed as a special resolution at the general meeting.

Any reference in the Act or registered constitution of the company to ordinary resolution or special resolution whether relating to resolution of other constituents other than shareholders is to be construed with similar understanding as pertains to resolutions passed at general meetings. Paragraph 11 of Eighth Schedule of Act 992 provides that: ***"(c) A reference in this Act or in the registered constitution of a company, debentures or debenture trust deed to an ordinary or special resolution of a meeting of a class of members, creditors, or debenture holders bear a like meaning to that specified in subparagraph (a) or (b) of this paragraph with the substitution of the members of the class for the members of the company."***

The Act further permits amendment of the terms of a resolution tabled at a general meeting. Paragraph 15 of Eighth Schedule of Act 992 provides that: ***"The terms of a resolution, special or***

ordinary, before a general meeting may be amended by ordinary resolution moved at the meeting if by the terms of the resolution as amended, adequate notice of the intention to pass the resolution can be deemed to have been given in accordance with paragraph 2.” That is where the company proposed to pass a resolution, the members can, by ordinary resolution, amend the terms of that resolution, prior to the passage of the resolution. The Act however requires that this can only be done if it can be construed that adequate notice of intention to pass the amended resolution has been given.

A resolution is deemed passed on the date on which it was in fact passed and where the resolution is by poll, on the day the result of the poll is declared, and not on the date on which the voting by poll was done.⁷⁶² The date a resolution is passed at a general meeting is dependent on whether the resolution is passed by a vote by show of hands or by a poll. Paragraph 19 of Eighth Schedule of Act 992 provides that:

- “(a) A resolution is passed at an adjourned meeting, on the date on which it was in fact passed at the adjourned meeting.*
- (b) A resolution is passed on a poll, on the day on which the result of the poll is declared, and not on any earlier day.”*

A resolution, ordinary or special, is passed the day it is in fact passed if it decided by a show of hands. But if the resolution is decided through voting by poll, the resolution is deemed pass on the date the result of the poll is declared. In this case, it may not be the day of the meeting. Thus, where members vote but left the counting to be done after the meeting and the result is declared on a subsequent day even when the members are not meeting on that day, the resolution is deemed to be passed on that day, which is the day of the declaration.

12.11 Written resolution

There is another category of resolution that is not passed at a general meeting. In essence, there can be three types of resolutions of a company. Two of such resolutions are passed at a general meeting, whilst the third type, a written resolution, is not passed at a general meeting. Section 163 of Act 992 provides that:

- “(1) Except as provided in subsection (5), a resolution in writing signed by all the members for the time being entitled to attend and vote on the resolution at a general meeting, or being bodies corporate by the duly authorised representatives of the bodies corporate, is as valid and effective, for the purposes of this Act as if the resolution had been passed at the general meeting of the company duly convened.*
- (2) Subsection (1) applies where the company has one member entitled to vote.*

⁷⁶² Paragraph 19 of Eighth Schedule of Act 992.

- (3) A resolution described as a “special resolution” is a special resolution within the meaning of this Act.***
- (4) A resolution is passed on the date on which the resolution was signed by the last member to sign, and where the resolution states a date as being the date of the signature by a member, that statement is sufficient evidence that the resolution was signed by that member on that date.***
- (5) Subsections (1) and (4) do not apply to a resolution to remove an auditor, which can be passed only at a general meeting in accordance with section 141, or to remove a director, which can be passed only at a general meeting in accordance with section 176.”***

A written resolution is a resolution passed by all members entitled to attend and vote on that resolution without the members having a general meeting. The resolution is passed on the date the last member entitled to attend and vote on the resolution signed the resolution. The requirement is not for all the members of the company to sign the resolution or unanimously approve the resolution. The requirement is for all the members entitled to attend and vote on that particular resolution to do so. A written resolution is valid as a resolution passed at a general meeting. Where the written resolution is designated as a special resolution, it has the meaning and satisfies the purpose for which a special resolution is required. A written resolution is deemed passed on the date the last member signed the resolution. However, the date indicated on the resolution as the date when the last member signed is sufficient evidence of that date. A written resolution can be used for all purposes except in two instances. It cannot be used to remove a director or an auditor. Directors and auditors of a company can only be removed at a general meeting after they have been heard in accordance with procedures stated in the Act. For an auditor, the general meeting must be an annual general meeting.

A company that has one member or where only one member is entitled to vote on a particular resolution can use a written resolution. The purpose of a written resolution is to allow the company to act or make decisions by its members without the complex requirement of holding a general meeting to do so. The use of a written resolution is, therefore, particularly suitable to a one-member company. It generally avoids delays and cost associated with having a general meeting to make a decision. However, the limitation of written resolutions that it cannot be used to remove a director or auditor of a company must be borne in mind.

12.12 Registration of certain resolutions

The Act also requires registration of copies of certain resolutions. Section 165 of Act 992 provides that:

“(1) A certified true copy of a special resolution of a general meeting or a class of members and of a resolution

(a) to which a specified proportion of a class of members have consented in writing, and

(b) which would not have been effective for the purpose, unless the written consent had been given, without the passing of a special resolution,

shall be forwarded to the Registrar for registration within twenty-eight days after the passing of the resolution to the making of the copy.

(2) The copy shall be printed, typewritten, or be in some other legible form acceptable to the Registrar.

(3) A copy of a resolution of a general meeting of the company for the time being in force shall be embodied in or annexed to a copy of the constitution of the company after the passing of the resolution, but where the sole effect of the special resolution is to amend a constitution, this subsection is sufficiently complied with if a copy of the constitution adopted after the passing of the resolution embodies the effect of the amendment and refers to the date of the passing of the special resolution.

(4) Where a company fails to comply with this section, the company and every officer of the company that is in default is liable to pay the Registrar an administrative penalty of twenty-five penalty units for each default.”

Two types of resolutions are required to be registered with the Registrar. A special resolution and an ordinary resolution that required a specified proportion of a class of members to consent in writing for it to be effective. A certified copy of such resolution which is printed, typewritten or in legible form acceptable to the Registrar must be delivered to the Registrar for registration. The resolution must be submitted to the Registrar within twenty-eight days after the passage of the resolution.

In addition, a special resolution of a general meeting which is in force must be embodied in or annexed to the constitution of the company. The company in providing its constitution to any third party must include such special resolutions that are in force. However, where the special resolution only amends the constitution, a copy of the amended constitution is sufficient evidence that the resolution is included in the constitution.

Failure to satisfy the registration requirement or annex a special resolution to the constitution as required, attract an administrative penalty of twenty-five penalty unit for each default.

12.13 Procedure on voting at general meetings

Decisions are made at a general meeting by voting. The voting is done by members entitled to vote on the particular matter. The general meeting at which the voting is done to decide on a matter must be a valid general meeting conducted in accordance with the Act and the constitution of the company. Voting is generally permitted after deliberation and discussion on the matter in the general meeting. In addition, the voting itself must comply with the requirement of the Act and the constitution of the company. The Act regulates the procedure for voting at a general meeting. Subject to specific requirements, it permits the registered constitution of the company to amend the procedure provided for under the Act. The manner of voting must therefore be in accordance with the Act and the constitution of the company to constitute a valid vote leading to a valid resolution on the matter. A resolution can, therefore, be invalidated if the voting is irregular.

Paragraph 16 of the Eighth Schedule of Act 992 provides that:

- “(a) Unless the registered constitution of a company otherwise provides, a resolution put to vote at a meeting shall be decided on a show of hands unless a poll is, before or on the declaration of the result of the show of hands, demanded by
 - (i) the chairperson
 - (ii) at least three members present in person or by proxy, or
 - (iii) a member or the members present in person or by proxy and representing not less than one-twentieth of the total voting rights of the members having the right to attend and vote on the resolution.*
- (b) A provision contained in the registered constitution of a company regarding voting procedure is void in so far as it would have the effect,
 - (i) of excluding the right to demand a poll on a question other than the election of the chairperson or the adjournment of the meeting; or
 - (ii) of making ineffective a demand for a poll on a question which is made by the persons specified in subparagraph (a)(i), (ii) or (iii).*
- (c) The demand for a poll may be withdrawn.*
- (d) On a show of hands, each member who is personally present and entitled to vote and each proxy of a member entitled to vote shall have one vote.*
- (e) Unless a poll is effectively demanded, a declaration by the chairperson that a resolution has, on a show of hands been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the minutes of the meeting is conclusive evidence of the fact without proof of*

the number or proportion of votes recorded in favour of or against the resolution.

- (f) If a poll is effectively demanded, it shall be taken at the time and in the manner that the chairperson directs.*
- (g) In place of directing that a poll shall be taken of those members present in person or by proxy at the poll, the chairperson may direct that voting shall be by postal ballot of the members entitled to attend and vote on the resolution.*
- (h) For the purposes of subparagraph (g), ballot papers shall be served on the members entitled to attend and vote on the resolution in the same manner as notice of the meeting is required to be given to them, and the members may cast their votes by personally completing the ballot papers or by having the ballot papers completed by their proxies whose instrument of appointment has been deposited, in accordance with subparagraph (e) of paragraph 9, not less than twenty-four hours before the time appointed for the closing of the ballot.
 - (i) Despite subparagraph (f) of this paragraph, a postal ballot in accordance with subparagraphs (g) and (h) shall be directed by the chairperson if,*
 - (i) the constitution of the company so provides, or*
 - (ii) or, or after the chairperson has directed a poll, an ordinary resolution in favour of a postal ballot under this subparagraph is moved at the meeting and passed on a show of hands.**
- (j) A postal ballot in accordance with subparagraphs (g) and (h) of this paragraph shall be deemed to be a poll.*
- (k) Except as otherwise provided in the registered constitution of a company, on a poll each member entitled to vote shall have one vote for each share held by the member and each member of a company limited by guarantee shall have one vote.*
- (l) On a poll a member entitled to more than one vote, or a proxy representing more than one member or a member entitled to more than one vote, need not, in voting, use all the votes or cast all the votes the member uses in the same way.*
- (m) Unless the registered constitution of the company otherwise provides, in the case of an equality of votes, whether on show of hands or a poll, the chairperson of the meeting at which the show of hands takes place or at which the poll is demanded is entitled to a second or casting vote."*

The Act has elaborate provisions to regulate voting at a general meeting. There are two types of voting at a general meeting. Voting by show of hands and voting by poll. Voting by show of hands as the name connotes is voting where members vote in favour or against a matter by show of hand.

The default position on voting at a general meeting is voting by show of hands.⁷⁶³ Therefore, unless otherwise provided in the registered constitution of a company, matters put to a vote must be decided by a show of hands. However, where matters are put to a vote by a show of hands and before the result is declared or on the declaration of the result, a vote by poll can be demanded on the matter.⁷⁶⁴ Unless demanded, a vote by show of hands for or against a resolution will decide on the resolution. A declaration of the result of a vote by show of hands by the chairperson and the entry in the book of the minutes of a general meeting is conclusive evidence of the number of votes cast for and against the resolution.⁷⁶⁵

On a vote by show of hands, each member has one vote irrespective of the number of shares the member has in the company.⁷⁶⁶ A member with one share has one vote whilst a member with ten thousand shares also have one share. Given that on a show of hands, each member has one vote notwithstanding the number of shares the member have in the company, voting by show of hand may not fairly represent the interest of members in the company as a member with more shares carries more risk than a member with a smaller number of shares.

The Act addresses this unfairness by permitting voting to be done by poll when demanded after a matter has been put to a vote by show of hand either before the declaration of the result or on the declaration of the result. The demand for a vote by poll can be made by three categories of persons – (i) the chairperson of the meeting; (ii) at least three members present in person or by proxy; or (iii) any member present in person or by proxy who has five percent or more of the total voting of members having the right to attend and vote on the resolution.⁷⁶⁷ No other person can demand a vote by poll unless the registered constitution otherwise provides. However, a provision in the registered constitution is void if it excludes the right to demand voting by poll or exclude any of the persons listed from making such a demand.⁷⁶⁸ However, the registered constitution can exclude question on the election of chairperson and adjournment of a general meeting from questions that a person can demand a vote by poll.⁷⁶⁹ A qualified person who makes a demand for a vote by poll can withdraw the demand.⁷⁷⁰

On a demand by poll, unless the registered constitution of a company otherwise provides, the number of shares a member have will determine the number of votes of that member.⁷⁷¹ Each share

⁷⁶³ Paragraph 16(a) of Eighth Schedule of Act 992.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ Paragraph 16(e) of Eighth Schedule of Act 992.

⁷⁶⁶ Paragraph 16(d) of Eighth Schedule of Act 992.

⁷⁶⁷ Paragraph 16(a) of Eighth Schedule of Act 992.

⁷⁶⁸ Paragraph 16(b) of Eighth Schedule of Act 992.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Paragraph 16(c) of Eighth Schedule of Act 992.

⁷⁷¹ Paragraph 16(k) of Eighth Schedule of Act 992.

has one vote.⁷⁷² Therefore, a member with a greater number of shares will have more vote than a member with a smaller number of shares. The registered constitution of the company can provide otherwise by attaching a greater number of votes to a particular class of shares as against other classes. However, unless the registered constitution otherwise states, for a company limited by guarantee, each member on voting by poll has one vote irrespective of the interest of such member in the company.⁷⁷³ Since each share carries one vote, a member with more than one share can vote differently for each share or number of shares.⁷⁷⁴ A proxy representing more than one member can also vote differently for the members or vote differently for different number of shares of a member.⁷⁷⁵

On a valid demand for a vote by poll on a matter, the poll must be taken at the time and in the manner directed by the chairperson of the meeting.⁷⁷⁶ The vote by poll may take place at the general meeting to decide on the matter as directed by the chairperson. The Act also permits that rather than voting by poll at the general meeting, the chairperson may direct that voting be done by postal ballot of members entitled to attend and vote on the matter.⁷⁷⁷ Voting by postal ballot may be directed by the chairperson if provided by the constitution or where after directing a vote by poll, an ordinary resolution is passed by show of hands in favour of vote by postal ballot.⁷⁷⁸ If so directed, ballot papers must be served on members entitled to attend and vote on the resolution in the same manner notice of a general meeting is given to the members.⁷⁷⁹ The members may vote by completing the ballot paper or through a proxy whose instrument of appointment is submitted to the company at least twenty-four hours before the time appointed for close of the ballot.⁷⁸⁰ A postal ballot is deemed to be voting by poll.⁷⁸¹

Where after counting of votes cast, whether by show of hands or poll taken at the meeting or by postal ballot, there is equality of votes, the chairperson of the meeting at which the voting by show of hands took place or the meeting where the poll is demanded is entitled to break the tie by exercising casting vote or second vote.⁷⁸² Casting vote is used here to refer to the vote of the chairperson to decide a tie break even though the chairperson ordinarily has no vote on the matter. The second vote refers to the chairperson casting a second vote in instances where the chairperson

⁷⁷² Ibid.

⁷⁷³ Paragraph 16(k) of Eighth Schedule of Act 992.

⁷⁷⁴ Paragraph 16(l) of Eighth Schedule of Act 992.

⁷⁷⁵ Ibid.

⁷⁷⁶ Paragraph 16(f) of Eighth Schedule of Act 992.

⁷⁷⁷ Paragraph 16(g) of Eighth Schedule of Act 992.

⁷⁷⁸ Paragraph 16(i) of Eighth Schedule of Act 992.

⁷⁷⁹ Paragraph 16(h) of Eighth Schedule of Act 992.

⁷⁸⁰ Ibid.

⁷⁸¹ Paragraph 16(j) of Eighth Schedule of Act 992.

⁷⁸² Paragraph 16(m) of Eighth Schedule of Act 992.

has a right to vote and has voted which vote was counted to arrive at the tie. The second vote is to break the tie. The chairperson may, therefore, exercise a second vote if he has already voted or a casting vote if he originally has no vote on the matter or did not vote. The mechanism of casting or second vote is provided to break the deadlock on a matter where there is equality of vote. The registered constitution may however provide for other means of breaking a tie other than a second or casting vote exercisable by the chairperson of the meeting.

Voting by joint holders of shares of a company is determined by seniority. Where two more persons hold shares jointly, the vote cast by the most senior of the holder either in person or through a proxy is counted to the exclusion of votes by the other joint holders.⁷⁸³ For this purpose, the seniority is determined by the order in which the names appear in the register of members kept by the company.⁷⁸⁴ In the case of a member with an unsound mind, a person appointed by the court for such purpose is entitled to vote on behalf of the person with an unsound mind.⁷⁸⁵ The person appointed by the court may also appoint a proxy to attend and vote at a general meeting.⁷⁸⁶

12.14 Minutes of meetings

A company is required to take and keep minutes of a general meeting. The requirement is a mandatory requirement under the Act. Minutes of a meeting simply refers to records of proceedings of the meeting. Even though the Act does not expressly list the items that must be recorded, it provides the minutes must cover the proceedings of meetings. Generally, the minutes must cover the following items:

- (a) description of the meeting – annual general meeting or extraordinary general meeting of the particular company.
- (b) The date, time and place of the meeting
- (c) List of meeting participants
- (d) Purpose of the meeting
- (e) For each agenda items: decisions, action items, and next steps.
- (f) Any other matter discussed at the meeting
- (g) Documents to be included in the meeting report

Section 166 of Act 992 provides that:

“(1) A company shall cause minutes of the proceedings of general meetings and meetings of a class of members to be entered in a book or books kept for the purpose.

⁷⁸³ Paragraph 17 of Eighth Schedule of Act 992.

⁷⁸⁴ Ibid.

⁷⁸⁵ Paragraph 18 of Eighth Schedule of Act 992.

⁷⁸⁶ Ibid.

(2) A minute under subsection (1), if purporting to be signed by the chairperson of the meeting at which the proceedings took place or of the next succeeding meeting, is sufficient evidence of the proceedings.

(3) Where minutes have been made in accordance with this section, until the contrary is proven, the meeting shall be deemed to be duly held, convened and conducted.

(4) Where a company fails to comply with subsection (1), the company and each officer of the company that is in default is liable to pay to the Registrar an administrative penalty of two hundred and fifty penalty units."

It is, therefore, mandatory for the company to keep minutes of a general meeting. Failure to do so attracts administrative penalties. The minutes must be of the proceedings of the general meetings. The requirement is also applicable to meetings of a class of members. It is the responsibility of the Company Secretary to take records of a general meeting. Paragraph (a) of Section 212 of Act 992 provides that: *"The duties of a Company Secretary include*

(b) keeping the books and records of the company

(c) ensuring that minutes of the meetings of the shareholders and the directors are properly recorded in the form required by this Act;"

It is therefore part of the duties of the Company Secretary to ensure the minutes are taken and the records are kept in accordance with the Act.

Even though the duty is imposed on the Company Secretary to ensure the minutes are taken, the minutes must be signed by the chairperson of the meeting for the minutes to be sufficient evidence of proceedings of the meeting. The chairperson may sign the minutes at the end of the meeting or the next succeeding meeting. Minutes of a meeting taken in accordance with the section and purportedly signed by the chairperson has a significant effect in law. Such a minute is sufficient evidence of the proceedings of the meeting. Secondly, it is a prima facie evidence that the meeting was validly convened and conducted. The minute, therefore, provide proof of proceedings of the meeting and established that the meeting was validly convened and conducted. However, contrary evidence is permitted to rebut the presumption that the meeting was validly convened and conducted.

Companies may keep a book in which minutes are recorded or a file on which typed-written minutes signed by the chairperson are kept. Electronic copies may also be kept by the company. The book or file containing the minutes must be available for inspection by the members of the company. Section 167 of Act 992 provides that:

"(1) The books containing the minutes of proceeding of a general meeting or class meetings of a company shall be kept at the registered office of the company and shall, during business hours, subject to reasonable restrictions that the

constitution of a company may impose, be open to the inspection of a member without charge.

- (2) Not less than two hours in each day other than a Saturday or a Sunday or a public holiday shall be allowed for inspection under subsection (1).*
- (3) A member is entitled to be furnished at a cost determined by the company, within ten days after the member has made a request in that behalf to the company, with a copy of the minutes.*
- (4) If an inspection required under this section is refused or if a copy required under this section is not sent within the proper time, the company and every office of the company that is in default is liable in respect of each default to pay to the Registrar an administrative penalty of twenty-five penalty units for each day during which the default continues and the Court may, by order, compel an immediate inspection or furnishing of a copy."*

The Act requires the company to keep the book containing the minutes at the registered office of the company. The book containing the minutes must be available for inspection by the members for at least two hours within business hours of each working day. A member may request for a copy and is entitled to be furnished the copy within ten days of the request subject to payment of cost determined by the company. An administrative penalty is imposed on the company for each default of permitting the inspection or failure to furnish a copy to the member so requesting within the time indicated. The Court can order the company upon application by the affected member for the company to permit inspection or to furnish a copy to the member.

12.15 Class meetings

Other than a general meeting of members of a company, there may be a meeting of a class of members which does not involve all the members of the company. The Act does not make separate rules for such meeting but provides for the application of the rules on a general meeting to such meetings. Section 164 of Act 992 provides that:

- "(1) The provisions on general meetings in accordance with sections 163 and the provisions of the Eighth Schedule apply to meetings of a class of members in like manner as they apply to general meetings of companies, but the necessary quorum shall be set out in subsection (2) and a member of the class present in person or by proxy may demand a poll.*
- (2) At a meeting of a class of members, the necessary quorum shall be,*
 - (a) if there are not more than two members of that class, one member present in person or by proxy; or*

- (b) *in any other case, two members, present in person or by proxy, holding not less than one-third of the total voting rights of that class.*
- (3) *The constitution of a company may provide for a larger but not for a smaller quorum for the purposes of subsection (2)."*

The provisions applicable to a general meeting apply to meetings of a class of members except the provision in relation to quorum for a general meeting. The quorum of a class of member is one member in case there is less than two members of the class. Where more than two, the quorum is two members holding at least one-third of the total voting rights of the class. The members may attend a meeting of a class either in person or by proxy.

12.16 Informal decisions and acting without meeting

The Act provides that members in a general meeting constitute not only a recognised but a principal organ of a company. The acts of such members are automatically the acts of the company. However, members are not required to act only through a general meeting. There are two instances where members' act will be binding as an act of the company notwithstanding that the members did not hold a general meeting in accordance with the Act and the constitution of the company. The first instance is that members are permitted to act by a written resolution under section 163 of the Act. This is discussed above under resolutions. Under section 163(1) of the Act, a resolution in writing signed by members entitled to attend and vote on a resolution at a general meeting is as valid and effective for all purposes of the Act as if the resolution was passed at a general meeting duly convened and held by the company. The members can, therefore, act through a written resolution without having a general meeting. However, written resolution cannot be used to remove directors and auditors of a company.⁷⁸⁷

Secondly, members may act without a general meeting by making a decision informally. Such decisions are binding on the company even though the members have not held a general meeting or formally passed a written resolution. Such informal decisions have been recognised under case law as binding on the company. The position has also been given statutory backing under section 301 of Act 992. The critical requirement for such informal decisions to be binding on the company is the decision must be a unanimous decision of the members. The principle has therefore been referred to us as the unanimity principle. The position was stated by Lord Davey in *Salomon v. Salomon & Co.*⁷⁸⁸ when he said that "*the company is bound in a matter intra vires by the unanimous agreement of its members.*"

⁷⁸⁷ Section 163(5) of Act 992.

⁷⁸⁸ [1897] A.C. 22 at 57.

The case that subsequently fully established the unanimity principle is the English case of *In re Duomatic*⁷⁸⁹. Given the origin of the principle from the case of *In re Duomatic*, it is also referred to as the Duomatic Principle. A decision arrived at unanimously by the members may either be in writing or verbal or through the conduct of the members.

*In re Duomatic Ltd*⁷⁹⁰ - a company was incorporated in 1960 with a share capital. All the ordinary shares were held by the three directors, Elvins, Hanley and East. The non-voting shares were held at all material times by a single preference shareholder. The articles of the company provided that the remuneration of the directors should be determined from time to time by the company in a general meeting; no such resolution was passed in respect of any relevant period. Relations between Hanley and his fellow directors were not good. He had no service contract. However, he received £4,000 by way of an inducement to leave the company without making any trouble. He left the company on 1 April 1963, and on the following 19 May transferred all his shares to Elvins. Both Elvins and Hanley had drawn on the company from time to time for their personal needs during the company's financial year ended 30 April 1963. When the final accounts for that year, which were approved and signed by Elvins and East were drawn up, they disclosed payments made to Elvins and Hanley totalling £15,661. A new director, Wood, was appointed on 17 April 1964, and in July Elvins transferred 32 shares to him and a further 64 shares to two other persons. An arrangement was made between Elvins and Wood, that as from 1 May 1964, Elvins should draw no more than £60 per week. This arrangement was known to and approved by the other holders of ordinary shares. On 23 October, the company went into voluntary liquidation. By that date, Elvins had received from the company £2,197. In the liquidation, the liquidator claimed repayment, in respect of the year ended 30 April 1963 and the monies paid to Hanley and Elvins as remuneration in respect of the year ended 30 April 1964. The court held that although Elvins and East did not take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries nevertheless, at the time of passing the accounts for the year ended 30 April 1963, they applied their minds to the question whether the drawings by Elvins and Hanley should be approved as being on account of remuneration payable to them as directors and, accordingly, their consent should be regarded as tantamount to a resolution of a general meeting and the drawing by Elvins and Hanley as directors' remuneration in that year would not be disturbed. Buckley J. stated as follows:

"The articles of the company incorporated by reference art 76 of Table A in Sch 1 to the Companies Act 1948, which requires that the remuneration of directors shall from time to time be determined by the company in general meeting. The affairs of this company seem to have been conducted with extreme informality. There was never any resolution passed determining that any of the directors should receive any remuneration, or at any rate no resolution was ever passed authorizing the

⁷⁸⁹ [1969] 2 Ch 365.

⁷⁹⁰ [1969] 1 All ER 161.

directors to receive any remuneration in respect of the periods with which I am concerned, which are, the year ended 30 April 1963, the year ended 30 April 1964, and the period from 1 May 1964 to 23 October 1964, when the company went into voluntary liquidation. What happened as regards directors' remuneration in the year ending 20 April 1963, was this. Mr. Elvins and Mr. Hanley drew on the company from time to time as their personal needs required, and at the end of the financial year their drawings were totalled; and those totals were grossed up by suitable sums to account for the tax that ought to be paid in respect of the directors' remuneration so received. For two of them, Mr. Elvins and Mr. Hanley, the drawings plus the tax amounted to an aggregate of £15,661 1s 8d, and that figure was inserted in the profit and loss account of the company as representing directors' salaries paid in respect of that period... It is common ground that none of the sums which I have mentioned were authorised by any resolution of the company in general meeting, nor were they authorised by any resolution of any formally constituted board meeting; but it is said on behalf of Mr. Elvins that the payments were made with the full knowledge and consent of all the holders of voting shares in the company at the relevant times, and he contends that in those circumstances the absence of a formal resolution by the company in duly convened meeting of the company is irrelevant.... It seems to me that if it had occurred to Mr. Elvins and Mr. East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that would have made the position of the directors—that is to say, Mr. Elvins and Mr. Hanley—who received the remuneration, secure, and nobody could thereafter have disputed their right to retain their remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr. Elvins and Mr. Hanley should be approved, as being on account of remuneration payable to them as directors, seems to me to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed on the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. The preference shareholder having shares which conferred on him no right to receive notice of or to attend and vote at a general meeting of the company could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting. Accordingly, it seems to me that the evidence that I have heard leads to the conclusion that the drawings by Mr. Elvins

***and Mr. Hanley during the accounting year ending 30 April 1963, which are covered by the item of directors' salaries £15,661 1s 8d in the profit and loss account, cannot now be disturbed.*"**⁷⁹¹

A unanimous decision, consent or approval by all members of a company outside of a general meeting of a matter that could have been approved at a general meeting is, therefore, a valid act of the company as if the decision was made in a validly held general meeting and a formal resolution passed. The critical factor is that all the members entitled to attend and vote on the matter have unanimously approved or consented to the matter. This approach seems to rely on the substance rather than the form of decision making. That is, it should not matter that the members did not go through the formality of a general meeting as required under the Act or the constitutions once in substance, all the members have agreed or consented to the matter upon averting their mind to the matter. The rationale for the decision in the Duomatic case was explained in the case of *EIC Services Ltd v Phipps*⁷⁹².

In *EIC Services Ltd v. Phipps*⁷⁹³ – Neuberger J explained the rationale for the Duomatic principle in relation to an issue on approval of bonus issue as follows:

"120. It is common ground between the parties that:

- Before the three directors could properly have approved the issue and allotment of the bonus shares, there should have been authorisation, under Regulation 110, by an ordinary resolution, of the 16 shareholders, of the capitalisation of the relevant sum in the share premium account and of the appropriation of that sum to pay for the bonus shares.***
- Owing, it appears, to the failure of Mr. Connolly to advise as to the need for such authorisation, no general meeting of the 16 shareholders took place with a view to the passing of an ordinary resolution giving such authorisation.***
- It is nonetheless possible, in principle, for the issue and allotment of the bonus shares to have been authorised other than through approval at a general meeting, by virtue of the so-called Duomatic principle.***

121. This principle, on which the first and second defendants rely, is named after In re Duomatic Ltd [1969] 2 Ch. 365, and it has been expressed in slightly different ways in different cases. In Duomatic itself, Buckley J said at 373:

"[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter

⁷⁹¹ Emphasis mine.

⁷⁹² [2003] EWHC 1507.

⁷⁹³ Ibid.

which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

In Parker and Cooper Limited –v- Reading [1926] Ch. 975, the principle was expressed in these terms by Astbury J at 984:

"[W]here the transaction is intra vires and honest... it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."

More recently Meagher JA in Herman –v- Simon (1990) 8 ACLC 1094 at 1096 described the principle as:

"a doctrine that formalities may be disregarded if they have been waived by all the shareholders acting in concert who want the same substantial result."

122. Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter."

It should be noted that the court in subsequent cases emphasized the fact that the unanimous approval or consent to an act will not render an ultra vires act valid. That the approval must be in relation to an intra vires act. That if the act is ultra vires, the unanimous approval, either at a general meeting or informally, will not render the act valid.

*In re Express Engineering Works, Ltd*⁷⁹⁴ - five persons formed a private company in which they were the sole shareholders, and they sold to it for £15,000, which was in fact secured by debentures of the company's property which they had acquired for £7,000. The contract for sale to the company and the issue of debentures were carried out at a meeting of the five individuals, who thereupon appointed themselves directors of the company. That meeting was described in the books of the company as a board meeting. The articles forbade any director to vote in respect of any contract or arrangement in which he might be interested, and in a winding-up of the company the liquidator

⁷⁹⁴ [1920] 1 Ch 466.

claimed that the issue of the debentures was invalid. In the Court of Appeal, it was held, there being no suggestion of fraud, that the company was bound in a matter *intra vires* by the unanimous agreement of its members and that although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting, and transacted the same business. In these circumstances, the issue of the debentures was not invalid. Lord Sterndale M.R. stated @ pg. 470:

*"It was contended on the one hand that the issue of the debentures was invalid for this reason, that all the directors being interested parties were precluded by art. 9 from voting, and that though the five persons acting together as corporators undoubtedly could make the contract they could only do so in a properly constituted general meeting. On the other hand it was argued that the contract could not be called invalid if every shareholder knew of and sanctioned it; and further, that whatever the draftsman of the minutes may have styled the meeting, it was in fact a meeting of all the corporators, and they were able, whatever they might call themselves, to waive technicalities and meet together and make any contract they chose. As authority for that the appellant relied upon what was said by Lindley L.J. in delivering the judgment of the Court in *In re George Newman & Co.* There were, however, two differences between that case and the present one. First, the transaction there was *ultra vires*, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon v. Salomon & Co.* (1) 'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires*."*

Warrington LJ stated @ pg. 470 and 471 that:

"It was competent to them [the five corporators of the company] to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as businessmen they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

Younger LJ. also stated @ pg. 471 that:

"... I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed and every competent resolution passed for which no further formality is required by statute becomes binding on the company."

*Parker & Cooper Ltd v. Reading*⁷⁹⁵ - in this case, debenture was issued to Reading as security for a loan. The debenture was sealed and signed by the two directors as prescribed by the articles. However, the seal was not fixed in the presence of the two directors as required by the articles. The transaction had at all times been discussed with all the four members and they had all individually assented to it without a general meeting. Subsequently, the liquidator challenged the validity of the debenture. It was held that an informal unanimous agreement between members may be effective as an extraordinary or special resolution. That a formal meeting of members of a company is unnecessary if all the members in fact assent to a transaction which is within the powers of the company to undertake. Astbury J. stated as follows:

"Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the incorporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously. The plaintiffs contend that the two directors acted throughout as if they were partners, and cannot now turn round and shelter themselves behind the company law. I do not take this view. If company law enables the entirety of the incorporators to ratify an irregular intra vires transaction why should this not protect an honest bona fide intra vires transaction entered into for the benefit of the company?"

*In re George Newman & Co*⁷⁹⁶ - Newman, the chairman of a company in which substantially all the shares were held by himself and his family, purchased on behalf of the company the right to a building agreement to be obtained from certain commissioners. The commissioners objected to the company as a tenant and proposed to substitute Newman, who thereupon sold the benefit of the agreement to the company at an advance of £10,000, of which £7000 was spent upon commissions and otherwise to obtain the agreement from the commissioners, and £3000 was applied by Newman to his own use. A further sum of £3500 was spent by Newman out of the assets of the company upon his private house. These payments were made out of money borrowed by the company for the purpose of its business; they were sanctioned by resolutions of the directors and were approved by all the shareholders. The articles contained no power to make presents to directors. Upon a summons taken out by the liquidator in the winding-up of the company against Newman under section 10 of

⁷⁹⁵ [1926] Ch 975.

⁷⁹⁶ [1895] 1 Ch 674.

the Companies (Winding-up) Act, 1890, the court held that Newman was not liable for the £7000, but was liable for the £3500, first because the shareholders for the first time had no power to authorise the making of presents to directors out of money borrowed by the company; secondly, because if there had been such power it could be exercised only at a general meeting. Lord Halsbury stated:

"In answer to the liquidator's claim for this sum, and in answer to his claim to the £3000 already referred to, Mr. George Newman relies on the articles of the company and on the fact that all the directors and shareholders knew and sanctioned what was done. It remains to consider this defence with reference to both of these sums. When the facts are understood both these sums were in truth presents by the directors out of the company's assets to G. Newman with the consent of the other shareholders who were of age; and the question is whether these presents can be treated as valid against the liquidator on the winding-up of the company, which is hopelessly insolvent and which was largely in debt when these presents were made. Mr. Justice Vaughan Williams has held that they are unimpeachable, and he referred to the case of In re British Seamless Paper Box Company ... as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were, in fact, allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as paid up was registered. The transaction, therefore, was intra vires, and it was taken to be so both by counsel and by the Court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which then consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and, the company being ultimately wound up, the liquidator sought to recover the nominal value of the shares, treating them, in fact, as not paid up. The Court held that this could not be done, because the transaction (being intra vires) was honest and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. ... Mr. George Newman and his co-directors evidently ignored their legal position entirely. They regarded Mr. George Newman as the company, and it never seems to have occurred to them that he and his brothers could not do as they liked with what they regarded as their own property, or rather as his, for he and his children held the bulk of the shares. If this view were correct in point of law, if the corporate body could be disregarded, it would follow that Mr. George Newman and

his brothers would be liable without limit for the debts which were contracted in the name of the company. This would be a just and proper result to arrive at; but the Court is precluded by the terms of the Companies Act, 1862, ss. 191, 192, from adopting it. The Court is bound to recognise the company as incorporated, and to give effect to all the consequences of such incorporation... Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves... But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorise such presents as those impeached by the liquidator; and the result is that his appeal must be allowed as to £3000, part of the £10,000, and as to the £3500, and Mr. Newman must be ordered to pay these sums, with interest at 4 per cent."

*Cane v. Jones*⁷⁹⁷ - a family company incorporated in 1946, had an issued capital of £30,000 divided into shares of £1 each, of which 15,000 were vested in the first and second defendants jointly, representing one branch of the family, and the remaining 15,000 in two trustees of a family trust in trust for the plaintiff as sole beneficiary, representing the other branch of the family. The company's articles of association provided for up to six directors; that the brothers, Percival and Harold, should be life directors; that the chairman should be elected by the directors, and should have a casting vote

⁷⁹⁷ [1980] 1 WLR 1451.

at board meetings, and that he should preside over and have a casting vote at general meetings of the company. Percival was the third defendant and father of the first and second defendants. Harold was the plaintiff's father. In March 1967 the first and second defendants agreed with the two trustees that the chairman should not have any casting vote. On the determination of the trust, the trustees transferred 15,000 shares in the company to the plaintiff. Subsequently, a state of deadlock was reached in the management of the company's affairs. The first and third defendants, maintaining that the agreement of March 1967 was unenforceable by the plaintiff who had not been privy to it, sought to enforce the chairman's right to exercise a casting vote. The plaintiff denied that any such right existed as a result of the agreement reached by all the shareholders in March 1967. On the question of whether the agreement of March 1967 was effective to alter the company's articles of association, the court held that despite the wording of sections 10 and 141 of the Companies Act 1948 and the fact that there had been neither a meeting nor a resolution in writing, the agreement of March 1967, being an expression of the unanimous will of all the corporators acting together and being *intra vires* the company, was effective to amend the company's articles of association so as to deprive the chairman of his casting vote. Michael Wheeler QC stated @ pgs. 1460 – 1461 that:

"... For my part I venture to differ from Mr. Potts on the first limb of his argument, namely that articles can only be altered by special resolution. In my judgment, section 10 of the Act is merely laying down a procedure whereby some only of the shareholders can validly alter the articles: and if, as I believe to be the case, it is a basic principle of company law that all the corporators, acting together, can do anything which is intra vires the company, then I see nothing in section 10 to undermine this principle. I accept that the principle requires all the corporators to "act together": but with regard to this I respectfully adopt what Astbury J. said in Parker and Cooper Ltd. v. Reading [1926] Ch. 975, 984:

"Now the view I take of both these decisions [In re Express Engineering Works Ltd. [1920] Ch. 466 and In re George Newman & Co. [1895] 1 Ch. 674] is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."

... I should add that the evidence in the case before me is that the 1967 agreement was signed by "the two sides," if I may call them that, separately, and that they did not meet together, however informally, for the purpose of signing the document. But it is clear beyond doubt that the agreement did represent a meeting of minds which is, after all, the essence of a meeting and the passing of a resolution ... I should add in passing that a copy of the 1967 agreement was never, as far as I am aware, sent to the Registrar of Companies for registration. It may be that there is a gap in the registration requirements of section 143. But be that as it may, the fact that the 1967 agreement was drafted as an agreement and not as a resolution, and that the four

signatories did not sign in each other's presence does not in my view prevent that agreement overriding pro tanto — and so far as necessary — the articles of the company; in my judgment Mr. Potts's first argument fails and unless he can show that the 1967 agreement has been superseded, the chairman of the company has no casting vote at board or general meetings."

The Duomatic Principle or Unanimity Principle has found support in Ghanaian case law.

In *Asafu-Adjaye and Others v. Agyekum*⁷⁹⁸, an action was commenced by one of the director-cum-shareholder for acts amounting to oppression. In support of the action, it was alleged that a director has increased his shares without resolution. The increase in the shares was done at a shareholders' meeting by agreement even though no special resolution was passed as prescribed under the Regulations of the Company. It was held that although Act 179 contained many provisions empowering or requiring certain matters to be approved or authorised by the passing in a general meeting of a particular resolution, it was established that all the shareholders acting together could do anything intra vires the company, even though the Code specified a particular procedure by which the thing might or was to be done. Thus, it was perfectly within the power of the members of the company to agree orally to issue shares without any resolution as in section 41 of the Code or alter the number of shares without any resolution to alter the company's regulations as prescribed in section 57 of the Code. Osei-Hwere JA stated @ pg. 396 that:

"Although Act 179 contain many provisions empowering or requiring certain matters to be effected or authorised by the passing in general meeting of a particular resolution, it is established that all the shareholders acting together can do anything intra vires the company, even though the Code specifies a particular procedure by which the thing, may or is to be done. This principle was stated by Lord Davey in Salomon v. Salomon & Co. [1897] A.C. 22 at 57 when he said that "the company is bound in a matter intra vires by the unanimous agreement of its members." Accordingly it has been decided: (a) that it is sufficient for all the members informally to ratify an act of the directors without a meeting: Parker and Cooper Ltd. v. Reading [1926] Ch. 975; (b) that it is necessary only that all the members entitled to vote should give their assent: Re Duomatic Ltd. [1969] 2 Ch. 365; and (c) that the articles of association may be altered by such an agreement of the shareholders, notwithstanding the provisions in section 10 of the Companies Act, 1948 that the alteration may be made by special resolution: Cane v. Jones [1981] 1 All E.R. 533.

Thus it was perfectly within the power of the members of the company to agree orally to issue shares without any resolution as in section 41 of the Code or alter

⁷⁹⁸ [1984 – 86] 1GLR 386.

the number of shares without any resolution to alter the company's regulations as prescribed in section 57 of Act 179."

*Dhalomal v. Pupulampu and Others*⁷⁹⁹ - this was a case involving subletting of premises by a deceased tenant to Pupulampu as a sub-tenant. It was alleged by Dhalomal, the landlord, that the tenant did not comply with the Rent Act, 1963 (Act 220), section 22(1) which provides that: "22. (1) No person, in the case of a monthly or shorter tenancy of any premises, shall sub-let such premises without the written consent of his landlord...". The subtenant alleged that the landlord has waived the application of the section since he was introduced by the tenant to the landlord and he did not raise any objection. It was held that the appellant did not waive the statutory prohibitions imposed by Act 220, section 22(1) against subletting by monthly tenants. Osei-Hwere JA laid down the principle on waiver of statutory provision @ pgs. 354-355 as follows:

"Decisions on the Companies Acts afford fertile examples of waiver of statutory requirements. It is now firmly established that all the shareholders acting together can do anything intra vires the company, even though the Acts specify a particular procedure by which the thing may, or is to be done. This principle was stated by Lord Davey in Salomon v Salomon [1897] AC 22 at 57, where he said that "the company is bound in a matter intra vires by the unanimous agreement of its members." It has been decided: (a) that where the directors are all the shareholders, a board resolution passed with all the directors present is effective to bind the company, notwithstanding that what is done is beyond the powers of the directors: Re Express Engineering Works Ltd [1920] 1 Ch 466, (b) that it is sufficient for all the members informally to ratify an act of the directors without a meeting: Parker & Cooper Ltd v Reading [1926] Ch 975; (c) that it is necessary only that all the members entitled to vote should give their assent: Re Duomatic Ltd [1969] 2 Ch 365; and (d) that the articles of association may be altered by such an agreement of the shareholders, notwithstanding the provision in section 10 of the 1948 Act that the alteration may be made by special resolution: Cane v Jones [1980] 1 WLR 1451.

What was decided in those cases was not that such an agreement between the shareholders took effect as a special or extraordinary resolution imposed by the Acts, but that such an agreement exercised an overriding power, which could be exercised as an alternative to the power conferred by the Acts, which enables less than all the shareholders to act by resolution of a specified majority at a general meeting. It is as if to the statutory provisions has been added the rider, "But, if all the shareholders entitled to vote agree upon the matter, there is no need to convene the meetings or to pass the resolution." But this principle has to be qualified where what is to be done affects the interests of persons other than the shareholders, such as debenture holders.

⁷⁹⁹ [1984-86] 1 GLR 341.

In Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993 at 1016-1017 it was observed:

"General social policy from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of persons enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands".

But there may be provisions in a statute which cannot be waived because waiver is expressly prohibited. In other cases, the presence of a public interest precluding waiver is evident from the imposition of penalties for non-compliance with prescribed formalities. In summation, statutory provisions can be waived if (a) they have been enacted solely for the benefit of the person or class of persons waiving them; (b) they are procedural; (c) the statute does not expressly prohibit waiver; and (d) the waiver is not contrary to public policy."

In the above case, the Court established that four conditions must be satisfied for an act engaged in contrary to a statutory provision to be valid. These are:

- (a) they have been enacted solely for the benefit of the persons or class of persons waiving them;
- (b) they are procedural;
- (c) the statute does not expressly prohibit waiver; and
- (d) the waiver is not contrary to public policy.

All the four conditions must be satisfied for the validity of the act or decision contrary to the statutory provision to be valid.

12.17 Statutory restatement of the Duomatic or Unanimity Principle

The Duomatic or Unanimity principle has been given statutory backing in the Companies Act, 2019. Section 301 of the Act titled "Unanimous agreement by shareholders" has elevated the principle from its common law status to a statutory position. Section 301 of Act 992 states:

- “(1) Where all shareholders of a private company agree to or concur in any action which has been taken or is to be taken by the company***
(a) the taking of that action is deemed to be validly authorised by the company despite any provision in the registered constitution of the company; and
(b) the provisions in any of the constitutions referred to in the Second, Third and Fourth Schedules shall not apply in relation to that action.”

The section permits shareholders of a private company to reach an informal agreement, without a general meeting or passage of a resolution, which will be binding on the company. The unanimous agreement is binding on the company notwithstanding the procedure prescribed in the constitution, registered or default, of the company has not been complied with. Unlike the Duomatic or unanimity principle, which applies to all company, the section seems to limit the application of the section in two respects. First, the application of the section seems to be limited to shareholders, which is companies with shares. It will be implied that companies limited by guarantee are excluded from the scope of application of the section. Even though the strict interpretation of the section will lead to such a result, it is recommended that a purposive interpretation should be adopted. The purpose of the section to give effect to unanimous decisions of the shareholders and members of a company. Therefore, where members of a company limited by guarantee unanimously agree to or concur on action taken or to be taken, such action should be binding on the company. The purposive approach finds support in the fact that Paragraph (b) of the section refer to Fourth Schedule of the Act which is the constitution of a company limited by guarantee.

Secondly, the section limits its application to private companies. There are good reasons why public companies should be excluded. Given the large number of its membership, it may be impracticable to obtain a unanimous agreement of all the members. However, there is no good reason if in practice the unanimous agreement of the members is obtained, to hold the agreement as not binding on the company. A public company may not necessarily have a large membership. The section should therefore be applicable to all instances where the unanimous approval or consent of the members are given to an action taken or to be taken. In any case, even where companies limited by guarantee and public companies are excluded under the sections due to strict interpretation of the section, the principle as developed under case law should be applied to hold such unanimous agreement or approval valid and binding on the company. Section 5 of Act 992 makes rules of equity and common law applicable to companies provided the rules are not inconsistent with the Act. Since the Act did not expressly exclude companies limited by guarantee or public companies, the Duomatic principle should continue to be applicable.

Section 301 of Act 992, without limiting the scope of subsection (1), lists a number of acts that may be unanimously agreed to by shareholders that will be binding on the company. Subsection (2) of Section 301 of Act 992 provides:

- “(2) Without limiting the matters which may be agreed to or concurred in under subsection (1), that subsection shall apply where all shareholders of a private company agree to or concur in*
- (a) the issue of shares by the company;*
 - (b) the making of a distribution by the company;*
 - (c) the repurchase or redemption of shares in the company;*
 - (d) the giving of financial assistance by a company for the purpose of, or in connection with, the purchase of shares in the company;*
 - (e) the payment of remuneration to a director or a member or the conferral of any other benefit on a director or member;*
 - (f) the making of a contract between an interested director or a member and the company;*
 - (g) the entry into a major transaction; or*
 - (h) the ratification after the event of any action which could have been authorised under this section.”*

It should be emphasised that the mention of the above specific acts does not restrict the scope of application of the unanimity principle under section 301 of the Act. Acts not listed remain valid once all the members of the company agree or concur in the action taken or to be taken.

13.0 DIRECTORS OF COMPANIES

13.1 Introduction

Directors occupy the most important position in the governance of a company. In any discussion of corporate governance, the focus is on directors for the obvious reason that the directors are the directing mind of the company. The definition of corporate governance as *“the system of rules, practices and processes by which a company is directed and controlled”*,⁸⁰⁰ requires focus on directors as the group of persons who direct and control the affairs of the company.

Under the Companies Act, 2019 (Act 992), a company is to act through its recognised organs under the Act. Section 144(1) of the Act provides that: *“(1) A company shall act through the members of the company in general meeting or the board of directors or through officers or agents, appointed by, or under the authority derived from the members in general meeting or the board of directors.”* Three organs are prescribed under the Act that can act for and on behalf of a company. The distribution of the corporate powers among the three constituents or organs must be done by the constitution of the company subject to the mandatory provisions of the Act. Subsection (2) of section 144 of the Act provides that *“Subject to this Act, the respective powers of the members in general meeting and the board of directors may be determined by the constitution of a company.”*

Notwithstanding that there are three organs and the constitution of the company may determine the allocation of corporate powers among the three organs, directors remain a critical, arguably the most important, organ for two reasons. First, unless expressly indicated in the constitution of a company, the directors retain the most important corporate power which is the power to manage the business of the company. Section 144(3) of Act 992 provides that: *“(3) Except as otherwise provided in the constitution of a company, the business of the company shall be managed by the board of directors who may exercise the powers of the company that are not by this Act or the constitution required to be exercised by the members in general meeting.”* The default position under the Act is that the board of directors retains the power to administer the business of the company. Since the company is set up to undertake a business or pursue an object, the power to manage the business may be regarded as the most important corporate power. Secondly, the default position has become the acceptable practice in corporate governance. Other than the requirement of placing limitations on the exercise of the powers of the directors, directors have, by and large, retained the powers to manage and administer the business of a company.

⁸⁰⁰ Richard Smerdon, A Practical Guide to Corporate Governance (4th edn. Sweet & Maxwell, 2010).

Directors, therefore, are without doubt the fulcrum of any corporate governance consideration. Denning L.J. in *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.*⁸⁰¹, where he stated @ pg. 172 as follows:

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

This chapter explains the principles under the Companies Act, 2019 (Act 992) relating to directors of a company.

13.2 Definition of directors

Section 170(1) of Act 992 provides that: *"For the purpose of this Act "director" means those persons, by whatever name called, who are appointed to direct and administer the business of a company"*. The section defines who a director of a company is by two criteria – (a) the function performed by the person and not the designation by which the person is known, and (b) the fact that the person is appointed. That is, a person qualifies as a director where the person is appointed to manage and administer the business of the company. The definition under the Act is based on functionality rather than designation. It does not matter whether the person is referred to as a director or not. Once the person performs the functions of directing and administering the business of the company, the person is a director notwithstanding whatever designation they are known or called.

In *Kwapong v. Ghana Cocoa Marketing Board (Consolidated)*⁸⁰², an Interim Management Committee was appointed for a corporate entity, Ghana Cocoa Marketing Board. The IMC has undertaken various acts on behalf of CMB. The appointment of the IMC was challenged. It was held that the appointments of the members of the interim management committee of the CMB by the President, not having been made with the advice of the Council of State, was in clear contravention of article 57 of the Constitution, 1979, and were therefore quite irregular. However, since they constituted the de facto governing body of the CMB they could properly execute the lawful powers of the CMB. Osei-Hwere JA stated @ pgs. 89 to 90 as follows:

⁸⁰¹ [1957] 1 Q.B. 159.

⁸⁰² [1985-86] 1 GLC 74.

“The white paper issued on the Archer Report dissolved the board of directors of the first defendants forthwith and directed that Mr Kwame Pianim, chief executive of the first defendants, should continue to direct the affairs and operations of the board until the establishment of the proposed council which was to replace the Cocoa Marketing Board. It is not denied that Kwame Pianim resigned his appointment whilst the council had not been established. In the meantime the Constitution, 1979 was in operation. The President by exhibit M, appointed the second defendant as chairman and the third and fourth defendants as members of a committee to manage the affairs of the cocoa industry pending the formation of the Cocoa Council. Exhibit M was, ex facio, a personal appointment made by the President and it was clearly aimed at appointing the governing body of a public corporation. This appointment was in clear contravention of article 57 of the Constitution, 1979 because he could only make the appointment with the advice of the Council of State. It was conceded by the defendants’ counsel that on 9 October when the President made his appointment the Council of State had not been constituted. The appointments of the second, third and fourth defendants (which seem to have been made out of necessity) were, therefore, quite irregular. Although their appointments were irregular they constituted the de facto governing body of the first defendants and they could properly execute the lawful powers of the first defendants. What they could not do was to exercise powers not allowed them by either the Constitution or their governing enactment and they remained liable for acts ultra vires of these powers.”

Section 170(1) of Act 992 indicates that a person can only lawfully be a director if that person is appointed to direct and administer the business of the company. However, subsection (2) of Section 170 of Act 992 provides that for the purposes of imposing liability on a person, a person who is not duly appointed as a director may be held liable as a director in a number of instances. A distinction needs to be made between the two subsections. A person not appointed as such cannot be a director, but for the purpose of imposing liability, that person can be treated as a director. Such persons are held liable as directors even though they are not appointed a director (that is not *de jure* director) but they are in fact deemed to be directors (that is a *de facto* director). This is treated in detail below.

13.3 Director as an officer of the company

The directors are officers of the company and the directors acting together constitute the Board of Directors. The First Schedule of Act 992 defines “officer” by providing that “*“officer” in relation to a body corporate includes any director ... appointed under a power contained in an instrument”*. The Board of Directors is a principal organ of the company and their acts are deemed to be the acts

of the company.⁸⁰³ The act of individual directors, unless so empowered by the Board or members in a general meeting, is not an act of the company. Unless the act of a director is so authorised by a principal organ or the company is estopped from denying the act of the director or the act is ratified by a principal organ after it has been undertaken, the act will not be binding on the company.⁸⁰⁴ This may be different in the instances of a managing director who is appointed by the Board and given all or some of the powers of the Board.⁸⁰⁵

The nature of the office of directors is that of a fiduciary and agency relationship with the company. The fiduciary duty is imposed as per the Companies Act, 2019⁸⁰⁶ and the common law⁸⁰⁷. Section 190(1) of Act 992 provides that *“(1) A director of a company stands in a fiduciary relationship towards the company”*. The following cases provide authority for the position that a director is both an agent of the company and stands in a fiduciary relationship with the company.

*Aberdeen Railway Company v. Blaikie Brothers*⁸⁰⁸ - in this case, Blaikie Bros had a contract with Aberdeen Railway Company to make iron chairs at £8.50 a ton. Blackie Brothers sued to enforce the contract. Aberdeen Railway Company argued they were not bound because at the time of entering into the contract, Sir Thomas Blaikie, the Managing Director of Blaikie Brothers, was also the chairman of the board of directors of Aberdeen Railway Company. The contract was thus affected by conflict of interest and not enforceable against Aberdeen Railway Company. Sections 40-1 of the Companies Act 2006 gives directors unlimited capacity to bind the company when the directors act in good faith provided that the act is within the powers of the company. But if an action by a director is beyond their authority or in breach of some fiduciary obligation, then they can be made personally liable. It was held that Aberdeen Railway Company was not bound by the contract. In so holding, Lord Cranworth L.C. stated in relation to the position occupied by the director @ pg. 399 as follows:

“This, therefore, brings us to the general question—whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner?

The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into

⁸⁰³ Sections 144 and 147 of Act 992.

⁸⁰⁴ Section 148 of Act 992.

⁸⁰⁵ Section 146 of Act 992.

⁸⁰⁶ Section 190 of Act 992.

⁸⁰⁷ Section 217 of Act 992.

⁸⁰⁸ (1854) 1 Macq HL 461.

engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Regal (Hastings) Ltd v. Gulliver and others⁸⁰⁹ - in this case, the action was based on the allegation that the directors and the solicitor had used their position to acquire the shares in Amalgamated, a subsidiary of Regal, for themselves. That they sold the shares at a very substantial profit which they have kept. That since they had obtained that profit by using their offices as directors and solicitor and, they were accountable for it to Regal, and that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. It was held that the directors were liable to account for the profit notwithstanding that they may not have acted mala fide or fraudulently or in the interest of the company. That they are liable on the ground that a person in a fiduciary relationship obtains profits in acting on behalf of a beneficiary. The liability, therefore, arises simply due to the position in which the profit was made. Lord Russell of Killowen stated @ pg. 9 that:

"The rule of equity which insists on those who by use of a fiduciary position makes a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

Automatic Self Cleansing Filter Syndicate Co Ltd v. Cuninghame⁸¹⁰ - a shareholder with 1,202 shares out of 2,700 shares of the company wanted the company to sell its assets to another company. At a meeting, the shareholder was able to get a majority vote of 1,505 shares in favour of a resolution approving the sale. The directors, who were against the sale, decided to decline to comply with this resolution. The shareholder commenced an action in the name of the company against the directors. The constitution of the company conferred on the directors the power to manage the business of the company including selling the assets of the company. The general power conferred on the directors was only subject to an extraordinary resolution passed by the shareholders. It was thus argued that the shareholder cannot instruct the directors by a simple majority. It was however contended that the directors were agents of the company and must act on the instruction of the shareholders. It held that directions cannot be given to the directors by a simple majority. That the directors can only be

⁸⁰⁹ [1942] UKHL 1; [1967] 2 AC 134.

⁸¹⁰ [1906] 2 Ch 34 CA.

instructed by a special resolution and the directors can reject the offer. Lord Collins MR stated in relation to the position occupied by the directors as follows:

"It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes, directors are agents. For whom are the agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors, it is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents... There are provisions by which the minority may be overborne, but that can only be done by special machinery in the shape of special resolutions."

*Promexport International (Ghana) Ltd v. First Ghana Building Society*⁸¹¹ - in this case, an action brought to recover possession of premises and evict the appellant from premises purchased by the respondent. The defendant company in its defence stated that the defendant company will rely on an agreement executed by one Raymond Okudjeto. It was stated that Raymond Okudjeto was the managing director at the time of execution of the agreement but there was no indication in the agreement that it was executed by Raymond Okudjeto for or on behalf of the company. The court dismissed the defence and the defendant appealed. It was held in dismissing the appeal that unless clearly indicated that the managing director was acting for or on behalf of the company, the managing director was not acting as an agent of the company. Implied in the judgement that if it was so indicated that Raymond Okudjeto was acting on behalf of the company, he would have been deemed to be an agent of the company. Lamptey JA stated the position @ pgs. 398 to 399 as follows:

"It will be noticed that paragraph 5 of the statement of defence failed to disclose the capacity in which Raymond Okudjeto purported to enter into the said agreement to purchase the premises. The description of Raymond Okudjeto as the managing director of the defendant company does not ipso facto make him an agent for and on behalf of the defendant company. Indeed the Companies Code, 1963 (Act 179) made adequate and specific provisions touching upon the whole process of acquisition of property by limited liability companies. It cannot as a matter of law be submitted that Raymond Okudjeto entered into the said contract for and on behalf of the defendant company."

*Dikiyi & Others v. Ameen Sangari Industries Ltd*⁸¹² - a director-shareholders of the defendant company who is the heir-apparent to a family stool negotiated a lease on behalf of the defendant company with the stool. In an action to set aside the lease by the stool on grounds inter alia that the

⁸¹¹ [1989-90] 1 GLR 395 CA.

⁸¹² [1992] 1 GLR 61.

lease was unconscionable, Kpegah J stated in relation to the position and duties of director @ pg. 69 that:

"I would like to view this against his statutory duties to the company on behalf of which he negotiated with his family. By the provisions of section 203 of the Companies Code, 1963 (Act 179) a director of a company stands in a fiduciary relationship with the company and he must observe the utmost good faith in his dealing with the company or on its behalf. And under the provisions of section 206 of Act 179, a director of a company shall not, without the company's consent, place himself in a situation where his duty to the company conflicts with or may conflict with his personal interest or his duties to other persons.

These two provisions find expression in the words of Lord Cranworth L.C. in the case of Aberdeen Rail Co. v. Blaikie Brothers [1843-60] All E.R. Rep. 249 at 252, H.L. This is what he said:

"A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect." It should be said that conflict of duties is just as objectionable as a conflict of interests. However, there is no breach of this duty when the company consents. The evidence in this case does not point to the contrary and I am therefore not prepared to hold otherwise."

Directors are also trustees of the company. A fiduciary position requires one to act in the interest of or for the benefit of another.

*Great Eastern Railway Company v. Turner*⁸¹³ - Horatio Love, then chairman of the board of directors of GETC, on behalf of the company and with the money of the company purchased shares in Lynn and Hunstanton Railway, which shares were duly transferred to him as trustee for the company. Lynn and Hunstanton were aware of this fact. Upon Horatio ceasing to be chairman of the board, the shares were transferred by him to his successor, J. Goodson, who also later transferred to Turner. Turner was subsequently declared bankrupt and his assignees refused to transfer the shares to the newly appointed chairman of the board of directors. In an action by the company against the assignees of Turner, it was held that though the purchase by one company of shares in another was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his

⁸¹³ [1872] 8 Ch 149.

assignees and that he must transfer the shares as the company should direct. Lord Selborne LC stated @ pg. 152 that:

"The directors are the mere trustees or agents of the company – trustees of the company's money and property – agents in the transactions which they enter into on behalf of the company. In this case, without legal authority, and therefore without the consent of the corporation, whose trustees and agents they were, the directors took a part of the company's money and therewith purchased a property which this contest proves to be of the same value – shares in the Lynn and Hunstanton Railway Company. Those shares so bought – not a farthing of any other person's money having contributed to the purchase – were placed in the name of three successive chairman of the company, and were uniformly dealt with as that which they were, the property of the company."

The directors are appointed as officers of the company and stand in a fiduciary and agency relationship with the company. The relationship of the directors with the company is not only regulated under the Act but the constitution of the company as well as the terms of appointment. In addition, the common law and rules of equity continue to be applicable to directors. Section 217 of Act 992 provides that:

"The rights, duties and liabilities of officers and agents of companies shall continue to be governed by the rules of the common law and equity relating to principal and agent, and master and servant except in so far as those rules are not inconsistent with the express provisions of this Act."

The above provision under the law also supports the proposition that a director stands in an agency relationship with the company.

13.4 Requirement of directors – minimum number and residence

Every company incorporated in Ghana must have directors. The Companies Act, 2019 requires that there a company must have at least two directors at all times.⁸¹⁴ A company can appoint more than two directors. The Act specifies the minimum number of directors a company can have but did not provide for the maximum number. Where the company fails to have the required minimum of two directors, the company must cease carrying on business after four (4) weeks unless the company appoints directors to make the minimum number.⁸¹⁵ Section 171 of Act 992 provides as follows:

"(1) A company incorporated after the commencement of this Act shall have at least two directors, one of these directors being ordinarily resident in Ghana."

⁸¹⁴ Section 171(1) of Act 992.

⁸¹⁵ Section 171(2) of Act 992.

- (2) If at any time the number of directors is less than two in contravention of subsection (1), and the company continues to carry on business for more than four weeks after that time, the company, the director and each member of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the company so carries on business after the expiration of the four weeks without having at least two directors.***
- (3) Every director and every member of the company who is cognisant of the fact that the company is carrying on business with fewer than two directors are jointly and severally liable for the debts and liabilities of the company incurred during that time.***
- (4) Subject to this section, the number of directors may be fixed by, or in accordance with, the constitution of the company."***

It is mandatory for all companies to have the minimum number of two directors. Failure to have the minimum does not affect the existence of the company. Where the company ceases to have the minimum number of two, that is the company has one or no director, the company has four weeks to continue to carry on business with less than the two directors. If the company is unable to appoint the directors to have at least two directors within four weeks after the number of directors falls below two, the company must cease to carry on business. If the company continues to carry on business after the four weeks with less than two directors, the one director and member of the company who has knowledge of this fact and the company are jointly and severally liable for the debts and liabilities of the company incurred during the time the company carried on business with less than two directors after the four weeks from the date the company ceases to have less than two directors. In other words, the Act permits the lifting of the veil of incorporation and ascribing liability incurred during the period of default where the company carries on business with less than two directors. The period of default is not the date from which the company ceases to have less than two directors, but every day after the four weeks grace period. In addition, the director and members aware of the default and the company are liable to pay an administrative penalty of twenty-five penalty units for each day of the period of default.

Subject to the statutory minimum requirement of two directors and resident requirement for one of the two directors, the constitution of the company can provide for the maximum number of directors that a company should have. However, sector specific legislation may in some instances prescribe a minimum and maximum number of directors for a company operating in the sector above the two prescribed under Act 992. In that instance, the company pursuant to section 4 of Act 992 must comply with the minimum and maximum number of directors under the sector specific legislation. An example is companies engage in the business of banking and specialised deposit-taking licensed under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The Bank of Ghana

pursuant to the powers conferred under section 92 of Act 930 has issued the Banking Business – Corporate Governance Directives, 2018 which prescribed minimum and maximum number of directors a bank or specialised deposit-taking institution must have. Paragraph 58 of the Directives provide a company licensed as a bank or specialised deposit-taking institution must have a minimum of five and a maximum of 13 directors. A company engaged in a banking business must therefore have a minimum of five directors and not the two prescribed under Act 992. Other than where a sector specific legislation so provides, the minimum number is the two directors as prescribed under Act 992 and there is no maximum number.

The maximum number of directors a company appoints, however, must depend on the requirement of each company taking into account the expertise required for the effective and efficient management of the business of the company. In addition to that, it is recommended to have an odd number of directors than an even number for the purpose of decision making since the decision of the board of directors is by simple majority unless otherwise stated. However, even where an even number of directors are appointed, mechanism must be stated in the constitution of the company to deal with deadlock on the board. An important factor to be aware of is that other than the minimum number of two directors and resident requirement of a director under the Act, the constitution of the company must provide for the requirements of directors including the maximum.

The Act also requires that at least one director of every company in Ghana must at all times be ordinarily resident in Ghana.⁸¹⁶ Section 182 of Act 992 provides the resident requirements as follows:

- “(1) At least one director of the company shall at all times be resident in the Republic.*
- (2) In the event of a willful breach of subsection (1), the company and every director of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the default continues.*
- (3) The rights of the company concerned under or arising out of a contract made during the time that a director of the company is not resident in the Republic are not enforceable by action or any other legal proceedings.*
- (4) For the purposes of subsection (3)*
 - (a) the company may apply to the Court for relief against disability imposed by subsection (3) and the Court, on being satisfied that it is just and equitable to grant relief, may grant the relief generally or as regards a particular contract and on the conditions that the Court may impose;*
 - (b) the rights of any other party as against the company, or any other person in respect of the contract are not limited; and*

⁸¹⁶ Sections 171(1) and 182 of Act 992.

(c) if an action or proceeding is commenced by any other party against the company to enforce the rights of that party in respect of the contract, subsection (3) does not preclude the company from enforcing in that action or proceeding by way of counterclaim, set-off or otherwise, the rights that the company may have against that party in respect of that contract."

Liabilities are imposed on a company that fails to have a director resident in Ghana at all times. Act 992 imposes two liabilities. First, an administrative penalty is imposed on each director and the company in default. Second, there is a disability imposed on the company's ability to bring legal proceedings to enforce contracts entered into at the time of the default. The company even though a legal person is deprived of the legal capacity to sue on contracts entered into at the time of the default. Even though the Act imposes a disability on the legal capacity of the company to enforce contracts entered into at the time of default, the company can be sued by third parties to enforce liability under the contract against the company. The Act, however, permits the company in such instance to seek relief through counterclaim or set off. In addition, the Act also permits the company to apply for relief, which is permission to be granted by the court which allows the company to sue. The relief will be granted if the court is satisfied that it is just and equitable to permit the company to sue.

A similar provision is in the repealed Companies Act, 1963. There seems to be no justification for the resident requirement other than the reason given by Gower⁸¹⁷ that given the sections on substitute and alternative directors, the company should be able to comply with the resident requirements. It seems not to make any sense to insist that at least one of the directors of a company, must be resident in Ghana at all times failing which liabilities are imposed on the company and the directors. It is more absurd when one considers the fact that directors are not responsible for the day-to-day management of the firm unless the director is appointed to an executive position. It is, however, suspected that the residency requirement is to ensure that there is a director resident in Ghana and conversant with the activities and operations of the company. If that is the reason for the requirement, it is suggested that resident should not be construed as being present in Ghana at all times, but resident should be construed in the strict and technical sense used for tax purposes under the Income Tax Act, 2015 (Act 896). Section 101(1) of Act 896 provides that:

"(1) An individual is resident in the country for the year of assessment if the individual is

(a) a citizen, other than a citizen who has a permanent home outside of the country and lives in that home for the whole of that year;

⁸¹⁷ Final Report of the Commission of Enquiry into the Working and Administration at the present Company Law of Ghana, @ pg. 301.

- (b) present in the country during that year for an aggregate period of one hundred and eighty-three days or more in any twelve month period that commences or ends during that year;*
- (c) an employee or an official of the Government of Ghana posted during abroad during that year; or*
- (d) a citizen who is temporarily absent from the country for a period of not more than three hundred and sixty-five continuous days, where that citizen has a permanent home in Ghana."*

The residency requirement of directors under Act 992, it is suggested, must be interpreted in the restricted sense as used in Act 896. An interpretation that equates resident in Ghana at all times to being present in Ghana at all times will produce an absurd result of imposing liability on a company where two directors travel out of Ghana or choose to hold a board meeting outside Ghana, even where the directors are engaged in the business of the company outside Ghana.

13.5 Appointment of directors

As noted above, the Companies Act, 2019 provides that *"For the purpose of this Act "director" means those persons, by whatever name called, who are appointed to direct and administer the business of a company"*. The definition of who a director is not only tied to the function performed (that is management of the business of a company), but it is also tied to how the person gets to the position by which he is required to manage the business of a company. In other words, the definition of who is a director is not grounded only on the function performed but is also grounded on how the person gets to the position of performing those functions. Per the definition in the Act, a person becomes a director through appointment. Under the Act, an appointment is, therefore, the only lawful means by which a person becomes a director. This assertion is supported by the Act when it further provides in section 172(2) that *"A person shall not be appointed a director of a company unless the person has, before the appointment..."*⁸¹⁸ made certain declarations and consented in writing to the appointment. As discussed below, there are certain instances that a person may be held liable as a director without an appointment as a director. However, such persons cannot be deemed a lawfully appointed director of a company for all purposes under the Act. The person cannot sue to exercise the right, powers and benefits a director of the company is entitled to. Such a person is only deemed to be a director for the purpose of imposing duties and liabilities on that person and not for any other purpose.

Appointment of a director is made in accordance with Act 992 and the constitution of the company. Act 992 regulates the appointment of a director in the absence of provisions on appointment in the

⁸¹⁸ Emphasis mine.

constitution of the company. The Act provides for the requirements of appointment, qualification of directors, manner of appointment and persons who can appoint directors.

Section 172 of Act 992 provides as follows:

- “(1) The first directors of a company shall be named in an application for incorporation.*
- (2) A person shall not be appointed as a director of a company unless the person has, before the appointment*
 - (a) made a declaration submitted to the company and subsequently filed with the Registrar to the effect that, the person has not within the preceding five years of the application for incorporation been*
 - (i) charged with or convicted of a criminal offence involving fraud or dishonesty;*
 - (ii) charged with or convicted of a criminal offence relating to the promotion, incorporation or management of a company; or*
 - (iii) a director or senior manager of a company that has become insolvent or if the person has been, the date of the insolvency and the particular company; and*
 - (b) consented in writing to be a director and filed the consent within twenty-eight days.*
- (3) Subject to this section and to sections 173 and 174, the appointment of directors shall be regulated*
 - (a) by section 300 in the case of a private company, and*
 - (b) by sections 325 and 326 in the case of a public company except as otherwise provided in the constitution of a company.*
- (4) The constitution of a company may provide for the appointment of a director or directors by a class of shareholders, debenture holders, creditors, employees or any other person.*
- (5) Despite a provision to the contrary in the constitution of a company, a casual vacancy in the number of directors may be filled by,*
 - (a) the continuing directors or director although the number of directors have been reduced below that fixed as the necessary quorum of directors; or*
 - (b) an ordinary resolution of the company in general meeting.*
- (6) In exercising the power to fill a vacancy under subsection (5), the directors shall observe the rules laid down in section 190 and 191 and shall not appoint a person to be a director unless the directors have taken reasonable steps to satisfy themselves of the integrity and suitability of the person to be a director of the company.*

- (7) *Where the casual vacancy filled under subsection (5) is one which, under the terms of the constitution of a company, should be filled by an appointment by a class of shareholders, debenture holders, creditors, employees, or any other person, the director appointed by the continuing directors or by ordinary resolution of the company in general meeting, shall cease to hold office as soon as the other director is duly appointed in accordance with the constitution.*
- (8) *In the event that*
- (a) *there are no directors of a company, or the number of directors is less than the quorum required for a meeting of a meeting of the board; and*
 - (b) *it is not possible or practicable to appoint directors in accordance with the constitution of the company,*
a shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make an appointment if the Court considers that it is in the interest of the company to do so.
- (9) *An appointment by the Court under subsection (8) may be made on such terms and conditions as the Court considers fit."*

Section 172 of Act 992 requires directors of a company to be appointed. A critical requirement for the appointment of directors of a company is the conditions that must be satisfied prior to the appointment. The person to be appointed a director of a company must have provided a statutory declaration that he is not subject to a number of disqualification factors and must have provided express written consent to the appointment. These two requirements must precede the actual appointment of the director for a valid appointment. The written consent must be given prior to the appointment. This is signified by the fact that the date on the letter of consent must be prior to the letter or resolution appointing the person as a director. The court has held that lack of prior written consent will render the appointment invalid.

*Politis and Another v. Plastico Ltd (No.2)*⁸¹⁹ – a director, who was the sole remaining director upon the death of another, appointed another director to fill the casual vacancy. The law requires that there must be a written consent from the prospective director prior to appointment. No written consent was received by the director prior to the appointment. The court held that even though the director has the power to appoint in this instance, appointing the director without the required consent is ultra vires and renders the appointment void. Amissah JA stated @ pgs. 30 and 33 that:

"One of the grounds on which Mr. Kuma's appointment was challenged was that this statutory prerequisite, his consent in writing before appointment as a director, had not been fulfilled. The argument was that if there was consent it ought to have been included in the minutes recording the decision to appoint him. I would not go

⁸¹⁹ [1967] GLR 24.

so far as to say that the consent in writing should invariably appear in the minutes of a meeting, if any, at which a director is appointed. If it does appear, of course, it would settle all questions, as to whether the requirement was fulfilled or not. But surely, the fact that the appointee did consent in writing before appointment could have been referred to in the minutes, or in the document which evidenced his appointment. In this particular case not only was it not referred to.... Had there been such a piece of writing I am sure either he or Mr. Kuma or both of them would have produced it or explained why it was not referred to in the minutes and sought an adjournment to produce it. They did no such thing. I am therefore driven to the conclusion that the point was completely ignored because there was no such consent which could have been produced or discussed. In the absence of this, I am bound to declare that Mr. Kuma's appointment as a director was invalid. ... it is hereby declared that his appointment as a director of Plastico Ltd. was ultra vires, null and void."

The statutory declaration must be submitted to the company and subsequently filed with the Registrar. The person to be appointed a director must declare that within the last preceding five years, the person has not been charged or convicted of criminal offences relating to fraud or dishonesty, or offence relating to the promotion, management or incorporation of a company, or he was not a director or senior manager of a company that has become insolvent or he is insolvent. Sector specific legislations may impose additional requirements as part of the appointment process. The Banking Business – Corporate Governance Directive, 2018 issued by the Bank of Ghana pursuant to section 92 of the Banks and Specialised Deposit-Taking institutions Act, 2016 (Act 930) mandates that prior written approval of Bank of Ghana is obtained prior to the appointment.

Under section 173 of Act 992, the content of statutory declaration to be provided by the prospective director are some of the factors that disqualify a person from being appointed a director. The statutory declaration required under section 172(2) is to shift the obligation from the company to the prospective person to indicate he is not disqualified from being appointed as director. Imposing the requirement of a statutory declaration on the person to be appointed under Act 992, means the company does not need to undertake extensive due diligence on the person. Self-assessment will have to be undertaken by the person to be appointed prior to making the declaration because if the declaration is later found to be untrue, penalties are imposed under the Statutory Declaration Act, 1971 (Act 389) on the person in addition to the penalties imposed under Act 992. Section 172(2) of Act 992 also requires the person to be appointed a director to give a written consent prior to his appointment. The written consent must be filed with the Registrar within 28 days of the consent. It must be emphasized that the statutory declaration and the written consent must precede the letter or resolution appointing the person as director for the appointment to be valid.

*Quarcoopome v. Sanyo Electrical Trading Co. Ltd and Another*⁸²⁰ - the plaintiff was a director of the first defendant from 1965 to 1972. The defendant was the shareholder of Ghana Sanyo Electrical Trading Manufacturing Co Ltd, which was the second defendant. The plaintiff alleged he was appointed by the first defendant and has acted as director of the second defendant from 1974 to 2001 but has not received agreed remunerations in breach of an oral agreement between the plaintiff and the first defendant. There was enough evidence to indicate the plaintiff acted as director for the second defendant but there was no evidence of a resolution appointing the plaintiff and there was no prior written consent of the plaintiff to the appointment as required under section 181 of the Companies Act, 1963 (Act 179). The High Court gave judgment for the plaintiff that he has acted as director and awarded the plaintiff compensation, not based on the agreement but on a quantum meruit basis. The defendant appealed and the Court of Appeal set aside the judgment that it was in contravention of section 194 of Act 179 since the award amounted to the usurpation of the powers of the members to set the remuneration of directors. On further appeal to the Supreme Court, it was held on the issue of whether the plaintiff was a director that the plaintiff was not a director as there was no resolution appointing the plaintiff and the plaintiff did not provide a prior written consent required under Act 179. That under section 194, the only way to determine the remuneration of a director is by ordinary resolution and the court cannot set remuneration based on quantum meruit basis. Ansa JSC stated @ pgs. 221 and 223 to 225 as follows:

"We shall first consider the issue relating to the position of the directorship of the plaintiff in the second defendant company. There was ample evidence that he acted as a director of the second defendant company for quite a long period of time and, as stated above, in that capacity, he rendered services for the benefit of the company. But in spite of this, the question is: was he duly appointed by the company into that position? This was largely a matter of law the answer lying squarely in the provisions of the Companies Act, 1963 (Act 179). Section 181 thereof provides on appointment of directors that:

"181. Appointment of directors

(1) A person shall not be appointed a director of a company unless that person has, prior to the appointment consented in writing to be appointed. ...

The position of the plaintiff that he was a director of the second defendant company, was not to be inferred from only the fact that he worked for the company for such a long time that he could be called and treated as a director under the Companies Act. In our view, the question whether the plaintiff was appointed a director of the company was a positive fact that was capable of direct proof, by simply producing evidence of the existence of a resolution passed to that effect, and evidence of his prior written consent to be so appointed. On the evidence, there was no such written consent and the issue was could this requirement be dispensed with especially in

⁸²⁰ [2009] SCGLR 213.

the teeth of evidence that he did in fact serve as a director in the company for that long period of time? ...

Section 179 of Act 179 is relevant for our consideration whether or not the plaintiff was appointed a director of the company. The section reads:

"179. Meaning of "directors"

- (1) For the purposes of this Act "directors" means those persons, by whatever name called, who are appointed to direct and administer the business of the company.*
- (2) A person, who is not a duly appointed director of a company,*
 - (a) who holds out as a director or knowingly allows to be held out as a director of that company, or*
 - (b) on whose directions or instructions the duly appointed directors are accustomed to act, is subject to the same duties and liabilities as if that person were a duly appointed director of the company.*
- (3) Subsection (2) shall not derogate from the duties or liabilities of the duly appointed directors, including the duty not to act on the directions or instructions of any other person.*
- (4) Where a person, who is not a duly appointed director of a company, holds out as a director or knowingly allows to be held out, as a director of the company, or if the company holds out that person, or knowingly allows that person to hold out as director of the company, that person or the company, is liable to a fine not exceeding one hundred and fifty penalty unit. ...*

Thus, person who had not been duly appointed a director of a company, (which was to say, in accordance with the legal provisions quoted above), but nevertheless acted or held himself out, or allowed himself to be held out as such director, committed an offence punishable by a fine prescribed by law."

Section 172 of Act 992 also requires the appointment to be done in accordance with the Act subject to terms of the constitution. It should be noted that the terms of the constitution of the company do not override all the provisions of the Act on appointment. The terms of the constitution are subject to section 173 which deals with the qualification of directors and subsection (5) of section 172 which gives power to continuing directors or members of the company by ordinary resolution, to appoint a director to fill casual vacancy. Even though section 172(3) of the Act requires the appointment of directors to be done in accordance with the constitution of a company, the Act provides for a default position in the event the constitution of a company fails to provide for the manner of appointment. The default position for a private company is provided under section 300 and that of a public company is provided under sections 325 and 326 of the Act.

Section 172 of the Act also provides for the different categories of persons that may appoint directors of a company. Subsection (4) of the section provides that the constitution of a company may require an appointment to be made by a class of shareholders, debenture holders, creditors, employees or any other person. Section 29(2) of Act 992 provides that *“Where the constitution empowers a person to appoint or remove a director or any other officer of the company, that power is enforceable by that person although that person is not a member or officer of the company.”* The constitution of a company, subject to subsection (5) of section 172 may, therefore, give shareholders or class of shareholders, debenture holders or class of debenture holders, employees or class of employees, creditors or class of creditors or any other person the power to appoint a director. As provided under subsection (5) of the section, continuing directors or members of a company by ordinary resolution have the power to appoint directors to fill casual vacancy notwithstanding who is named in the constitution of a company as having the power to appoint a director or directors of the company.

Other requirements may be applicable in relation to the procedure for the appointment of a director as stated in sector specific legislation. The Banking Business – Corporate Governance Directive, 2018 issued by the Bank of Ghana pursuant to section 92 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) provides for some additional requirements in the appointment of a director of a bank or specialised deposit-taking institution. This includes obtaining the prior written approval of the Bank of Ghana as well as a declaration by the proposed director to the Bank of Ghana and the board of the company his professional interest, business and investment interests.

A number of options for the appointment of directors are discussed below.

(i) Appointment or recruitment by subscribers or promoters

Section 172(1) of Act 992 provides that *“The first directors of a company shall be named in an application for incorporation”*. The responsibility to name the first directors of a company is, therefore, imposed on the person who submits the application for the incorporation of a company. The First Schedule of the Companies Act, 2019 defines a subscriber as *“a person who applies for the incorporation of a company”*. Section 12 states *“Subject to this Act, a person of the age of eighteen years and above may apply for the incorporation of a company under this Act.”* A subscriber will also qualify as a promoter under section 10(1) of Act 992 if the subscriber is engaged or interested in the formation of a company based on the steps taken. However, not all subscribers will necessarily qualify as a promoter unless he engages in the formation of a company beyond his particulars being listed on the application and his signing of the application.

The subscriber or a promoter under subsection (1) of section 172, therefore, have the responsibility to appoint, recruit and name the first directors of a company in the application submitted under section 13 of Act 992 for the incorporation of the company.⁸²¹

(ii) Appointment by members

The constitution of a company may also empower members, a class of member or a specific member to appoint a director, a number of directors or all the directors of a company.⁸²² Even though the Act requires the constitution of a company to give the members such power, the default positions under section 300 for private companies and sections 325 and 326 for a public company require the appointment of directors to be made by members of a company in the event the constitution of a company does not provide for the exercise of the power of appointment of directors. Section 172(3) of Act 992 provides that *“(3) Subject to this section and to sections 173 and 174, the appointment of directors shall be regulated*

- (a) by section 300 in the case of a private company, and*
- (b) by sections 325 and 326 in the case of a public company.”*

Section 300 of Act 992 which provides for the appointment of directors of a private company provides that:

- “(1) The appointment and removal of directors of a private company may, subject to sections 171 to 176, be regulated by the registered constitution of the company.*
- (2) In the absence of a contrary provision in a registered constitution of the company, each of the existing directors shall continue to hold office until the director vacates office under section 175, or is removed under section 176.*
- (3) A company may at any time by ordinary resolution fill a vacancy in the number of directors and may at any time by ordinary resolution increase the number of directors, but the total number of directors shall not exceed the maximum prescribed by the registered constitution of that company if it has one.”*

Members of a company, therefore, have the power to appoint directors of a company from time to time by ordinary resolution or to fill vacancies in the number of directors. In making such appointments, the members cannot exceed the maximum number of directors required to be appointed under the constitution of the company.

In addition to the powers to appoint directors by members under section 300 of the Act, the Act under section 172(5), gives the members the power to fill a casual vacancy on the board by ordinary

⁸²¹ See the case of *Twycross v. Grant* (1877) 2 CPD, discussed under chapter 5.0 of this book.

⁸²² Section 172(4) of Act 992.

resolution. Section 172(5) of Act 992 provides that: ***“(5) Despite a provision to the contrary in the constitution of a company, a casual vacancy in the number of directors may be filled by ... (b) an ordinary resolution of the company in general meeting.”*** The difference between the power under sections 300 and 172(5) of the Act is that the power under section 300 can be taken away or modified under the constitution of the company, whilst that of section 172(5) cannot be so modified. Where, for example, the constitution names employees of a company as the group of persons to appoint a director, the members cannot appoint a director under section 300 of the Act. However, where there is a casual vacancy on the board, even though the employees have the power to appoint, the members can by ordinary resolution appoint a director to fill the casual vacancy pending the exercise of the power by the employees. Subsection (7) of section 172 provides that the director appointed by members to fill the casual vacancy ceases to be a director once the appointment is made by persons named in the constitution to appoint directors.

In *Dolphyne v. Speedline Stevedoring & Co. Ltd and Another*⁸²³, where a trial court through the remedy of specific performance ordered one shareholder to appoint the plaintiff as a director when the company was owned by two shareholders, the Court of Appeal set aside the judgment. Kpegah JA stated @ pg. 357 that:

“I will therefore approach the as if the appointment of a director is not regulated by the company’s Regulations. I will therefore bring the matter under section 272(2) of Act 179 which provides that in the absence of a provision in the Regulations as to the mode of appointment of a director, the company may,

“at any time by ordinary resolution fill any vacancy in the number of directors and may at any time by ordinary resolutions increase the number of directors so however that the total number of directors shall not exceed the maximum, if any, prescribed by the Regulations.”

The evidence is clear that the 2nd defendant is only one of the members of the company.”

The position above is similar to that of a public company in the sense that members are giving the power to appoint directors. The difference is the automatic retirement from the office of directors of a public company, the manner of the re-election of retiring directors to the office of directors and the appointment of director.

Section 325 of Act 992 provides that:

Subject to sections 172 to 176 and sections 326 and 327 and except as otherwise provided in a registered constitution of a company, the following rules shall apply to the retirement and appointment of directors of a public company:

⁸²³ [1992-93] GBR 353.

- (a) at the first annual general meeting of the company every director shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being or, if the number of directors is not three or a multiple of three, then the number nearest one-third, shall retire from office;*
- (b) the directors to retire in every year shall be those who have served longest in office since their last election, but, as between persons who became directors on the same day those to retire shall, unless the directors otherwise agree among themselves, be determined by lot;*
- (c) a director appointed to the office of managing director shall not, while holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors;*
- (d) a retiring director is eligible for re-election;*
- (e) the company, at the annual general meeting at which a director retires as provided in this section, may fill the vacated office by electing a person to that office, and in default the retiring director shall, if offering to stand for re-election, be deemed to have been re-elected unless at the meeting it is expressly resolved not to fill the vacated office or unless a resolution for the re-election of the director has been put to the meeting and lost;*
- (f) a person is not eligible for election to the office of director unless not less than three days and not more than twenty-eight days before the date appointed for the general meeting, a notice in writing
 - (i) of the intention to propose that person for election, signed by a member entitled to attend and vote at the meeting; and*
 - (ii) of the consent to be elected as a director, signed by the person proposed, is lodged at the registered office of the company; and**
- (g) on increase or decrease in the number of directors, the company may, by ordinary resolution determine in what rotation the increased or decreased number is to retire from office."*

The first directors are appointed by subscribers who subscribed to the constitution of the public company as named in the application submitted for incorporation of the company or named by the promoters in the constitution or application for incorporation of the public company. Once incorporated, the members of the public company have the power to remove and appoint new directors. Without exercising such power, the directors named in the constitution of the company

continue in the office subject to section 325 which provides for the automatic retirement of all the directors at the first annual general meeting of the public company. When the directors so retire, the members at the annual general meeting have the power to elect new directors, including electing from the retiring directors. The retiring directors are eligible for re-election. The person is not eligible to be elected to the office of a director unless two notices are given not less than three days and not more than twenty-one days to the general meeting. The first notice is a notice of intention to propose the person to be elected which must be signed by a member entitled to attend and vote at the general meeting. The second notice is the letter of consent of the proposed person to be elected as director signed by the person proposed. The letter of consent must be lodged at the registered office of the company.

At each subsequent annual general meeting after the first annual general meeting, not all directors of the public company are required to automatically retire from office. At every subsequent annual general meeting after the first annual general meeting, one-third of the total number of directors must automatically retire. If the total number of directors is not in a multiple of three, the number nearest one-third are to retire. The directors to retire are in the order of the longest serving directors. Where two or more directors are of the same duration, those directors may agree among themselves those that must retire failing which the determination is made by casting a lot. The automatic retirement does not apply to a director appointed a managing director whose term as a managing director has not expired. It is however applicable to directors occupying other executive positions other than the position of a managing director. Retiring directors are eligible for re-election to the office of directors.

It is important to remember that the constitution of the public company can modify this requirement of automatic retirement of all directors at the first annual general meeting and one-third of directors at a subsequent annual general meeting. In addition, where there is a subsequent increase or decrease in the number of directors of the public company, the company by ordinary resolution may determine the rotation in which the increased or decreased number of directors may retire.

In view of the automatic retirement, the Act permits instances where members may by a single resolution appoint two or more persons as directors of a public company, except a company limited by guarantee. Section 326 of Act 992 provides that:

- “(1) At a general meeting of a public company, other than a company limited by guarantee, a resolution for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a resolution that it shall be so moved has first been carried unanimously.*
- (2) A resolution moved in contravention of subsection (1) is void, whether or not the resolution being so moved was objected to at that time.*

- (3) For the purposes of this section, a resolution approving appointments or nominating persons for appointment shall be treated as a resolution for appointment.*
- (4) This section shall not apply where a registered constitution of a company provides for cumulative voting in accordance with section 327."*

The resolution that seeks to appoint two or more persons as directors cannot be moved unless it is resolved that the resolution should be so moved. In other words, there must first be a resolution that a single resolution be considered to appoint two or more persons as directors. If the first resolution is not passed, a single resolution cannot consider more than one person as directors of the company. Each proposed person must be considered and appointed by separate resolutions. The requirement of a single resolution to appoint two or more directors is not applicable where the constitution of the company requires cumulative voting for the election of directors under section 327 of the Act.

Section 327 of Act 992 on cumulative voting for directors of a public company provides:

- "(1) The registered constitution of a public company may provide that directors shall be elected by cumulative voting.*
- (2) Where the registered constitution of a company provides for cumulative voting,*
 - (a) although there is provision to the contrary in the constitution of the company, the minimum number of directors of the company shall not be less than three and the whole of the directors, including a managing director, shall retire from office at each annual general meeting;*
 - (b) the votes of each member shall, for the purposes of electing directors to fill the resulting vacancies, be multiplied by the number of vacancies;*
 - (c) a member may cast the resulting votes of that member in favour of one candidate for election or may distribute the resulting votes among as many candidates as that member thinks fit;*
 - (d) the candidates receiving the highest number of votes up to the number of directors to be elected, shall be declared elected;*
 - (e) despite section 176, unless the whole board of directors is removed by an ordinary resolution duly passed in accordance with that section, a director may not be removed under that section if the votes cast against the removal would, when multiplied by the total number of directors, have been sufficient to secure the return of that director at an election of the whole board conducted in accordance with the rules contained in paragraphs (a), (b), (c) and (d) of this subsection."*

This section is applicable only when the constitution of a public company provides that directors must be elected by cumulative voting. If so provided, all the directors automatically retire at each annual general meeting including the first annual general meeting. The retirement of one-third of the number of directors at each subsequent annual general meeting after the first annual general meeting is not applicable. All directors including the director appointed as the managing director automatically retire at each annual general meeting. The accumulation of votes is done by multiplying the vote of a member by the number of vacancies to be filled. Therefore, if the number of directors is five and all retired, the total number of vacancies are five. Where members are to vote by show of hands, a member will therefore have a total number of five votes. However, if they are to vote by poll, and a shareholder has ten thousand shares, the shareholder will have fifty thousand votes resulting from multiplying the total number of shares with the total number of vacancies since each share carries one vote. A shareholder holding fifty thousand votes can cast his total number of votes (fifty thousand votes) for one candidate or divide the total number of votes among any number of candidates. At the end of the voting, the candidates are ranked based on the number of votes obtained. The candidates receiving the highest number of votes become directors based on the number of vacancies available. Therefore, if there are twelve candidates ranked in order of highest votes and there are five vacancies, the first five candidates with the highest votes become directors of the company.

Where directors are to be appointed by cumulative voting, the removal of directors by ordinary resolution will not be effective if the number of votes against the removal multiplied by the total number of directors will secure the re-election of the director in the event of the election of that director through the process of cumulative voting where all directors have retired.

(iii) Appointment by continuing directors

A company may by its constitution empower continuing directors to appoint one or more directors up to the maximum number of directors permitted under the constitution of the company. As discussed earlier, section 172(4) of the Act permits the constitution of a company to provide for the appointment of a director or directors by any person. Further section 29(2) of the Act provides any person named in the constitution of a company as having the power to appoint a director can enforce that provision. The directors can therefore be empowered under the constitution of a company to appoint directors. However, even where the constitution so provides for the power of a director or directors to appoint other directors, the provision will be self-defeating where there is no continuing director to exercise the power to appoint the other directors. There must, therefore, be provisions to deal with such situations when the power is given to the directors in the constitution of the company. Failing such provision, the members under the power to fill a casual vacancy under section 172(5) may fill such vacancy.

Notwithstanding express powers given to a director or directors to appoint other directors, the Act provides for the appointment of directors to fill casual vacancy by the continuing directors. This provision is operative irrespective of any contrary term stated in the constitution of the company. Section 172(5) of Act 992 provides that: *"Despite a provision to the contrary in the constitution of a company, a casual vacancy in the number of directors may be filled by, (a) the continuing directors or director although the number of directors may have been reduced below that fixed as the necessary quorum of director"*. Casual vacancy refers to a situation where the seat on the board becomes vacant by chance during the term of the board or the particular director.

In *Politis and Another v. Plastico Ltd (No. 2)*⁸²⁴, Amissah JA stated:

"casual vacancy is any vacancy other than one occurring by effluxion of time, or through the director retiring by rotation. In York Tramways Co., Ltd. v. Willows (1882) 8 Q.B.D 685 at p. 694, C.A. Lord Coleridge C.J said: "'Any casual vacancy' means any vacancy not occurring by effluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy." And in Munster v. Cammel Co. (1882) 21 Ch.D. 183 at pp. 187-188 "casual vacancy" was taken also to exclude a vacancy occurring through the retirement of a director by rotation."

In a situation of a casual vacancy, the Act permits the continuing directors to fill the casual vacancy by appointing a director to fill casual vacancy. The continuing directors are permitted to meet and proceed with the appointment even where they are unable to form a quorum, which is attributable to the casual vacancy.⁸²⁵

In *Politis and Another v. Plastico Ltd (No.2)*⁸²⁶, the facts of which are stated earlier, Amissah JA stated @ pgs. 27 and 29 that:

"The appointment of directors is governed by section 181 of the Code. Subsection (5) of that section provides:

"181. (5) Notwithstanding any provision in the company's Regulations, any casual vacancy in the number of directors may be filled by,

(a) the continuing directors or director notwithstanding that their number may have been reduced below that fixed as the necessary quorum of directors; or

(b) by an ordinary resolution of the company in general meeting:

Provided that,

(a) in exercising their power to fill such vacancy the directors shall observe the rules laid down in sections 203 and 204 of this Code

⁸²⁴ [1967] GLR 24.

⁸²⁵ Also see section 188(2)(f) of Act 992.

⁸²⁶ [1967] GLR 24.

- and shall not appoint any person to be a director unless they have taken reasonable steps to satisfy themselves that he is a person of integrity and suitable to be a director of the company;*
- (b) *if the casual vacancy so filled is one which, under the terms of the company's Regulations, should be filled by an appointment by any class of shareholders, debentureholders, creditors, employees or other person, the director appointed by the continuing directors or by an ordinary resolution of the company in general meeting, as the case may be, shall cease to hold office so soon as any other director is duly appointed in accordance with the Regulations."*

This provision undoubtedly gives a sole surviving director power to appoint another to fill a casual vacancy. Mr. Moore therefore invited me to hold that the death of Dr. Politis did not give rise to a casual vacancy, as the vacancy created by it was permanent. But the authorities are against this proposition. A casual vacancy is any vacancy other than one occurring by effluxion of time, or through the director retiring by rotation. In York Tramways Co., Ltd. v. Willows (1882) 8 Q.B.D 685 at p. 694, C.A. Lord Coleridge C.J said: "'Any casual vacancy' means any vacancy not occurring by effluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy." And in Munster v. Cammel Co. (1882) 21 Ch.D. 183 at pp. 187-188 "casual vacancy" was taken also to exclude a vacancy occurring through the retirement of a director by rotation. This view is also supported by the Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana (the Gower Report.) In its comment on the proposed subsection quoted above, the report at p. 130 stated as follows:

"Subsection (5) provides that a casual vacancy in the number of directors may be filled either by the continuing director or by the general meeting. There is no need to say here that an appointee of the directors can subsequently be dismissed by the general meeting, since this follows from section 185. But proviso (ii) is necessary in order to cover the situation where, for example, the Regulations provide that debentureholders or preference shareholders shall have power to appoint a director. If the director so appointed dies or retires, the continuing directors or the general meeting can appoint to prevent a hiatus. But their appointee will retire if the debentureholders or the preference shareholders appoint someone else."

I cannot, therefore, accede to Mr. Moore's request. Thus upon the death of Dr. Politis, the sole surviving director had the power to appoint a director to fill the casual vacancy created. For this purpose, I do not think a meeting of the company

was necessary. The Code confers power on him to make the appointment himself. I would therefore have held that the appointment of Mr. Kuma as a director was regular but for the fact that one statutory provision does not appear to have been complied with. Section 181(1) prohibits the appointment of any person as a director of a company unless he shall prior to the appointment have consented in writing to be appointed. The consent in writing is an essential precondition of appointment. Although there is no penalty specifically attached to this subsection, this was only because as stated in the Gower Report at p. 129: "There is no need to provide here for a penalty for breach as this follows from section 179 (3)."

Turning to section 179 (3) of the Code we find the provision that:

"If any person, not being a duly appointed director of a company, shall hold himself out, or knowingly allow himself to be held out, as a director of the company, or if the company shall hold out such person, or knowingly allow such person to hold himself out, as a director of the company, such person or the company, as the case may be, shall be liable to a fine not exceeding one hundred pounds."

The omission to give prior consent in writing therefore makes the appointment invalid in that the person so appointed cannot be described as a "duly appointed director."

In the appointment of a director to fill a casual vacancy, the person to be appointed must satisfy the requirements under the Act and the constitution of the company in terms of qualification. The Act also expressly requires the continuing directors to observe the duties imposed on directors and limitation on powers exercisable by the director in undertaking due diligence to satisfy themselves that the person to be appointed has integrity and suitable to be a director. Section 172(6) of the Act provides that:

"In exercising the power to fill a vacancy under subsection (5), the directors shall observe the rules laid down in sections 190 and 191 and shall not appoint a person to be a director unless the directors have taken reasonable steps to satisfy themselves of the integrity and suitability of the person to be a director of the company".

The appointed director will cease to be a director once the person or persons named in the constitution of the company to appoint directors appoint a director. Section 172(7) of the Act provides that:

"Where the casual vacancy filled under subsection (5) is one which, under the terms of the constitution of a company, should be filled by an appointment by a class of shareholders, debenture holders, creditors, employees, or any other person, the director appointed by the continuing directors or by an ordinary resolution of the

company in general meeting, shall cease to hold office as soon as any other director is duly appointed in accordance with the constitution."

(iv) Appointment by the court

The High Court is permitted under the Act to appoint a director in some limited instances when it is in the interest of the company to do so. Act 992 provides in section 172(8) that:

"In the event that,

(a) there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the board; and

(b) it is not possible or practicable to appoint directors in accordance with the constitution of the company,

a shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make an appointment if the Court considers that it is in the interest of the company to do so."

Two preconditions for the exercise of the court's decision to appoint a director or directors are that there are no directors or continuing directors are unable to form a quorum, and secondly, it is not possible or practicable to appoint directors in accordance with the constitution of the company. Even if the two conditions are satisfied, the court must come to the conclusion that it is in the interest of the company for the court to appoint a director or directors of the company for the court to exercise the discretion to appoint directors for the company. Per subsection (8) of Section 172, only shareholders or creditors of the company may apply to the court to appoint directors where the conditions in the subsection are satisfied. Where the court appoints a director, the court may provide for terms and conditions for the appointment, Section 172(9) of the Act provides that:

"An appointment by the Court under subsection (8) may be made on such terms and conditions as the Court considers fit."

In *Dolphyne v. Speedline Stevedoring & Co. Ltd and Another*⁸²⁷, where a trial court through the remedy of specific performance ordered one shareholder to appoint the plaintiff as a director when the company was owned by two shareholders, the Court of Appeal set aside the judgment only on the ground that there are two members and the 2nd defendant alone cannot exercise the power under section 272(2) of the Companies Act, 1963. Kpegah JA stated @ pg. 357 that:

"I will therefore approach the as if the appointment of a director is not regulated by the company's Regulations. I will therefore bring the matter under section 272(2) of Act 179 which provides that in the absence of a provision in the Regulations as to the mode of appointment of a director, the company may,

⁸²⁷ [1992-93] GBR 353.

“at any time by ordinary resolution fill any vacancy in the number of directors and may at any time by ordinary resolutions increase the number of directors so however that the total number of directors shall not exceed the maximum, if any, prescribed by the Regulations.”

The evidence is clear that the 2nd defendant is only one of the members of the company.”

13.6 ‘Director’ without an appointment

As indicated above, to lawfully become a director, one needs to be lawfully appointed in accordance with the Act and the constitution. The definition of director is based on functionality and appointment.⁸²⁸ There are two categories of persons that the law may hold liable as a director even though such persons are not duly appointed as directors. The first category is what is generally termed as *de facto* directors. That is a person who performs or is performing the function of a director or represents or is represented as a director when not duly appointed. The second category of persons is called a shadow director. Shadow directors do not represent or allow themselves to be represented as a director, but they habitually instruct directors who act on those instructions. That person is not in law a director but is deemed to be a director for the purposes of imposing liability on that person.

A *de facto* director and shadow director are not lawfully appointed directors of a company for all purposes under the Act. They cannot sue to exercise the right, powers and benefits a director of the company is entitled to. Such a person is only deemed to be a director for the purpose of imposing duties and liabilities on that person and not for any other purpose. In commenting on similar provisions under the repealed Companies Act, 1963, Professor Gower stated:

“They do not actually become directors but they are subject to the same duties and liabilities as if they were.”

The Act provides for the liability of both *de facto* and shadow directors as well as those designated as a “director” when in fact they are not directors.

(i) De facto director or director by holding out

A *de facto* director is a person who acts as director of a company without having been duly appointed as such, continues to act after his or her formal appointment has been terminated or expired, or represents or is represented as a director when not duly appointed. In other words, a *de facto* director is a person who has not been appointed a director but who in law is treated as a director for the purpose of imposing duties and liabilities on that person as a director. For one to be a *de facto* director,

⁸²⁸ Section 170(1) of Act 992.

there must therefore be lack of appointment in accordance with the Act and the constitution of the company, and secondly, there must be facts established from the conduct of the person that the law deems as the performance of functions of a director. The facts must establish that the person is acting as a director or holds himself out or allows the company or others to hold him out as a director.

Section 170(2) of the Act provides that: *“A person, not being duly appointed director of a company (a) who holds out as a director or knowingly allows to be held out as a director of that company ... is subject to the same duties and liabilities as if that person were duly appointed director of the company.”* In respect of a director by holding out, the person held liable as a director either holds or represents himself out as a director of a company or knowingly allows others to hold or represent him as director of a company even though not duly appointed a director of the company in accordance with the Act or the constitution of the company. A director by holding out is a *de facto* director as stated above. Such a person is held liable as a director because he either by his conducts or words represents that he is a director or he knowingly allows himself to be represented as a director. The concept of liability by holding out is akin to the application of the equitable doctrine of estoppel where a person through his conduct represents that he is a director or acquiesce in such representation by others, he is to be held liable as a director and estopped from denying the representation. It is important to note that where the representation is not by the person being held liable, his knowledge of the representation by others that he is a director is crucial. He must have been aware of such representation and must have acquiesced in such a representation.

*Commodore v. Fruit Supply (Ghana) Ltd*⁸²⁹ - the respondent company was incorporated with two directors to engage in the business of trading in frozen fish. The company required a licence. One of the directors doubled as the chairman and managing director of the company. The managing director engaged the assistance of one Attoh Quarshie to assist with obtaining the licence required for the importation of fish. After obtaining the licence, the managing director requested the assistance of Quarshie to raise the money required to start the business. Quarshie assisted in obtaining the money from the appellant on terms that required the company to provide all the frozen fish to Quarshie to sell and after Quarshie recover the money given to the company, to continue to take delivery of fish on credit that were sold and payment made to the company. In view of the role played by Quarshie, it was agreed to pay some of the profit of the company to Quarshie which was done by the appellant paying the money into Quarshie's account. Quarshie also acted on various transactions of the company as a director and his name was printed on the letterheads of the company as a director of the company. The company alleged the appellant failed to pay for fish supplied and brought an action to recover the amount. The appellant alleged he has paid money into Quarshie's account for the company and counterclaimed for recovery of the amount. The company denied it has authorised Quarshie to engage in those transactions with the appellant. The High Court ruled in favour of the company and dismissed the counterclaim. On appeal, the Court

⁸²⁹ [1977] GLR 241.

of Appeal held that Quarshie was a director for the company even though he was not duly appointed. Lassey JA stated in relation to holding that Quarshie was a director @ pgs. 248 to 252 as follows:

“From the above conclusion, broadly two questions seem to arise in my opinion. They are these: (1) Was Attoh Quarshie a director of the company? ... The first question was factually answered by the learned judge in the negative. But it was submitted that he was wrong in his finding of fact. The judge decided as a fact that Attoh Quarshie was never appointed a director in the company, and that there was no evidence that he had instructions to receive payments from the defendant on behalf of the company. The question is: Was the judge right in so deciding? The contention on behalf of the company was that the judge rightly decided that Attoh Quarshie was not a director because there was no evidence that he was ever appointed to such a position in the set-up of the company.

As the company is an artificial person, it can only act normally through human agents. These agents are usually the directors. From the evidence it is clear that two persons were actually associated actively with the running of the company as a going concern. They were Edward Ramia and Attoh Quarshie. Of these two persons only Edward Ramia was in fact appointed a director in the company.

As between the members of the company themselves, the documentary evidence revealed that Edward Ramia and Mrs. Wadad Ramia were properly appointed directors. The evidence about Attoh Quarshie's claim that he was a director seems to me to be rather slight. Edward Ramia said in evidence that the company proposed to appoint Attoh Quarshie a director, but it never did. Even though Attoh Quarshie claimed to be a director, he did not produce the company's resolution appointing him as such. Furthermore, the returns of names of directors for the purposes of section 27(1) of the Companies Code, 1963 (Act 179), gave the names of the directors in exhibit F, but it did not include Attoh Quarshie.

On the oral as well as the documentary evidence on record on this issue, I think the learned judge was fully justified in finding as a fact that Attoh Quarshie was not a director. Even if Attoh Quarshie was not formally appointed a director, the crucial question was whether the company held him out as such to transact business with the defendant. It seems the learned judge did not consider it legitimate to go over and consider whether Attoh Quarshie had authority to conduct the business of the company with the defendant. The court merely described him as “a sort of frontman for import licences” for the company. But the defendant depended on the holding out as part of her defence, and her counsel put the holding out in the forefront of his further submission in support of the other limb of the defendant's ground of appeal alleging misdirection by the judge.

Learned counsel for the defendant submitted that the judge's conclusion was wrong in so far as it was based on a misapplication of the relevant principle of company law. He claimed that even if Attoh Quarshie was not in fact appointed a director, the company held him out as such and he transacted the fish selling business with the defendant on his company's behalf as director, and, therefore, the company was estopped from denying that he was so held out. Counsel further pointed out that if the company so held out Attoh Quarshie as a director, then it follows as a matter of law that he had ostensible authority to do all things within the scope of the office, including receiving payments from the defendant for the company he represented.

To this submission on a point of law, learned counsel for the company rightly conceded, in my view, that if the indications on the evidence were that the company so held out Attoh Quarshie as its director with authority to transact business with the defendant, then the company would be precluded from denying that he was a director, and would also be bound by the acts done within the scope of Attoh Quarshie's office.

It seems plain to me on the facts as found that Attoh Quarshie conducted business negotiations with the defendant in the faith that he was a duly appointed representative of the company, and, therefore, as against the defendant, the company could not be heard to say that Attoh Quarshie was not its director.

The company denied that it had business connection with Attoh Quarshie and appointed him as its agent with authority to conduct its fish selling business with the defendant. The learned judge found as a fact that Attoh Quarshie was not a director, but the point at issue was that the judge ought to have gone on further to hold that Attoh Quarshie was also held out as a director by the company to do its business. In this case, if one goes through the oral evidence tendered and also examines the several documents and correspondence admitted into evidence, one can see repeated instances of Attoh Quarshie's exercise of authority as a director in control of the company's business.

The set up in Fruit Supply (Ghana) Ltd. is easy to envisage. It was an importing and a trading concern, and as I read some of the several letters produced in evidence, I cannot help forming the impression that the company was partially controlled by Attoh Quarshie who exercised authority over its business affairs as if he were the regular chief executive. But I think the right starting point of Attoh Quarshie's exercise of authority on behalf of the company was in respect of signing the applications for the company to be registered as an importer, and this he did with the concurrence of the managing director of this company, Edward Ramia. Besides, Attoh Quarshie's own evidence at the trial shows that he was not simply held out as having authority as a director, but that he actually acted as such in relation to

his dealings with the defendant in particular. Attoh Quarshie himself said, inter alia: I was a director of the company. As a director I wrote letters to the Ministry of Trade for the company to be registered as importers... As a result the company was registered." His evidence was confirmed in this respect by the testimony of an official from the Ministry of Trade, Accra. The letters such as exhibits K, L, M and N all provide adequate testimony of the fact that as early as the formation of the company, Attoh Quarshie had emerged, judging by the various activities he undertook for the company, as a much more important chief executive than the company's managing director himself. Thus when the company needed at the outset money to open letters of credit in the bank so as to start business, Attoh Quarshie persuaded the defendant to provide the capital needed for the company's business and this act was clearly one which was within the ordinary ambit of the authority of a director or managing director.

The company's managing director, Edward Ramia, denied in evidence that Attoh Quarshie was a director of the company, but admitted that his name was printed on the company's letter-head as one of its directors. Edward Ramia said:

"I know Attoh Quarshie. He is not a member of my company. We were to make him a director of the company. We did print papers on which he appeared as a director. But he was never confirmed because he failed to contribute the necessary shares to make him director. He is not the managing director of the company."

Section 198(1) of the Companies Code, 1963 (Act 179), provides that: "Every company shall in all trade circulars and business letters on or in which the company's name appears state in legible characters with respect to every director...(a) his present forenames and surname." In compliance with this requirement, the company printed the names of its directors on all its letter-heads, and among the directors was Attoh Quarshie. In exhibit F, a letter dated 28th April 1968, it is stated that the company had powers to remove the name of a director from its books if the company ceased to regard him as a director. But Attoh Quarshie's name was never cancelled from the company's circular letters as a director. This shows that although in fact he was never appointed a director, the company, however, held him out as such in its transactions with outsiders or third parties, including the present defendant. The evidence showed that the whole of the company's undertaking with the defendant was concluded by Attoh Quarshie as director.

The manager of the Ghana Cold Stores Ltd., which stored the consignments of the frozen fish on behalf of the company before they were delivered to the defendant, gave evidence at the trial. He said his organisation dealt with Attoh Quarshie as

the company's director, and took instructions from him in his capacity as such in relation to the deliveries of fish to the defendant. The manager said:

"Attoh Quarshie was once our customer with the defendant. I know on the letter-heads of Fruit Supply, Attoh Quarshie is a director. I have a letter from Fruit Supply showing Attoh Quarshie as a director... Attoh Quarshie was signing for Fruit Supply. He has authority to this effect."

The manager, continuing his evidence, added further that: "In February and March 1969, I refused to deliver fish to the defendant if I did not receive a letter from Ramia or Attoh Quarshie and Ramia gave contradictory instructions as to the release of fish to the defendant." The manager explained that:

"When Ramia came I insisted on receiving a letter from them with their signatures. When I received exhibit L, I knew Attoh Quarshie and Ramia were both directors... On the strength of exhibit D2 I issued to the defendant 2,985 cartons of Ramia's fish...Attoh Quarshie dealt with us for the plaintiff. Attoh Quarshie has been representing Ramia at the fish harbour."

Exhibits D1, D3 and L, letters written on the company's letter-heads, all described Attoh Quarshie as director. When later a dispute seemed to have arisen between the managing director of the company, Edward Ramia, and Attoh Quarshie over the release from the Cold Stores of the company's fish to the defendant, Edward Ramia, the managing director, wrote a note, exhibit D3, to the manager of the Ghana Cold stores Ltd. in these terms: "Please note that our director, Mr. Attoh Quarshie, is hereby fully authorised to store fish for this company, and to withdraw, transfer or do whatever he considers appropriate to do during the absence of the managing director of this company." The fair inference, in my view, from the terms of this letter is that the company acknowledged that Attoh Quarshie was its director.

In view of the ample proof provided on the evidence with regard to the way in which Attoh Quarshie was closely associated with the company, and also considering the varied nature of the business assignments he undertook on behalf of the company generally, it is impossible to escape the conclusion that he was a director held out by the company. From this it follows that, even though the learned judge rightly decided as a matter of fact that Attoh Quarshie was not a director, he should have gone further to hold that nonetheless, as a matter of law, he was held out as such. To this extent I think the learned judge was in error."

The case of *Quarcoopome v. Sanyo Electrical Trading Co. Ltd and Another*⁸³⁰ which was discussed earlier is also support this position.⁸³¹

⁸³⁰ [2009] SCGLR 213.

⁸³¹ See pages 546 to 547.

Re Hydroadam (Corby) Ltd⁸³² - Eagle Trust plc had a wholly-owned subsidiary, Midland City Partnerships Ltd (MCP), which in turn had a wholly-owned subsidiary, Landsaver MCP Ltd (Landsaver 19). Hydroadam (Corby) Ltd (the company) was a wholly-owned subsidiary of Landsaver 19. The company had two corporate directors. The company went into liquidation and the liquidator commenced proceedings against two of the directors of Eagle Trust plc, Mr. Thomas and Mr. Hardwick, alleging that they were liable under section 214 of the Insolvency Act 1986 as *de facto* or shadow directors in connection with the affairs of the company. The directors applied to have the liquidator's application against them struck out. The applications by the directors were dismissed and the directors appealed. In allowing the appeal, it was stated that where a body corporate was a director of a company, whether *de jure*, shadow or *de facto*, it did not follow that its own directors must ipso facto be shadow directors of that company. On the facts, the liquidator had neither pleaded nor adduced evidence that either of the directors against whom the wrongful trading proceedings had been commenced were at the material times directors of the company. Accordingly, the appeal would be allowed. Millett J. explained a *de facto* director as follows: pgs. 181 to 184 that:

"... Directors may be of three kinds: de jure directors, that is to say, those who have been validly appointed to the office; de facto directors, that is to say, directors who assume to act as directors without having been appointed validly or at all; and shadow directors who are persons falling within the definition which I have read. ... A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such."

Re Kaytech International Plc, Secretary v. Kaczer⁸³³ - an action was taken by an originating summons issued on 14 August 1995 the Secretary of State for Trade and Industry sought disqualification orders under section 6 of the Company Directors Disqualification Act 1986 against the respondents, (1) Tomas Kaczer, (2) Malcolm Huntley Potier and (3) John Douglas Solly, all of whom were said to have been directors of Kaytech International plc (International), alleging that they had been directors of International which had gone into voluntary liquidation on 20 August 1993. The second and third respondents denied that they had been directors of International. It was held by Rimer J that Potier was a *de facto* director. Rimer J stated @ pgs. 401 to 405 as follows:

⁸³² [1994] 2 BCLC 180.

⁸³³ [1999] 2 BCLC 351; [1998] All ER 665.

*“The applicant claims that Mr Potier was either a de facto or shadow director of International. If he was neither, then the claim against him fails. If he was either, then he was a director of International for the purposes of s 6. As regards shadow directors, s 22(4) and (5) of the 1986 Act show that the references to a ‘director’ in s 6 include a shadow director. As regards de facto directors, Sir Nicolas Browne-Wilkinson V-C held in *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698 at 707, [1988] Ch 477 at 490, that the references to a director in what is now s 6 include directors validly or invalidly appointed, and persons merely acting de facto as directors. None of that is in dispute. What Mr Potier does dispute is that he was either a de facto or shadow director. I shall deal first with whether he was a de facto director.*

*In *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, at 183, Millett J said:*

‘A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly only be discharged by a director. It is not sufficient to show that he was concerned in the management of the company’s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such.’

*In *Re Richborough Furniture Ltd* [1996] 1 BCLC 507 at 522–523, Mr Timothy Lloyd QC, sitting as a deputy judge in the Chancery Division, quoted that passage and continued:*

*‘In *Re Moorgate Metals Ltd* [1995] 1 BCLC 503 Warner J said that this passage could not be intended to mean that a de facto director must be someone to whom the label director has been expressly attached. If Millett J’s formulation in *Re Hydrodam (Corby) Ltd* were correct and exhaustive, Mr Muncaster would not satisfy the test because, apart from minor incidents, he was never held out by Richborough as a director and never claimed or purported to be a director. Moreover it would be difficult to say that there was anything that he did which could not properly have been performed by a manager below board level. However, like Warner J, I do not believe that this is an exhaustive statement of the test. In *Re Lo-Line Electric Motors Ltd* I do not believe that it would have availed Mr Browning to say that he did not claim or purport to be a director and was not held out as such in relation to the two companies*

which I have mentioned of which he undoubtedly acted as director, nor would it have helped to look at each act that he did and to say that, possibly in different circumstances, it was something that could have been done by someone below board level under delegated authority from the board.'

Later in the same judgment, Mr Lloyd QC said (at 524):

'what is a de facto director?

However, a different and far from straightforward question arises as to what amounts to acting as a director or assuming to act as a director. In a case such as Morris v Kanssen ([1946] 1 All ER 586, [1946] AC 459) or Re Lo-Line Electric Motors Ltd it would be clear, from the absence of any validly appointed director and the practical situation in which the de facto director is the person who conducts the management of the company's affairs. In other cases it is more difficult. The difficulty arises particularly in the present case from three factors. First, there were other validly appointed directors who were active in the management of the company. Second, Mr Muncaster's acts could be referred to a different role in relation to the company, namely that of the provision of consultancy services on behalf of Jade under the consultancy agreement. Third, it is also necessary to consider the interest and status of the shareholders; although Mr Muncaster was not a shareholder, it seems to me that he was acting, in practice, on behalf of Jade which was a shareholder. It was recognised by those concerned that the shareholders had a role and a say in relation to certain of the more critical acts and decisions facing the management of Richborough. It seems to me that for someone to be made liable to disqualification under s 6 as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment, as in Morris v Kanssen) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or some other capacity such as shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt.'

In his able argument, Mr Thompson submitted that the evidence does not justify a conclusion that Mr Potier was a de facto director. I deal with his submissions against the findings that I have already made, namely that Mr Kaczer and Mr Potier agreed before International was incorporated that it was to be owned between them

beneficially on an 80/20 basis, either directly or through Holdings, and that the services which Mr Potier rendered to International were not rendered as an independent fee earning consultant or adviser. Nor could most of what Mr Potier did be said to be referable to his status as secretary of International, and it is accepted that he was not an employee of it. Moreover, even though I have found that he had a 20% beneficial interest in International, the work he did cannot in my view readily be explained as having been performed by him in his capacity as such an owner: International's articles of association, like those of most companies, delegated its management to the directors.

In the circumstances of this case, it seems to me, therefore, that a reasonable starting point is this, namely: if Mr Potier was not doing what he did in the capacity of a de facto director, in what other capacity could he have been doing it? Mr Thompson's submissions, however, were to the effect that it does not follow that Mr Potier must have been acting as a director. He emphasised that the hallmarks of directorship include a decision-making capacity on behalf of the company; participation in board decisions on an equal and collegiate basis; and the bearing of ultimate responsibility for those decisions. He says that what Mr Potier did failed to satisfy any of these conditions. He was not involved in decision making, and nor did he participate in board meetings on an equal footing with Mr Kaczer. There were, in fact, no board meetings, and Mr Thompson submitted that the evidence showed that all the decisions about International, including those of its affairs with which Mr Potier was particularly concerned (property and finance), were ultimately taken by Mr Kaczer. Mr Kaczer's evidence was, he said, that Mr Potier advised him, not that he instructed him or gave him orders. Further, Mr Thompson pointed out the respects in which Mr Potier did not act on an equal footing with Mr Kaczer. He did not sign cheques and he played no part in the running of the business from day to day.

Mr Thompson put his arguments very attractively, but I have not been persuaded by them. It is difficult to generalise about the circumstances in which a particular person may or may not be regarded as assuming the role of a director of a company, but in this case I have come to the view that Mr Potier was from the outset assuming such a role.

What emerged from all that I have read and heard in connection with this case is that, from at least about June 1992, International and Holdings were to be, and became, companies owned beneficially by Mr Kaczer and Mr Potier; that both individuals were going to devote substantial time to building International up, with each bringing in his respective skills and expertise; that neither was going to be an employee of International; and that any original plan that Mr Potier's

services were to be provided as an outside consultant for fees was superseded by the arrangement under which he was to have a share in the equity.

What one then sees is that all the instructions for the incorporation of International and Holdings were given by Mr Potier. It was he alone who pretended to raise the necessary capital for it. When it was incorporated and up and running his formal role was that of secretary, but he devoted himself to matters which went beyond those with which a company secretary is ordinarily concerned, in particular to International's property and financial interests and concerns, and Mr Kaczer dealt with the rest of International's business. When International was in terminal decline, it was again Mr Potier who played a, and probably the, major part in instructing solicitors and accountants. During its operations he held himself out as a director, so describing himself in his letter to Bernard Thorpe of 24 November 1992. He allowed himself to be held out to the creditors at the June 1993 meeting as International's chief executive, which must have conveyed to them that he was a director. The business plan also referred to the November 1992 approach by House of Fraser to 'the directors' of International, words which could only have been regarded by the author as referring to Mr Kaczer and Mr Potier: no-one has suggested that Mr Solly ever had anything to do with the running of International. The presentation, whatever its precise extent, which Mr Potier made to the creditors at the June 1993 meeting could only have been regarded by them as being made by him as a director of International, an understanding which would have been fuelled by the explanation in the business plan that he and Mr Kaczer were its joint founders. Mr Potier's phoney letter to Holdings dated 31 July 1993 (written on about 28 September 1993) also refers to International's 'directors' as having decided to put it into liquidation, a reference which must have embraced himself. Not only does Mr Potier appear to have gone out of his way to convey to third parties that he was a director, that is how they appear to have regarded him. The correspondence from the consul at the Australian Consulate shows that she apparently understood him to be a director; certain creditors at the meeting of 20 August 1993 were disappointed that Mr Potier did not put in an appearance, so that they could question him on his role in International's downfall, whereas they would hardly have wanted to do so if their understanding was that he had merely been an outside adviser. Mr Mole also came to the conclusion that Mr Potier was deeply involved in International.

And so he obviously was. He acknowledged as much in the buyout agreement he drafted, where he referred to International as 'currently run by' Mr Kaczer and himself. He did not suggest that anyone else played a part in its running, and the people who run companies are its directors. Mr Kaczer also acknowledged that he and Mr Potier could fairly be regarded as running International, although he emphasised their different spheres of activity. I accept, as Mr Thompson pointed

out, that this is not a case in which it can be said that Mr Potier was on an equal footing with Mr Kaczer in the running of International, since the picture does seem to be that Mr Kaczer ran the business from day to day without reference to anyone; also he made the final decisions on those matters which were within Mr Potier's province. On the facts of this case, however, I do not regard that as a factor justifying a conclusion that Mr Potier was not acting as a director. If International had been a company in which there was an identifiable group of directors (whether validly or invalidly appointed) who met on a regular basis to make decisions, then it might well be, if Mr Potier were not a member of such group, that that would be a persuasive indicator that he was not acting as a director. But that is not this case. This was a company which had either one or two de jure directors, depending on what Mr Solly's status was. But even if Mr Solly was a de jure director, his role in directing International's affairs was zero. For practical purposes, all the various aspects of its business were conducted by Mr Kaczer and Mr Potier. They were between them its owners, although Mr Kaczer had, with an 80% interest, by far the lion's share and it is natural, therefore, that he regarded the company as essentially his company and that he assumed the task of making the final decisions. As between Mr Kaczer and Mr Potier, one of them had to have the casting vote, and it is not surprising that it was Mr Kaczer.

The company was therefore essentially in the nature of a quasi-partnership between two working partners, who had materially unequal shares, separate roles in the operations of the company's affairs, and with the senior partner having the final say. I do not, for my part, regard circumstances such as that as negating the possibility that the junior partner, albeit not a director de jure, might nevertheless be a director de facto. I find that Mr Potier was a de facto director of International."

There are statutory liabilities imposed on the company where there is director by holding. Section 170(4) of the Act provides that: *"Where a person, who is not a duly appointed director of a company, holds out as a director or knowingly allows to be held out as a director of the company, or if the company holds out that person or knowingly allows that person to hold out as a director of the company, that person or the company, is liable to pay to the Registrar an administrative penalty of two hundred and fifty penalty units."* There is, therefore, a penal liability imposed on the company and person holding or held out as director. In addition, the duties and liabilities of a director are imposed on the person.

The Companies Act, 2019 also introduces a paradigm where a person can be held liable as a director simply by having the word "director" attached to the title or position of the person in relation to a company. Section 170(5) of the Act states that: *"For the purposes of subsection (2), (3) and (4), a person who is described as director of a company, whether the description is qualified by the word*

“local, “special”, “executive” or any other way, shall be deemed to be held out as a director of that company.” This essentially creates a broad framework where any designation of the position of a person working in a company may lead to the person being held liable as a director. This may cover reference to heads of departments or units that are sometimes designated with the word “director” such as “Personnel Director”, “Finance Director” “Operations Director”, “Marketing Director”, “Sales Director”, etc even though such persons are not duly appointed as a director.

(ii) Shadow Directors

Section 170(2) of Act 992 provides that ***“A person, not being a duly appointed director of a company ... (b) on whose directions or instructions the duly appointed directors are accustomed to act, is subject to the same duties and liabilities as if that person were a duly appointed director of the company.”*** A shadow director is a person who is not duly appointed as a director, who has not represented or permitted himself to be represented as a director but on whose directions or instructions a duly appointed director habitually acts. A person who gives advice in a professional capacity that informed the act of a director is not a shadow director. A single instruction on which a director acted will not make the person giving that instruction a shadow director. For a person to be a shadow director, the person must be in a position where instructions given by that person to a director or majority of directors are habitually acted on by the directors. In order to distinguish a *de facto* director and a shadow director for a person to be held as a shadow director, the following must be established:

- (a) that there are others who are directors of a company, whether *de facto* or *de jure*;
- (b) that the person to be held liable as a shadow director habitually directed those directors on how to act in relation to the company;
- (c) that the directors of the company, *de jure* or *de facto*, habitually acted in accordance with such directions; and
- (d) that the directors were accustomed to act on the instruction or direction of the person.

Where the facts above are established, the person giving the instruction or direction will be held liable as a shadow director. The Act imposes the same duties and liabilities on duly appointed directors on the shadow directors.

A *de facto* director is therefore different from a shadow director. The distinction is critical in instances where legislation expressly refers to one or the other. Reference to one does not automatically include reference to another.

In *Re Hydrodam (Corby) Ltd*⁸³⁴, the facts of which are stated earlier, Millett J. stated @ pgs. 181 to 184 that:

⁸³⁴ [1994] 2 BCLC 180.

“Liability for wrongful trading is imposed by s 214 of the Insolvency Act 1986. The statutory liability is imposed exclusively upon persons who are or were at the material time directors of the company in liquidation. But s. 214(7) provides that in the section ‘director’ includes a shadow director. A shadow director is defined in s 251 of the Insolvency Act 1986 in these terms:

“Shadow director” in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act ... ’

... Directors may be of three kinds: de jure directors, that is to say, those who have been validly appointed to the office; de facto directors, that is to say, directors who assume to act as directors without having been appointed validly or at all; and shadow directors who are persons falling within the definition which I have read. The defendants accept, though for the purpose of these appeals only, that the liability imposed by s 214 extends to de facto directors as well as to de jure and shadow directors. It appears to me that that concession is plainly correct. Liability for wrongful trading is imposed by the Act on those persons who are responsible for it, that is to say, who were in a position to prevent damage to creditors by taking proper steps to protect their interests. Liability cannot sensibly depend upon the validity of the defendant’s appointment. Those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities which are attached to the office. Nevertheless, the statutory liability is imposed exclusively upon directors of one or other of the three kinds that I have mentioned. Accordingly, the liquidator must plead and prove against each defendant separately that he or it was a director of the company.

Mr Thomas and Dr Hardwick were never appointed directors of the company. It is submitted on their behalf that the liquidator has neither pleaded the necessary facts nor put forward the necessary evidence to establish that either of them was a de facto or shadow director of the company. In para 1.7 of the points of claim under the heading ‘Summary’, the liquidator has pleaded the substance of his case as follows:

‘The individual respondents also personally acted as de facto or shadow directors of the company as hereinafter pleaded in relation to them respectively.’

This makes it necessary to examine the later allegations in the pleadings in order to discover what the facts are relied upon to support the allegation that Mr Thomas and Dr Hardwick were de facto or shadow directors of the company.

I would interpose at this point by observing that in my judgment an allegation that a defendant acted as de facto or shadow director, without distinguishing between the two, is embarrassing. It suggests – and counsel's submissions to me support the inference – that the liquidator takes the view that de facto or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a de facto or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive.

A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2), that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

In the present case, there were titular directors of the company. They were Channel Island companies. That fact alone may be sufficient to justify an inference that they were accustomed to act in accordance with the directions of others; in which case there were shadow directors of the company. But there is nothing pleaded in the points of claim to suggest

that there were, in addition to the titular directors, any other persons who claimed to be directors of the company at all.

Counsel have argued the case before me on the footing that sufficient facts are pleaded to justify the inference that Eagle Trust and possibly MCP as well, acted as a shadow director of the company. I shall assume that that is so. Against Dr Hardwick – I take him first as the simpler of the two – what is alleged is pleaded under the heading of 'The Respondents' Respective Involvement' and is contained in para 23 of the points of claim, as follows:

'Dr Hardwick, as a director of Eagle Trust, is, with the other directors thereof, collectively responsible for the conduct of that company [ie Eagle Trust] ... in relation to the company.'

It is therefore the liquidator's case that Eagle Trust was a director of the company (presumably a shadow director); and Dr Hardwick's liability is based exclusively upon the fact, being the only fact alleged against him, that he was one of the directors of Eagle Trust. As one of the directors of a shadow director, it is alleged, he was one of those collectively responsible for Eagle Trust's conduct; and was accordingly a shadow director of the company. In my judgment the conclusion does not follow from the premise.

The liquidator submitted that where a body corporate is a director of a company, whether it be a de jure, de facto or shadow director, its own directors must ipso facto be shadow directors of the company. In my judgment that simply does not follow. Attendance of board meetings and voting, with others, may in certain limited circumstances expose a director to personal liability to the company of which he is a director or its creditors. But it does not, without more, constitute him a director of any company of which his company is a director."

*Re Unisoft Group Limited (No 3)*⁸³⁵ – when the court was called upon to decide whether a person based on the facts pleaded was a shadow director within the statutory definition of 'shadow director' which provides a shadow director is a person on whose instructions or directions 'the directors of the company' are accustomed to act. Harman J stated @ pg. 620 that:

"In order to consider the propriety of that allegation, one must go back to s 741 and see what a shadow director is because the term as used in the pleading is expressly in the defined sense of the Act and not in any other and more general sense, if there be such, which I know not. Section

⁸³⁵ [1994] 1 BCLC 609.

741 of the Act contains a definition in sub-s (1) of 'Director' and contains in sub-s (2) the following provisions:

'In relation to a company "shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity.'

In my view, those words can only mean what Mr. Lyndon-Stanford, for the respondents, suggested: that the shadow director must be, in effect, the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. That last requirement follows from the reference in the subsection to the directors being 'accustomed to act'. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct.

In my view, there can be no way in which the acts of any one of several directors of a company in complying with the directions of an outsider could constitute that outsider a shadow director of that company. Of course, if the board of the company be one person only and that person is a 'cat's paw' for an outsider, the outsider may be the shadow director of that company. But in a case such as this, with a multi-member board, unless the whole of the board, or at the very least a governing majority of it – in my belief the whole, but I need not exclude a governing majority – are accustomed to act on the directions of an outsider, such an outsider cannot be a shadow director. Further, there must be, as I say, more than one act and a course of conduct."

*The Republic v. Ibrahim Adam, Dr. Samuel Dapaah, Kwame Preprah, Dr. George Yankey and Ato Dadzie (Quality Grain Case)*⁸³⁶ – this was a criminal case in which the four accused persons were being prosecuted for a number of offences including causing financial loss to the state under the Criminal Code, 1960 (Act 29). In establishing the culpability of the 4th Accused through the breach of his duties as director of the Quality Grain Company, the Court stated in relation to the management of the Quality Grain Co. (Ghana) Ltd that @ pgs. 30 to 31 that:

"4th accused described Prof. Mills as the super-director of the Quality Grain Company. From the evidence, including the Professor's own evidence, I do not have any doubt that Prof. Mills often intervened in and even ran the affairs of the Quality Grain Company. He was in effect, what in Company law is called a "Shadow Director". Section 179(2)(b) of Act 179 defines such a director as a person on whose

⁸³⁶ [28/4/03] Suit No. FT/MISC.2/2000. HC.

directions or instructions the duly appointed directors are accustomed to act. Such a director is subject to the same duties and liabilities as if he were a duly appointed director of the company. But the existence of a shadow director does not release the duly appointed director from his duties or liabilities as a director, for the proviso to Section 179(2) provides "that nothing in this subsection contained shall be deemed to derogate from the duties and liabilities of the duly appointed directors, including the duty not to act on the directions or instructions of any other person". The involvement of Former Vice-President Prof. Mills did not preclude 4th accused from taking measures to protect the interests of the government. In fact it should have made it easier for him to draw attention to the delays, anomalies and irregularities being perpetrated by Mrs. Cotton and the Company – if he was aware of them – since because of the former Vice-President's interest it might have been easier to reach him personally or through memos and letters."

In *Re Kaytech International Plc, Secretary v. Kaczer*⁸³⁷, Rimer J in distinguishing between *de facto* director and shadow director, after holding Potier as a *de facto* director stated in relation to shadow director @ pgs. 405 to 406 as follows:

"I find that he was not a shadow director. In Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 at 183 Millett J said:

'A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director of the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.'

As follows from what I have said, this is not a case in which Mr. Potier was lurking in the shadows. He was out in the sun, openly acting as a director and was held out as such."

⁸³⁷ [199] 2 BCLC 351; [1998] All ER 665.

Since the shadow director is not a lawfully appointed director but on whose instruction duly appointed directors are accustomed to acting, the law imposed additional liability on duly appointed directors for breaching the duty which requires them to act based on their judgment. Section 170(3) of Act 992 provides that *“Subsection (2) shall not derogate from the duties or liabilities of the duly appointed directors, including the duty not to act on the directions or instructions of any other person.”* The duly appointed directors are therefore under a duty not to act on the instructions or directions of another person. That duty is breached in the situation of a director habitually acting on the instruction of a shadow director.

13.7 Qualifications of directors

The Companies Act, 2019 does not spell out positive criteria in terms of qualification a person must have to be appointed a director of a company. Act 992 did the opposite by stating negative criteria that when it applies to a person, the person cannot be a director of a company. Act 992, thus, disqualifies certain categories of persons from being appointed as directors or who can act as directors of a company in Ghana. A person can, therefore, only be appointed a director of a company if the person does not fall into the category of those disqualified. However, being a director is an important function that requires skills and expertise since the directors are responsible for managing the business of the company. The directors must, therefore, possess the skills required to effectively manage the business of the company. In view of this, some sector specific legislations provide for positive criteria, in addition to the disqualification criteria, which directors of a company engaged in business in the sector must possess. A good example is the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930).

Act 930 requires the prior written approval of the Bank of Ghana for the appointment of a person as a director of banks and specialised deposit-taking institutions.⁸³⁸ The Bank of Ghana has issued under section 92 of Act 930 two directives – The Banking Business-Corporate Governance Directive, 2018 and The Fit & Proper Person Directive, 2018 – to guide assessment of qualification of persons proposed to be directors of financial institutions prior to issuing the written consent. Paragraph 33 of the Corporate Governance Directive provides that *“The competencies of Board of Directors shall be diverse to facilitate effective oversight of Management and shall ideally cover a blend of the following fields: Banking, Law, Finance, Accounting, Economics, Information Technology, Business Administration, financial analysis, Entrepreneurship, Risk Management, Strategic Planning and Corporate Governance and other areas that the Bank of Ghana deems fit.”* In addition, the Fit & Proper Person Directive provides that for a person to be appointed a director, the person must be a “fit and proper person”. A “fit and proper person” is defined as *“a person who is suitable to hold the particular position which that person holds or is to hold as regards:*

⁸³⁸ Section 58(1)(g) of Act 930.

- (a) the probity, competence and soundness of judgment of the person for purposes of fulfilling the responsibilities of that person;*
- (b) the diligence with which that person fulfils or is likely to fulfil those responsibilities;*
- (c) whether the interest of depositors or potential depositors of the entity are threatened, be likely to be, in any way threatened by the person holding that position; and*
- (d) that the integrity of the person is established and the qualifications and experience of the person are appropriate for the position in the light of the business plan and activities of the entity which the person serves, or is likely to serve, taking into account the size, nature and complexity of the institution."*

The criteria for assessment on whether the proposed person to be appointed a director is fit and proper person based on the above definition includes experience, reputation, conflict of interest and independence of mind, time commitment, collective suitability and financial integrity, and interview. Assessment of experience is based on practical and professional experience gained through occupation and theoretical knowledge gained through education and training. In relation to education, the Directive requires a person to have a level and profile of the education, which should relate to banking and financial services or other relevant areas (mainly banking and finance, economics, law, administration, information technology, financial regulation, strategy, risk management, internal control, corporate governance, financial analysis and quantitative methods).

The Ghana Stock Exchange Listing Rules (2006) in Rule 11 and Regulation 8 of Stock Exchange (Ghana Stock Exchange) Listing Regulations 1990 (L.I. 1509) also seeks to give the Council of the Exchange the power to determine the suitability of directors of public companies that have applied to be listed on the Exchange. Rule 11 requires that satisfactory evidence must be provided that the management as a whole possesses the requisite experience, and the character and integrity of the directors and management are assessed by the evidence provided.

The above indicates that there should be some experience deemed suitable for a person to be appointed a director of a company. These qualifications for directors of companies operating in the banking and financial sector or listed public companies are in addition to disqualification criteria provided under Act 992 and Act 930, and directives issued pursuant to Act 930. The qualification requirements are however limited to banks, deposit-taking institution, financial holding companies and listed public companies. For companies in general, the disqualification requirements are applicable. However, Act 992 permits the constitution of the company to state qualification requirements for the appointment of directors. The promoters, subscribers or member of the company can, therefore, provide qualification criteria for the appointment of directors of a company in the constitution of the company.

Disqualification of a person from being a director of a company

As indicated above, even though Act 992 does not spell out the qualification a person must have to be eligible to be appointed a director, the person must not fall into the category of those deemed incompetent to be appointed directors of a company under the Act. The Act in section 173 disqualifies a number of persons from being appointed directors of a company incorporated under the Act. Section 173 of Act 992 provides that:

“(1) The following persons are not qualified to be appointed or to act as directors of a company:

- (a) an infant;*
- (b) a person adjudged to be of unsound mind;*
- (c) a body corporate*
- (d) a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of a company as a result of an order under section 177 so long as the order remains in force unless leave to act as director has been granted by the Court in accordance with that section; and*
- (e) an undischarged bankrupt, unless that bankrupt has been granted leave to act as director by the Court by which that person was adjudged bankrupt.”*

The Act, therefore, disqualifies five categories of persons from being appointed or acting as director. The first three are absolute disqualification with no exception. That is there are no instances that an infant, a body corporate and a person declared to be of unsound mind will act as a director of a company. A director is responsible for directing the business of the company which requires the exercise of judgment. These three categories of disqualified persons are deemed unable to exercise the requisite judgment due to lack of mental capacity. For a body corporate, it has no mind of its own and therefore cannot be appointed to direct a company. In respect to the last two, that is persons against whom an order has been made under section 177 or an undischarged bankrupt, the disqualifications are not absolute as with the leave granted by the court, such persons can be appointed or act as a director of a company.

Section 177 of Act 992 deals with restraining fraudulent persons from managing a company. The section provides as follows:

“(1) Where,

- (a) a person is convicted, whether in the Republic or elsewhere, of*
 - (i) an offence involving fraud or dishonesty,*
 - (ii) an offence in connection with the promotion, formation or management of a body corporate,*

- (iii) *an offence involving insider dealing, or*
 - (iv) *any other criminal offence which is not a misdemeanour;*
 - (b) *a person adjudged bankrupt whether in the Republic or elsewhere;*
 - (c) *a person has been culpable of a criminal offence, whether convicted or not, in relation to a body corporate or of fraud or breach of duty in relation to a body corporate;*
 - (d) *it appears that a person is debarred by the competent authority from being a member of a recognised professional body as the result of a disciplinary inquiry; or*
 - (e) *there is an ongoing investigation by a criminal investigating body or by the Registrar or the equivalent in a foreign jurisdiction regarding the matters in paragraphs (a) to (d);*
- the Court, on its own motion or the application of a person referred to in subsection (6), may order that that person shall not, without the leave of the Court, be a director of, or in anyway, whether directly or indirectly, be concerned or take part in the management of a company or act as auditor, receiver or liquidator of a company for the period specified in the order.*
- (2) *Without limiting subsection (1), a person is automatically disqualified for appointment as director or to act as a director of a company for a period of five years if that person has:*
 - (a) *been convicted within the last five years of an offence involving fraud or dishonesty, or relating to the promotion, formation or running of a company,*
 - (b) *has been a director or senior executive of a company that has become insolvent within the last five years on account of or partly as a result of the culpable activities of that director, or*
 - (c) *has been disqualified to act as Company Secretary, receiver, manager or liquidator of a company.*
- (3) *Where a person referred to in paragraph (a) of subsection (2) is subsequently subject to a*
 - (a) *second conviction, that person shall be automatically disqualified for a period of ten years; and*
 - (b) *third conviction, that person shall be permanently disqualified as a director or to act as a director.*
- (4) *An order under paragraph (a) of subsection (1) may be made by a court in the country before which the person is convicted.*
- (5) *A person referred to in paragraph (a) of subsection (2) may apply to the Court for re-instatement before the expiration of the ten years automatic disqualification period imposed under subsection (3).*

- (6) *An application for an order under this section may be made by*
- (a) *any member or officer of the company,*
 - (b) *a person who can demonstrate an interest in the case,*
 - (c) *the Registrar or by the Official Trustee,*
 - (d) *the trustee in bankruptcy of the person concerned, or*
 - (e) *by the liquidator of a body corporate.*
- (7) *A person who intends to apply for an order under this section shall give not less than twenty-eight days written notice of that intention to the person against whom the order is sought, and to the Registrar.*
- (8) *On the hearing of an application under this section, the applicant, the person against whom the order is sought, the Registrar and the Official Trustee may appear, and give evidence and call witnesses.*
- (9) *A person against whom an order is made under this section who intends to apply for leave to act as a director or in the management of a company shall give at least twenty-eight days written notice of that intention to the Registrar, and the Registrar, the Official Trustee, and that person on whose application the order was made or who appeared at the hearing at which the order was made, may appear and give evidence and call witnesses and draw the attention of the Court to any relevant matters.*
- (10) *Where an order is made or leave is granted under this section, the Court making the order or granting leave shall forward a copy to the Registrar who shall publish a summary of the order in the Companies Bulletin.*
- (11) *The Registrar shall maintain a register of orders made under this section and shall enter in the register, particulars of each order and of the leave granted.*
- (12) *The register shall be open to the inspection of a person on payment of a fee determined by the Registrar for each inspection.*
- (13) *A person who acts in contravention of an order made under this section commits an offence and is liable on summary conviction, in respect of each offence to a fine of not less than two hundred and fifty penalty units and not more than five hundred penalty units or to a term of imprisonment of not less than one year and not more than two years or both the fine and the imprisonment.*
- (14) *For the purpose of this section*
- (a) *“insider dealing” means buying or selling securities in a company by persons who have access to non-public information about the company; and*
 - (b) *“senior executive” means an employee who acts in the top hierarchy of the management of the company.”*

The disqualification of a person from being appointed or acting as a director under section 173(1)(d) and (e) of the Act is in relation to proceedings under section 177 of the Act. The object of section 177 of the Act from its title is to restrain fraudulent persons from acting as directors of a company. A number of persons may be restrained under section 177 and therefore comes under the disqualification criteria under section 173(1)(d) and (e) of the Act.

Under subsection (1) of Section 177, any person under subsection (6) may bring an application or the court on its own may disqualify any person coming under the section from being a director of a company. The grounds upon which the person may be liable for the disqualification are:

- (i) a person convicted of an offence of fraud or dishonesty
- (ii) a person convicted of an offence relating to promotion, formation or management of a body corporate
- (iii) a person convicted of an offence involving an insider dealing
- (iv) a person convicted of any criminal offence which is not a misdemeanour
- (v) a person declared bankrupt
- (vi) a person who is responsible for a criminal offence relating to a body corporate whether the person is convicted or not
- (vii) a person excluded from being a member of a recognised professional body as a result of disciplinary enquiry before a competent authority
- (viii) a person under investigation by a criminal investigating body or Registrar.

Under the subsection, it does not matter whether any of the above occurred within the Republic or elsewhere.

*Republic v. High Court, Accra, Ex parte Ploetner*⁸³⁹ - in this case, Mr. Ploetner was a managing director of Carl-Ploetner (Bremen) in Germany. Mr. Ploetner incorporated a company in Ghana of which he was a majority shareholder in Ghana called Carl-Ploetner Engineering Construction (Ghana) Ltd. As a result of the breach of German law, Carl-Ploetner (Bremen) was put into liquidation and a liquidator appointed. Even though Mr. Ploetner was not declared bankrupt in Germany, the liquidator unsuccessfully took action in Ghana to attach the assets of Mr. Ploetner. Mr. Ploetner's lawyer in Ghana who advised on the incorporation of Carl-Ploetner (Ghana) purported to remove Mr. Ploetner as a director of the company and took action to restrain Mr. Ploetner from acting as director of the company. The High Court gave an order relying on the previous statement of claim filed in an action by Mr. Ploetner that he admitted being bankrupt in Germany and therefore disqualified from being a director under section 182(1)(e) of Act 179. On appeal to the Supreme Court, the order of the High Court was quashed on the ground that the judge erred in relying on the statement of claim as evidence that Mr. Ploetner was declared bankrupt in Germany. Taylor JSC stated @ pg. 129 that:

⁸³⁹ [1984-86] 2 GLR 107.

“The second ground is in effect an assertion that only persons adjudicated bankrupts in Ghana and not foreign bankrupts are contemplated by section 182(1)(e) of Act 179, which provides that “an undischarged bankrupt, unless he shall have been granted leave to act as director by the Court by which he was adjudged bankrupt” shall not be competent to be appointed or to act as a director of a company. Now under section 186(1)(b) of Act 179, the High Court has jurisdiction, inter alia, when “a person is adjudicated bankrupt whether in Ghana or elsewhere” to suo motu restrain him from acting as director without the leave of the court. It seems to me that the combined effect of these two provisions is to give jurisdiction to the High Court in appropriate circumstances to restrain persons adjudged bankrupt whether in Ghana or outside the jurisdiction of the courts from managing companies in Ghana as directors.”

Under the subsection, the person does not need to be convicted of offences indicated but a charge leveled against the person may entitle a court to grant an order disqualifying the person. In addition, the court may on its own motion make an order disqualifying a person from being a director for a stated period.

*In re West Coast Dyeing Industry Ltd: Adams and Another v. Tandoh*⁸⁴⁰ - the appellant was the managing director of a subsidiary company in a group of companies and a director of other sister companies. After his dismissal as the managing director, he brought an action under section 218 of the Companies Act, 1963 for oppression against the shareholder and chairman of the board of directors who had taken over the affairs of the company. The respondent alleged and established that the appellant had engaged in a number of fraudulent activities based upon which he was dismissed. The appellant did not lead any evidence to disprove the findings. The court on its motion found that the appellant had engaged in fraudulent activities in relation to the management of the company and made an order under section 186(1)(c) of Act 179 disqualifying him from being a director of any company for four years. On appeal, the appellant contended that the judge erred in disqualifying him under section 186(1)(c) of Act 179 because that sanction could only be imposed during winding up proceedings, and besides, the trial judge did not investigate the charges against him and consequently the standard of proof required under section 186 was not satisfied. It was held dismissing the appeal that the trial court properly exercised its discretion under section 186 of Act 179. Abban JA stated @ pgs. 586 to 593 as follows:

“The last ground argued by learned counsel for the appellant was that the learned trial judge erred in law in invoking the sanction of disqualification prescribed in section 186 of Act 179, against the appellant when the provisions of the said section had not been satisfied and when there was no conclusive proof of criminal

⁸⁴⁰ [1984 – 86] 2 GLR 561.

misconduct on the part of the appellant towards any of the West Coast Group of Companies. Learned counsel contended that there was evidence that section 186(c) of the Code was not complied with, in that if the court intended to apply the said sanction, the court should have proceeded to investigate and make findings as against the appellant. The type of proceedings, in which such an order could be made, according to learned counsel, should be proceedings for winding up instituted by the Registrar of Companies or the Official Trustee.

Learned counsel again submitted that the standard of proof of the criminal misconduct required under section 186 is very high. But the witness, on whose evidence the learned trial judge relied, just detailed the circumstances of a meeting that was held by that witness and two other personalities with the parties herein; and that evidence did not show any criminal intent on the part of the appellant. Counsel further submitted that the contents of the appellant's supplementary affidavit made the issue as to whether a crime or a breach of trust was committed very inconclusive; and the only way in which the matter could have been resolved was to have called the appellant and cross-examined him on it. But this was not done and in the circumstances the learned trial judge wrongly invoked the sanction of disqualification against the appellant.

The argument is wholly misconceived. Dealing first with the last point raised by learned counsel, I hasten to point out that long before hearing of his application was commenced, the appellant had had notice that one of the respondent's contentions was that he, the respondent, had not committed any acts of impropriety against the company so as to be restrained from managing the affairs of the company as was being demanded by the appellant; but that it was rather the appellant whose criminal conduct the court should look into and on its motion, apply the sanctions under section 186(1)(c) of Act 179.

Thus, one of the issues which all the parties were aware of before the hearing began was whether the court after hearing should restrain the respondent from managing the affairs of the company or whether the court should rather, on its own motion, disqualify the appellant under section 186(1)(c). The appellant was therefore put on his guard to get ready with such admissible evidence as would convince the court not to invoke the said sanction against him. The appellant as I have stated, was represented by an able and experienced counsel who was supposed to know what was the best evidence to adduce to rebut the respondent's contention. Even so, the learned trial judge went as far as asking the appellant to adduce oral evidence in addition to his affidavit evidence. But the appellant flatly refused to do so; and it would have been an abuse of judicial power if the trial court, despite the appellant's refusal, had ordered the appellant into the witness-box to be examined and cross-

examined. The appellant's failure to make himself available for cross-examination, as counsel would have wished, cannot be blamed on the court.

I come to the more important part of learned counsel's argument, namely that the disqualification under section 186(1)(c) of the Code could not be imposed in any proceedings except in proceedings for winding up of a company. The relevant portions of the section in question read as follows:

186. (1) Where, ...

- (c) it appears that a person has been guilty of any criminal offence, whether convicted or not, in relation to any body corporate or of any fraud or breach of duty in relation to a body corporate, the Court, on its own motion or on the application of any of the persons referred to in subsection (3) of this section, may order that that person shall not, without the leave of the Court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company or act as auditor, receiver or liquidator of any company for such period as may be specified in the order."*

The persons referred to in subsection 3 of the section are the Registrar of Companies and the Official Trustee. It is clear that the section makes a general provision and does not indicate or specify the type of proceedings in which the court could restrain fraudulent persons and criminals from managing the affairs of companies. Section 186 (3)-(6) become applicable only when the application is to be made by the Registrar of Companies or the Official Trustee. But when the court decides to act on its own motion, as it was done in this present case, there is nothing in the section which forbids the court from so doing unless the proceedings before it are those of winding up proceedings.

*It appears learned counsel, with due respect, has misconstrued the said section by reading into it something which is not in the section and which the section never intended; and by so doing learned counsel has attempted to give a restricted interpretation to the section by limiting the exercise of the court's discretion, under the section, only in winding up proceedings. In the first place, there is no necessity to read words into the section. In the absence of clear necessity it is a wrong thing to read into an enactment something or words which are not there: see *Thompson v. Goold & Co.* [1910] A.C. 409 at 420, H.L. per Lord Mersey and also *Vickers, Sons & Maxim Ltd. v. Evans* [1910] A.C. 444 at 445, H.L. per Loreburn L.C.*

The words of section 186(1)(c) are plain and unambiguous; and in the circumstances the court is bound to ascertain the true meaning and the intention of the legislature from the language and the unambiguous expression used therein, and not to make out the intention from some other sources of information and then construe the words so as to meet an assumed intention.

The object of the section, no doubt, appears to be to safeguard the interest of members of the public who are shareholders of companies or who have either invested in or given credits to companies; and to ensure that the said investments and assets of companies are managed only by honest persons as directors and not by frauds or by persons with criminal propensity. In cases where the object of an enactment is the public safety, wide interpretation is called for or is necessary to effect that object; and giving section 186(1)(c) that interpretation, I am of the view that there is nothing in the section which indicates that the legislature intended to confine or restrict the invocation of the disqualification sanction in winding up proceedings only. The applicability of the said section may arise in any proceedings. This is more so in proceedings brought under section 218 of the Code where, as in the present case, the conduct of both the appellant and the respondent as directors of the company was the subject matter of that application.

Thus, irrespective of the type of proceedings which are before the court, the court has a discretion to resort to section 186(1)(c), and in a fitting case, make an order on its own motion, preventing criminals and fraudulent persons from managing companies. Furthermore, under the said section 186(1)(c), the court when acting on its own motion does not necessarily need a report or the presence of the Registrar of Companies or the Official Trustee. It does not have to institute any investigations as learned counsel for the appellant attempted to advocate." ...

I now turn to the submission of learned counsel for the appellant that conclusive proof of the criminal offence is required under section 186(1)(c). With respect to learned counsel, this cannot be correct.

The section itself makes it quite clear that the person concerned need not be a convicted person. All that is required is that it must appear to the court that the conduct of the said person or the matters complained of amounted to a criminal offence; and like the breach of duty or the fraud, the crime must have been committed in relation to a body corporate.

At any rate, the very high standard of conclusive proof advocated for by learned counsel for the appellant was achieved in the present case. For there was overwhelming evidence before the court on which the learned trial judge could hold that the appellant was guilty of a criminal offence and also of fraudulent breach of duty towards Solid Construction Co. Ltd., one of the companies within the West Coast Group. I may here refer to some of those acts which the appellant was found to have committed against the said company.

The appellant, as the managing director of Solid Construction Co. Ltd., without the knowledge of the board of directors of the said company, clandestinely opened a current account in the name of the company at the Social Security Bank, Head Office, Accra. Exhibit E, which was supposed to be the mandate from the Solid

Construction Co. Ltd. to the said bank, was signed by the appellant and someone who was not an employee of the company and who had nothing to do with the company. On the said mandate, exhibit E, the appellant falsely stated that he, the appellant, was not holding directorship of any other company and that the Solid Construction Co. Ltd. had authorised the opening of the said account by a resolution passed by the company at a meeting held on 23 January 1978. In fact, no such meeting ever took place and no resolution of this kind was ever passed by the company. The post office box number which the appellant used in opening that account was totally different from the recognised postal address of Solid Construction Co. Ltd. In short, the appellant fraudulently concealed this bank account from the board of directors and secretly operated it to his benefit and to the detriment of the company.

It was established, on the evidence, that the appellant, in his capacity as the managing director of Solid Construction Co. Ltd., entered into three different contracts on behalf of the company with some institutions without informing the directors of the company. Neither did he record the said contracts in any of the books of the company as he was duty bound to do. The appellant again concealed these contracts from the board of directors. What was worse, the appellant, in his capacity as the said managing director, received payments in respect of these contracts. The said payments were made by cheques issued in the name of Solid Construction Co. Ltd.

*The appellant, using the company's stamp, fraudulently endorsed those cheques and made them payable to himself personally. He paid these cheques into his private bank account and then withdrew the amount and misappropriated it. Sums of money the appellant misappropriated in the manner as described, ran into thousands of cedis. These were the facts found by the learned trial judge and which facts are fully supported by the evidence on record. How can it then be argued that these facts did not satisfactorily and convincingly prove that a crime had been committed by the appellant against a body corporate? The appellant could easily have been prosecuted and convicted of the crime of stealing. The two accused persons in the case of *Ampah v. The Republic* [1976] 1 G.L.R. 403, misconducted themselves in the manner as the appellant did in the present case, and they were charged with stealing contrary to section 124 of the Criminal Code, 1960 (Act 29).*

Briefly the said two accused persons were executive director and accountant respectively, of the Ghana Chamber of Mines. Not only did they have authority to sign cheques for and on behalf of the Chamber of Mines but also received cheques issued in favour of the chamber. Whenever they received any cheque coming from outside and drawn in favour of the chamber, they endorsed the back and made it payable into some secret bank accounts of theirs. They later issued their own

cheques to withdraw the money and misappropriated same. When they were found out they were prosecuted and convicted of stealing by the circuit court. One had seven years' imprisonment with hard labour while the other had five years.

They appealed as far as to the Court of Appeal but the said court constituted by Azu Crabbe C.J., Amissah and Annan JJ.A. affirmed the convictions and the sentences, and dismissed the appeal: see [1977] 2 G.L.R. 171, C.A.

This case has been cited just to demonstrate in clear terms that the appellant's conduct in relation to Solid Construction Co. Ltd. was criminal and fell squarely within section 124 of Act 29. Thus, the appellant was, without doubt, guilty of a criminal offence against that company even though he had not been convicted of it. He was also guilty of fraudulent breach of duty towards the said company. I am therefore of the opinion that the learned trial judge properly exercised his discretion when he invoked the provisions of section 186(1) on his own motion, and ordered that the appellant:

"shall not without leave of the court, be a director or in any way whether directly or indirectly be concerned with or take part in the management of any company incorporated under Act 179 for a period of four years."

For the above reasons, I find no merit in the appeal. Accordingly, I would dismiss it."

Except with conviction under section 177(1)(a) of Act 992, the order pursuant to which the person is disqualified must be an order made by the High Court either by the court *suo motu* or upon application by the persons indicated in subsection (6) of Section 177 of the Act. For disqualification order pursuant to section 177(1)(a) of the Act, the order may be made by the court in the country where the person is convicted.

The persons that can bring an action under subsection (6) of section 177 of the Act are member or officer of the company, a person who can demonstrate an interest in the case, the Registrar or Official Trustee, trustee in bankruptcy of the person concerned, or the liquidator of the body corporate.

Subsection (2) of Section 177 of the Act provides for automatic disqualification for persons convicted within the last five years of an offence involving fraud or dishonesty, or relating to promotion, formation or running of a company; or a person who is a director or senior executive of a company who within the last five years is wholly or partially responsible for the insolvency of the company; or a person who within the last five years has been disqualified from being a Company Secretary, receiver, manager or liquidator. The disqualification under subsection (2) of Section 177 of the Act is not based on an order by the court on its own or on application by any person. The disqualification automatically applies once a person has been found within the last five years to have suffered any disability under the subsection.

In sum a person is disqualified from being a director under the Act if the person is:

- (a) an infant
- (b) declared to be of unsound mind
- (c) a body corporate
- (d) a person restrained pursuant to section 177
- (e) undischarged bankrupt

Other than the disqualification of a person falling into any of the above, the Companies Act, 2019 does not provide for qualification criteria in terms of academic qualification or experience, or any integrity test. Notwithstanding that, the constitution of a company may prescribe qualification criteria based on education, background or character of the person. That is permitted under the Act. In other words, the constitution of a company may prescribe disqualification criteria beyond what is provided under the Act. Subsection (5) of Section 173 provides that *“The constitution of a company may provide that, classes of persons additional to those provided in subsection (1) are incompetent to be directors of the company.”* In view of this provision, some companies in their constitution have provided for diversity and gender representation in board appointments. This may be in addition to the designation of different expertise required for different board members to ensure efficient administration of the business of the company.

Additionally, sector specific legislation may prescribe additional disqualification criteria for directors for companies engaged in business in the sector. The Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) provides that the following persons are disqualified from being appointed director of a company engaged in the business of banking of specialised deposit-taking:⁸⁴¹

- (a) a person adjudged to be of unsound mind or is detained as a person with a mental disorder under any relevant enactment;
- (b) a person declared insolvent or has entered into an agreement with another person for payment of the debt of that person and has suspended payment of the debt;
- (c) a person convicted of an offence involving fraud, dishonesty or moral turpitude;
- (d) the person has been a director, key management personnel or associated with management of an institution which is being or has been wound up by a court of competent jurisdiction on account of bankruptcy or an offence committed under an enactment;
- (e) the person is a director or key management personnel of another bank, specialised deposit-taking institution or financial holding company in the country;
- (f) the person does not have the prior written approval of the Bank of Ghana; or
- (g) the person has defaulted in the repayment of the financial exposure of that person.

These disqualification criteria must be applied in addition to the general disqualification criteria under the Companies Act. In sum, sector specific regulations may prescribe additional

⁸⁴¹ Section 58(1) of Act 930.

disqualification criteria for the appointment of directors of a company or those who act as directors of a company.

Under Act 992, a person who is incompetent under section 173 must not be appointed or act as director of a company in Ghana. There are penalties prescribed for an unqualified person acting as or being appointed as director. Punishment is also imposed on the company that appoints an unqualified person as a director of that company. Section 173 of Act 992 in subsections (2), (3) and (4) provide as follows:

- “(2) Where a person specified in subsection (1), other than a body corporate, or a person of unsound mind, acts as a director of a company or agrees to be appointed a director, that person commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than one thousand penalty units or a term of imprisonment of not less than two years and not more than five years or both the fine and the imprisonment.*
- (3) Where a body corporate acts as a director or agrees to be appointed a director, the body corporate and every officer of that body that knowingly permitted the body corporate so to act or to be appointed is liable to pay to the Registrar, an administrative penalty of one thousand penalty units.*
- (4) Where a company appoints a person as director in contravention of this section, the company and every director of the company that is in default is liable to pay to the Registrar, an administrative penalty of one thousand penalty units.”*

Under subsection (4) above, it is not only the company that is liable to pay the administrative penalty, but also directors. The Companies Act, 2019 further imposes a duty on a director who becomes aware of his disqualification to report his disqualification. Section 178 of Act 992 provides that:

- “(1) On becoming aware of the disqualification to act as director, the director concerned shall immediately report the disqualification to the Board, and the Company Secretary in writing.*
- (2) A director who refuses to disclose or misreports the disqualification within twenty-one days of the disqualification, commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than one thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both the fine and the imprisonment.*
- (3) A vacancy created by the disqualification of a director under this section, may be filled as a casual vacancy in accordance with section 172.”*

Implied from section 178 of the Act is that a director who becomes aware of his disqualification will cease to be a director of the company upon reporting the disqualification to the Board and the

Company Secretary. Subsection (4) requires the vacancy created to be filled as a casual vacancy by the directors in accordance with section 172 of the Act. This requirement for filling such vacancy is further provided in section 179 of the Act. Section 179 of Act 992 provides that:

- “(1) Where a company ceases to have the minimum number of directors, the board of directors of the company shall fill the vacancy of a disqualified director in accordance with section 172.*
- (2) The board of directors shall deliver or cause to be delivered to the Registrar for registration, notice in an approved form of the change in the directors of that company as a result of a disqualification of a director.*
- (3) The notice shall be delivered to the Registrar within twenty-eight days after the company becomes aware of the disqualification or the relevant court order is made and shall be accompanied with*
- (a) a statutory declaration of the new director, to be a director, and*
- (b) a consent form signed by the new director to signify acceptance to be a director.*
- (4) If the company contravenes the provisions of this section, the company and any director and member of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the company so carries on business after the expiration of the specified period without filing the vacancy and subsequent notifying the Registrar.”*

13.8 Share qualification of a director

According to section 174 of Act 992, a director of a company need not be a member or shareholder of the company. The Act, however, provides that where the constitution of the company provides as additional qualification criteria, that a director must be a member or hold shares in the company, that requirement is applicable to directors and must be satisfied by the directors of the company. Section 174 of the Act provides:

- “(1) Except as otherwise provided in the constitution of a company, a director is not required to be a member of the company or hold a share in the company.*
- (2) Where the constitution of a company requires a director to hold a specified share qualification, every director shall obtain that qualification within two months after appointment as director or a shorter period that may be fixed by the constitution.*
- (3) The office of director shall be vacated if the director fails to hold the specified share qualification within two months after the appointment or if any time after the expiration of that period the person ceases to hold that qualification.*
- (4) Where a company amends the constitution so as to introduce or increase the requirement of a share qualification, every director holding office at the date of*

- the amendment shall have two months within which to obtain the qualification and shall not vacate office under this section unless that director fails to do so.*
- (5) *A person who vacates office under this section is not qualified to be re-appointed a director of the company until that person has obtained the qualification.***

A person does not need to be a member or shareholder of the company to be appointed a director of the company under the Act. However, the constitution may require the director to hold a specific number of shares of the company or generally to be a shareholder. Where so required by the constitution, the Act requires the director to acquire the required shares within two months after his appointment or such a shorter period as may be stated in the constitution of a company. The director is not required to hold that share prior to the appointment. The office of the director will be vacated if the director fails to acquire the share, or if at any time after the expiration of that period the director ceases to hold the share qualification.

In the case of amendment of the constitution to introduce or increase the requirement of a share qualification every director holding office at the date of such amendment has two months to meet the share qualification. If a director is unable to meet the share qualification, the director must vacate office after the two months. A director who vacates office as a result of failure to acquire the required shares must not be appointed as a director unless the director meets the share qualification.

13.9 Publication of name of directors

A company is required to publish the names of the directors of the company in trade circulars and business letters. Section 186 of Act 992 provides that:

“A company incorporated in the country shall state in legible characters in the trade circulars and business letters of the company on or in which the name of the company appears:

- (a) the present forenames and surname; and*
 - (b) any former forenames or surname*
- of every director, including substitute directors appointed in accordance with section 180 but excluding alternate directors appointed in accordance with section 181.”*

The requirement is that the names of the directors must be stated on the letterheads and correspondence from the company. In practice, the names of directors are also stated on the websites of the company. The requirement is applicable to all directors except alternate directors.

13.10 Non-assignment of office of directors

The Companies Act, 2019 prohibits the directors and officers of a company from assigning the office of directors and officers. The directors cannot, therefore, require another person not duly appointed as director or another appointed director to perform the duties of the director or to step in that director's shoes and assume his office. Section 187 of the Act provides that:

"A provision in the constitution of a company or in an agreement purporting to empower (a) a director to assign the office of that director, or (b) any other officer to assign the office of that officer to another person, is void."

In essence, a director cannot assign his office to another person to assume his duties. Any provision in the constitution of the company or in an agreement that allows such assignment is void and of no effect. This however does not include instances permitted under the Act that allows the board of directors to delegate their powers to a committee of directors or managing director. It also does not exclude instances where a director who is unable to act as a director or is out of the country to appoint an alternate director for a period not exceeding six months.

13.11 Register of Directors & Registration of Particulars of Directors

Since directors are the directing mind of the company and vested with the powers to manage the business of the company, it is important not to leave outsiders who seek to know who the directors of the company are in doubt. It must, therefore, be easy for outsiders to know who the directors of the company are. The Act seeks to achieve this through two requirements. The requirement that the company must keep a register of directors which contain particulars of the directors and registration of the particulars with the Registrar of companies. Section 215 of the Act requires that the company must keep at its registered office, a register of directors of the company.⁸⁴² Whilst the register must have the records of substitute director, that of alternate directors are not required.⁸⁴³ The content of the register include⁸⁴⁴:

- (a) name of directors including former names.
- (b) usual residential address
- (c) business occupation of directors
- (d) particulars of any other directorship.

⁸⁴² Section 215(1)(a) of Act 992.

⁸⁴³ Section 215(2) of Act 992.

⁸⁴⁴ Section 215(3) of Act 992.

The register must be open for inspection during business hours, subject to reasonable restrictions.⁸⁴⁵ Members are entitled to inspect without any charge, whilst other persons may pay prescribed fees.⁸⁴⁶ The register must be open for at least two hours of each day except Saturdays, Sundays and public holidays.⁸⁴⁷ Failure or refusal of the company to permit the inspection or not keeping the register in accordance with the section attract administrative penalty payable by the company and every officer of the company.⁸⁴⁸

Section 216 of the Act requires the company to, within twenty-eight days of a change of director or particulars of the directors, other than particulars of any other directorship, to send to the Registrar for registration notice in the prescribed form of the change, stating the date of the change.⁸⁴⁹ Failure to register the change in director or change in particulars of director with the Registrar attract administrative penalty payable by the company and every officer of the company.⁸⁵⁰

13.12 Types of Directors

The Act provides for the classification of directors based on whether the director in addition to being a director occupies an executive position in the company, or whether the director is appointed to act as a deputy for a named director or to act only when a director is absent or unable to act as a director. In any of these classifications, the person is a director of the company subject to the restriction placed on the director by the Act. The classifications are discussed below.

13.12.1 Executive and non-executive directors

This classification is based on whether in addition to the person being a director of the company, the person occupies an executive position in relation to the same company. That is whether the person occupies two positions in relation to the same company. A director, who in addition to being a director, occupies an executive position is an executive director, whilst a director who does not occupy any executive position is a non-executive or independent director of the company.

Act 992 permits the appointment of a director to an executive position which is an office or place of profit. That is a position that is remunerated by the company. Under section 183 of Act 992, the board of directors is empowered to appoint a director into an office or a place of profit in the company other than the place of an auditor of the company. The appointment of a director into an office or place of profit is done by the board of directors unless the constitution of the company provides

⁸⁴⁵ Section 215(6) of Act 992.

⁸⁴⁶ Ibid.

⁸⁴⁷ Section 215(7) of Act 992.

⁸⁴⁸ Section 215(8) of Act 992.

⁸⁴⁹ Section 216(1) of Act 992.

⁸⁵⁰ Section 216(2) of Act 992.

otherwise. The terms of the appointment, including the duration, remuneration and benefits attached to the position are determined by the board of directors in accordance with mandatory prescriptions under the Act. The mandatory prescriptions include section 185 which deals with the manner of remunerating directors. Remuneration includes payment of salary, commission, share of profits, participation in pension and retirement schemes applicable to the office. Section 214 of the Act also prohibits payment of tax-free remuneration to directors.

Section 183 of Act 992 provides that:

“Except as otherwise provided in the constitution of a company,

- (a) a director may hold any other office or place of profit under the company, other than the office of an auditor, in conjunction with the office of director;*
- (b) the directors may from time to time appoint one or more of their body to any other office for the period and on the terms that the directors may determine and, subject to the terms of an agreement entered into in a particular case, may revoke the appointment;*
- (c) subject to compliance with section 185 and subject to section 214, that office may be remunerated by way of salary, commission, share of profits, participation in pension and retirement schemes, or partly in one way and partly in another, as the directors may determine, and*
- (d) in exercising the powers under this section, the directors shall observe the rules laid down in section 190 and 191 and, in particular, in determining the amount of the remuneration, shall satisfy themselves that the amount of the remuneration is reasonably related to the value of the services of the holder of the office.”*

The first thing to note from the section is that the constitution of a company can provide for a contrary position in relation to the power to appoint directors to an executive position and determination of the terms of appointment. In the absence of a contrary position in the constitution of the company, the default position is that the appointment and determination of terms of the appointment of the executive position are made by the board of directors. Other than the position of auditors, the board of directors can from time to time appoint a director to any position of employment in the company. That appointment as an employee is subject to agreement between the company and the director. In determining the terms of the appointment, the section requires the board of directors to be guided by other sections of the Act. In addition, in determining the consideration to provide to the particular office, the directors must ensure that services provided are of sufficient value to the remuneration provided by the company. That is the remuneration provided must be based on performance. Such remuneration can be based on salary, share of profit, commission, participation in pension or retirement scheme or a combination of them. Since it is the

board of directors that appoint and determines the terms of appointment into an executive position, the section also gives them the power to remove the director from the executive position or vary the terms of appointment subject to the terms of the agreement of the appointment.

The determination of the remuneration of an executive director is however subject to section 185 of the Act which provides that *“(1) Subject to this section, the fees and any other remuneration including salary payable to the directors in whatever capacity, shall be determined from time to time by ordinary resolution of the company and not by a provision in an agreement.”* Even though the board of directors have the power to determine the terms of appointment of an executive director, the salaries payable must be determined by ordinary resolution of the company. That is the resolution passed by the members. It is therefore members of the company that must determine or approve the salary payable to the executive directors.

In *Quarcoopome v. Sanyo Electrical Trading Co. Ltd and Another*⁸⁵¹, the trial court awarded compensation to a *de facto* director for services rendered to the company on the basis of quantum meruit. On appeal, the Supreme Court held that under the provisions of section 194(1) and (2) of the Companies Act, 1963 (Act 179)⁸⁵², the fees or other remuneration payable to directors of a company were to be determined by ordinary resolution of the company and not by any provision in the company's regulations or in any agreement; any such provision would be null and void. There being no evidence that such a resolution was ever passed by the company, the trial judge erred in deciding to remunerate the plaintiff for services rendered to the second defendant company. It offended against the provision in section 194(1) and (2) of the Companies Act, 1963 and the award amounted to usurping the functions of the second defendant. Ansah JSC stated @ pgs. 226 to 229 that:

“The issue in this appeal was could such a director [de facto] be held entitled to any remuneration? The answer is provided in section 194(1) and (2) of Act 179 which provides that:

“(1) Subject to this section, the fees and other remuneration payable to the directors in whatsoever capacity, shall be determined from time to time by ordinary resolution of the company, and not by a provision in the Regulations or in any agreement, which provision or agreement is void.

(2) The fees payable to the directors as directors shall be determined from time to time by ordinary resolution of the company and not in any other way.”

... Section 185(9) of Act 179 is also relevant in connection herewith as it provides that:

⁸⁵¹ [2009] SCGLR 213.

⁸⁵² This is similar provisions reflected in section 185 of Act 992.

“185(9) This section shall not be taken as depriving a director who has a service agreement with the company of a right to compensation to which the director is lawfully entitled under that agreement on the termination of the directorship or of a right to damages if the removal from the directorship constitutes a breach of the service agreement.”

... The Court of Appeal was, however, of the view that:

“The law on the issue to be resolved by this appeal is that fees or other remuneration payable to directors are to be determined by ordinary resolution of the company and not by any provision in the company’s regulations or in any agreement”.

Furthermore the Court of Appeal held that the consequential award to the plaintiff in quantum meruit offended the clear provisions in the sections 194(1) and (2) of the Companies Act (quoted above), for the award amounted to usurping the functions of members of the second defendant company. There being no evidence that such a resolution has ever been passed by the company, the trial judge erred in deciding to remunerate the plaintiff for services rendered to the second defendant company in his capacity as a director. It was for this reason that the Court of Appeal rightly concluded that the trial judge erred in its judgment and set it aside.

... In our view, the trial judge should have averted her judicial mind to the provisions of the Companies Act that regulated all relevant issues in the alternative claim she was considering; to be very precise, section 194 (1) and (2) on remuneration for directors. It is curious why the learned trial judge did not make any reference whatsoever to this legal provision or cast a glance to the Companies Act for assistance and guidance. Her judgment was per incuriam, to say the least. The penalty was that such a judgment would be interfered with and set aside on appeal which the Court of Appeal rightly did.”

Even though sections 185(1) and (2) of Act 992 mandates that remuneration payable to directors in whatever capacity must be determined by ordinary resolution, section 185(4) and (5) permits remuneration payable to executive directors to be stated in the terms of appointment to such executive position and the registered constitution of the company. Sections 185(4) and (5) of Act 992 provides:

“(4) Where a director holds any other office or place of profit under the company in accordance with sections 183 or 184, the terms of the appointment may provide for the remuneration in respect of the appointment but that director is not entitled to a remuneration additional to the fees to which that person is entitled as director unless the terms of the appointment to that office have been approved by ordinary resolution of the company.

- (5) *The registered constitution of a company may make provision for benefits payable to directors including*
- (a) *compensation for loss of employment as director or former director;*
 - (b) *insurance benefits; and*
 - (c) *other indemnities."*

In the determination of the terms of appointment of the executive position, the board of directors may determine the remuneration attached to the executive position. However, such remuneration will not be payable unless approved by an ordinary resolution. In addition, the registered constitution can set out benefits payable to directors. The general principle, therefore, is that the remuneration of directors must be determined or approved by members. Such remuneration is determined by ordinary resolution or provided in the registered constitution. In practice, the board of directors may recommend that amount to members for approval by ordinary resolution. The employment contracts of executive directors including the managing directors are therefore subjected to the approval of members.

Generally, the board of directors must supervise the performance of the executive director in the executive position. It should be noted that whilst the board of directors can remove an executive director from his executive office, such removal must be in accordance with the employment contract. Such removal does not terminate the position of executive director as a director of the company but only the executive position. Similarly, the removal of a director from office by shareholders or whoever has the power to remove directors, will not automatically terminate his executive position, except in relation to managing directors, which position is dependent on the person being a director.

The appointed director will therefore act in two capacities in relation to the company, as a director and employee of the company. It is the directors that are also employees that are the executive directors whilst those that are only directors are the independent or non-executive directors. The executive directors as employees are required to provide services or work for the company on a day-to-day basis in accordance with the terms of employment. The employment position is regulated under the employment contract which is subject to the Labour Act, 2003 (Act 651). Generally, the executive directors together with the managing directors and other top management personnel constitute the management team.

Executive directors when acting in their employment positions are officers of the company, and therefore constitute a subordinate organ under section 148 of Act 992. Their acts will therefore only bind the company under section 148 based on authorisation, ratification or where the company is estopped from denying the act. However, when acting together with the other directors as the board of directors, they constitute a principal organ whose act is the automatic act of the company and

binding on the company under section 147 of Act 992. This position is different in relation to the position of a managing director who is also an executive director whose act will be binding on the company if the managing director is carrying on in the usual way the business of the company.

In *Bousiako Co., Ltd. v. Ghana Cocoa Marketing Board; Kwabo-Osekere Construction Works Ltd. v. Ghana Cocoa Marketing Board (Consolidated)*⁸⁵³, a distinction was drawn between the act of the principal organs as against the subordinate organs when a corporate entity seeks to deny a letter written by a member of its Interim Management Committee. Osei-Hwere J stated @ pgs. 841 to 843 that:

“It was argued by counsel for the plaintiffs that as the plaintiffs had entered into a contract with the defendants and had dealt in good faith with them, they had the right to assume that the acts within the constitution and powers of the defendants had been duly performed and that the plaintiffs are under no obligation to inquire whether acts of internal preliminaries and management had been regularly performed. Sections 139(a) and 140 of the Companies Code, 1963 (Act 179) regulate the above proposition. By section 139 it is provided, among others, that any act of the board of directors or managing director, for instance, while carrying on in the usual way the business of the company should be treated as the act of the company itself; and accordingly the company shall be civilly liable therefore to the same extent as if it were a natural person.

The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity. Section 140 also provides for situations when the acts of any officer or agent of a company shall be deemed to be acts of the company. These are, for instance, when the company, acting through its board of directors, or managing director, shall have expressly or indirectly authorised such officer or agent to act in the matter or shall have represented the officer or agent as having its authority to act in the matter. In any of these events the company shall be civilly liable therefore to the same extent as if it were a natural person. The company shall, however, not incur civil liability to any person if that person had actual knowledge at that time of the transaction in question that the board of directors, or managing director as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with, or relationship to the company, he ought to have known of the absence of power or of the irregularity.

⁸⁵³ [1982-83] GLR 824.

Act 992 does not prescribe rules on the balance between executive and non-executive directors in the composition of the board of directors of a company. However, good corporate governance requires that a good balance is achieved between executive directors and non-executive directors on the board of directors. Critically, the principle of accountability must be achieved to enable the board of directors to supervise the performance of the executive directors. That may likely not be achieved if the majority of directors are executive directors. However, the particular circumstances of a company may warrant instances where the majority or all directors of the company are executive directors. However, since it is the board of directors who appoint some of their numbers to executive positions and are required to supervise the performance of the executive team, having more executive directors than independent directors may diminish the accountability of the executive team to the board of directors.

Sector specific legislation may dictate the composition of the board of directors. The Banking Business – Corporate Governance Directive, 2018 issued pursuant to section 92 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), elaborate on the board composition of companies engaged in the business of banking and other financial services. The Directive maintains a similar distinction under Act 992 between the executive and non-executive directors by providing that:

*““executive directors” refers to directors who have definable management responsibilities in addition to their functions as directors;
“non-executive directors” refers to directors other than executive directors, i.e., they are not employees of the regulated financial institution and do not hold any other office in the institution in conjunction with their office as directors”.*

However, a distinction is drawn between non-executive directors and independent directors by placing more restriction on non-executive directors who qualify as independent directors as follows:

““independent directors” refers to non-executive directors who have the ability to exercise objective, independent judgment after fair consideration of all relevant information and views without undue influence from management or from inappropriate external parties or interests however, non-executive directors who may represent the interests of the bank’s, SDI’s⁸⁵⁴ or FHC’s⁸⁵⁵ (regulated financial institution’s) shareholders or have some form of connection with the regulated financial institution will not be considered as independent directors”

Unlike the general position above, where the terms non-executive directors and independent directors are used interchangeably, there is a distinction under the Corporate Governance Directive. Not all non-executive directors are independent directors. For a non-executive director to qualify as

⁸⁵⁴ SDI refers to Specialised Deposit-Taking Institution.

⁸⁵⁵ FHC refers to Financial Holding Company.

an independent director, he or she in addition to being able to exercise independent judgment, which is required of all directors, must not represent the interest of shareholders or be connected with the financial institution. The detailed provision on the requirement of independent director requires the non-executive director not to:⁸⁵⁶

- (a) have more than five percent equity interest directly or indirectly in the regulated financial institutions or in its related companies;
- (b) be employed in an executive position in the bank, SDI or FHC or its related company at least two years prior to his appointment date;
- (c) have relatives employed by the bank, SDI or FHC or any of its related companies as key management personnel in the last two (2) years;
- (d) have engaged in any transaction within the last two years with the regulated financial institution on terms that are not less favourable to the regulated financial institution than those normally offered to other persons;
- (e) have served as a director in the regulated financial institution continuously for more than two terms unless the director can affirm that his/her independence is not impaired;
- (f) be related to persons with a significant shareholding in the regulated financial institution or have any business or employment connections to a significant shareholder.
- (g) hold cross directorship position(s) with other directors on the Board of other institutions

In the composition of the board of directors of a company engaged in banking and specialised deposit-taking business, the Directive requires the non-executive directors to constitute the majority of the board of directors and the independent directors to constitute twenty persons of the board of directors. There are additional requirements related to the composition including having Ghanaians constitute not less than thirty percent of the board of directors and must be ordinarily resident in Ghana; and the prohibition against having not more than two related persons on the board.

The emphasis here is that any such sector specific requirements relating to appointment and composition of the board including those relating to executive and non-executive directors to constitute the board must be observed in relation to a company engaged in business in that sector. Where there is no such requirement, the general position under Act 992 is applicable. However, even where there is no sector specific requirement, the registered constitution may provide rules relating to appointment and composition of the board of directors including those relating to executive and non-executive directors, which rules will be applicable subject to mandatory provisions under Act 992.

⁸⁵⁶ Paragraph 31 of The Banking Business - Corporate Governance Directive, 2018.

13.12.2 The Managing Director

Act 992 provides for the position of managing director of a company. In many companies, the term chief executive officer may be used. Act 992 permits the board of directors to appoint one or more of their members to the position of managing directors and delegate all or some of the powers of the board of directors to the managing directors.⁸⁵⁷ The appointment of the managing director is regulated under section 183 which deals with executive directors generally and section 184 of the Act which specifically regulates the managing director. As noted above, a managing director is one type of executive director. The managing director is an executive director who occupies a position of profit or employment with the company which is regulated by an agreement between the company and the managing director. Section 184 of the Act provides as follows:

“Except as otherwise provided in the constitution of a company,

- (a) the directors may from time to time appoint one or more of their body to the office of managing director and section 183 shall apply to that appointment;*
- (b) the appointment of a managing director shall be automatically determined if the holder of the office ceases from a cause to be a director and, unless the agreement entered into in a particular case otherwise provides, the determination shall not constitute a breach of the contract with the company; and*
- (c) the directors may entrust to and confer on a managing director any of the powers exercisable by them on the terms and with restrictions that the directors think fit, and collaterally with, or to the exclusion of the powers of the directors and, subject to the terms of an agreement entered into in a particular case, may from time to time revoke or vary all or any of those powers.”*

Just like section 183, section 184 permits the constitution of a company to state contrary positions than stated in section 184. The constitution of a company may dispense with the requirement of the company having a managing director or entrust the appointment to shareholders other than the board of directors. However, the default position under section 184 of the Act, as similarly stated in section 146(b), is that the board of directors are permitted to appoint one or more of their numbers to the position of managing director. The law does not restrict the number of managing directors that a company can appoint. The law permits the directors to appoint one or more of their number as a managing director. However, by practice, companies generally have one managing director.

In the appointment of a managing director, the directors are required under section 183 to determine the terms of the appointment of the managing director. Under section 185, the salary payable to the

⁸⁵⁷ Section 143 of Act 992.

managing director must be determined by the ordinary resolution of the company. The remuneration to managing directors may be based on salary, commission, share of profit, participation in pension and retirement scheme. Even though the remuneration must be approved by ordinary resolution of the company, section 185(4) of the Act permits the terms of appointment to indicate the remuneration payable and such remuneration will be payable to the managing director provided the terms are approved by the ordinary resolution of the company. A critical requirement in the determination of remuneration payable to a managing director is that the remuneration must be commensurate with the service performed by the managing director. That is the services provided must be of sufficient value to the remuneration payable by the company to the managing director. The board of directors also have the power to revoke the appointment of the managing director or vary the terms of appointment.

The managing director has no inherent power as a managing director. Sections 183 and 146(b) of the Act provide that the board of directors may delegate some or all of the powers of the board of directors to the managing director. In particular, section 184(c) of Act 992 provides that *“the directors may entrust to and confer on a managing director any of the powers exercisable by them on the terms and with restrictions that the directors think fit, and collaterally with, or to the exclusion of the powers of the directors and, subject to the terms of an agreement entered into in a particular case, may from time to time revoke or vary all or any of those powers.”* The managing director of a company appointed by the board of directors does not have any specific powers conferred on him under the Act. It is for the board of directors to entrust or confer some or all of the powers exercisable by the board of directors on the managing director. Where the managing director is given any of the powers of the board of directors, the board of directors may limit and place restrictions on the exercise of the powers by the managing director. The board of directors may give the powers to the managing director and excludes the board from exercising the powers given or concurrently maintain the exercise of the powers. The board of directors are also entitled to at any time revoke or vary the powers of the board of directors conferred or entrusted to the managing director. This position is, however, subject to the terms in the registered constitution. Therefore, unless the constitution of the company indicates otherwise, the power of the managing director of a company is dependent on the powers conferred on him by the board of directors subject to any restriction or limitation the board may impose.

*Harold Holdsworth & Co (Wakefield) Ltd v. Caddies*⁸⁵⁸ – the respondent, Caddies, who was a director of the appellant company, was appointed managing director of the appellant company for a period of five years from 1 October 1948. Clause 1 of the agreement, which was dated 1 April 1949 states he “shall be and he is hereby appointed a managing director of the company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the

⁸⁵⁸ [1955] 1 All ER 725; [1955] 1 WLR 352.

date hereof which may from time to time be assigned to or vested in him by the board of directors of the company". The agreement further provided that the respondent should devote his whole time, attention and abilities to his duties under the contract and should obey the orders and directions of the board. At the date of the agreement, the appellant company had three subsidiary companies, of which one company was a textile company of which the respondent was a full-time managing director under a prior agreement. After his appointment by the agreement of 1 April 1949, the respondent was, in fact, the only managing director of the appellant company. Differences having arisen, the board of the appellant company resolved on 10 May 1950, that the respondent should confine his attention to the textile company only. Thereafter the respondent performed no executive or managerial functions for the appellant company. The respondent claimed that the resolution was a repudiation of the agreement of 1st April 1949, and brought an action against the appellant company for breach of contract. It was held by the majority that the appellant company was not in breach of the agreement of 1st April 1949, because the appointment of the respondent to be a managing director of the appellant company by clause 1 of the agreement and his description therein as such managing director did not limit the powers of the board under the subsequent words of the agreement and, on the true construction of the clause, the respondent's duties could be confined to the management of a subsidiary company of the appellant company. Viscount Kilmuir LC. Stated @ pgs. 728 to 730 that: "*The most important clause in the second agreement is cl 1, and I therefore set it out in full:*

"[The respondent] shall be and he is hereby appointed a managing director of the [appellant] company and as such managing director he shall perform the duties and exercise the powers in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date hereof which may from time to time be assigned to or vested in him by the board of directors of the company."

... First, the respondent is appointed a managing director. If one then asks what are the duties which he shall perform and what are the powers he shall exercise, the answer, from the words of the clause, is the powers and duties which may from time to time be assigned to, or vested in, him by the board of directors. If one then asks how shall he perform and exercise them, the answer is in relation to the business of the appellant company and the businesses (howsoever carried on) of its existing subsidiary companies at the date of the contract. The Lord President bases his second view on the initial words. He says:

"On the other hand, if the agreement is to be given ordinary business efficacy, I have come to the conclusion that weight must be given to the plain fact that the appointment of the [respondent] was an appointment as 'a managing director of the company'—a well recognised title in company administration, carrying responsibilities of a familiar nature and involving sundry obligations and liabilities under the Companies

Act. The [respondent] was not appointed to perform such duties, if any, as the board might assign to him. To borrow the language of Asquith, J, in Collier v. Sunday Referee Publishing Co. Ltd., the very 'foundation of the contract was the appointment of the plaintiff during the contract period to a specific office'."

Later the Lord President says:

"The [appellant company] were in my view disabled from depriving the [respondent] of the right to act as 'a managing director of the company'. They could not leave him with the name and withdraw the substance of his office."

I confess that this conception of a stratification of a position as managing director has puzzled me. Neither side relied on any provision in the articles of the appellant company, and they were not included in the record. By way of illustration, however, I refer to the relevant provisions of Table A in Sch 1 to the Companies Act, 1948. Paragraph 107, the first dealing with a managing director, is as follows:

"The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment. A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he cease from any cause to be a director."

That paragraph states specifically that the board can fix such terms as they think fit, while the director so appointed gets the advantage of not being subject to retirement by rotation. Paragraph 108 gives the directors the right to determine remuneration. Paragraph 109 gives the directors a complete discretion to entrust to, and confer on, a managing director any of their own powers. I cite with approval the summary in 6 Halsbury's Laws Of England (3rd Edn), p 297, para 601, where it is stated:

"A managing director may either be merely a director with additional functions and additional remuneration, or else he may be a person holding two distinct positions, that of a director and that of a manager."

I cannot find either in the statute or in the cases in which the matter has been considered anything to prevent a board of directors appointing a managing director and limiting his duties according to their own wishes. In other words, the first part of cl 1 does not, in my view, limit the powers of the board under the remainder of the clause.

I now come to consideration of the view of Lord Carmont, and I make two quotations from his judgment.

- (i) "Although this is not an appointment to a post, I have come to be of opinion that it is a contract whereby some duties must be assigned to the [respondent] of a managerial kind."*
- (ii) (ii) "I do not think that the [respondent's] averments further his case much beyond the statement which is not in dispute that he was withdrawn from any managerial participation at Balne Mills. If the board so acted under the impression that they were entitled totally to withdraw the [respondent] from management there, provided they allowed the [respondent] to continue to manage something elsewhere, then I think they were misinterpreting their contract with the [respondent]. The board may have been misled into the course they followed by the wrong view of the legal relations existing between the parent company and its subsidiaries, but none the less the [respondent] was deprived of all managerial functions at Balne Mills and in my opinion that deprivation could not be operated without a repudiation of the contract with the [respondent]. Such relegation to complete inaction from management so far as Balne Mills was concerned evinced an intention no longer to be bound by the contract."*

With all respect to this reasoning, I cannot spell it out of cl 1 of the contract. As I have stated, that clause lays down that the respondent, as such managing director, shall perform the duties and exercise the powers assigned to or vested in him by the board

"in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies."

I find it difficult not to read these words distributively and to treat them as giving a right to assign duties in relation to a subsidiary, but even if one reads them collectively, then the result of so doing is to give the power to the board to assign duties with regard to the activities of a group of companies viewed as a whole. This cannot, in my mind, mean that the managerial duties must cover the appellant company and every subsidiary. They can be limited to such activities as the board may select.

I have tried to give full weight to Lord Carmont's words that the board must have been misled by a wrong view of the legal relations existing between the parent company and its subsidiaries. I regret that I cannot understand how these raises difficulties in relation to the Textile Company. On the respondent's own averments the respondent was still managing director of that company, and acting as such pending the appointment of a successor. There was no personal or mechanical

difficulty in his exercising managerial functions in regard to that company. Further, the appellant company owned all the shares and, therefore, could, if any difficulty arose, ensure that the desires of its board with regard to the management of the Textile Company could be enforced. Equally, the fact that the respondent was obliged to devote all his time to his duties under the second agreement does not seem to me to present any difficulty if managerial functions were assigned in relation to a particular subsidiary.

On the view of the contract which I have taken and tried to explain, I am, therefore, of opinion that the resolution of 10 May 1950, did not constitute a breach of the contract.

Where some or all of the powers of the board of directors is delegated to the managing director and the managing director is acting within the delegated power, the managing director is a principal organ and under section 147, the act of the managing director is the automatic act of the company. The exercise of powers or performance of duties customarily performed by a managing director of a company carrying on business of the type carried by the company will, however, create a binding obligation on the company.⁸⁵⁹ The board may retain some supervisory power over the managing director in terms of requiring the managing director to report on the activities of the managing director or require approval from the board of directors for specific acts. The supervision may also be exercised through the power given to the board of directors under section 184 to vary or revoke the powers of the managing director, or altogether revoke the appointment of the managing director."

This position on the power of the managing director as stated above cannot be used to invalidate transaction entered into by the managing director on behalf of the company. That is, the lack of power of the managing director of a company cannot be used to invalidate transactions with third parties based on the presumption of regularity as stated in section 150(1) of Act 992. The section provides that "(1) A person having dealings with a company or with any other person who derives title under the company is entitled to assume that (b) a person described as a ... managing director ... has been duly appointed and has authority to exercise and perform the duties customarily exercised or performed by a ... managing director ... of a company carrying on business of the type carried on by the company or customarily exercised or performed by an officer or agent of the type concerned". The lack of powers of a managing director where the board of directors does not confer or entrust powers to the managing director will not invalidate transaction with third parties. The third parties are entitled to assume the managing director is duly appointed and has the authority to exercise and perform duties customarily performed by a managing director of a company carrying on the business of the type of the carried on by the company.

⁸⁵⁹ Section 150(1) of Act 992.

*West African Express (Ghana) Ltd v. Craig*⁸⁶⁰ - the respondent was appointed to manage the Kumasi office of the appellant company under terms that were not clear on the understanding that she was entitled to fifty percent of the commission after deduction of expenses. The respondent later threatened to resign if more favourable terms and a valid contract was not entered into. At the time of her letters, the managing director was out of the country. Mr. Nasar who was acting in subsequent discussions with the respondent entered into an agreement. It was subsequently alleged that Mr. Nasar was only the manager of the Accra office and has no authority to bind the company. It was held that at the time of entering into the agreement, Mr. Nasar was acting and has the authority to bind the company. Adumua-Bossman J.S.C. stated @ pg. 233 that:

"Learned counsel argued the two grounds together and posed two questions "(i) what was Nasar's position; and (ii) did the defendant-company ever hold out Nasar as agent to make the agreement?" He answered the first question by reference to the evidence on record from both the plaintiff and the company's representative at the trial that Nasar's substantive appointment was that of the manager of the Accra Office; with regard to the second question, he contended that it cannot be answered in the affirmative because of the answer to the first question, namely, that Mr. Nasar was only the Accra branch manager and no express authority was given to him by the company to negotiate the contract embodied in exhibit C.

It seems to me, however, that this argument of learned counsel stems from a disregard consciously or unconsciously, of the indisputable fact that at the material time because of the absence of Mr. Indge on leave in England, Mr. Nasar was acting in his stead as acting managing director. That being the position it is difficult to appreciate learned counsel's contention that Mr. Nasar had no authority express or implied (or "either real or apparent" as it was put in the second ground of appeal) to enter into the agreement, or to concede any force or substance to the contention. The learned judge dwelt a great deal on the available evidence which pointed irresistibly to the fact that Mr. Nasar acted with the knowledge of Mr. Malek the remaining director in Accra at the material time and held that he found it, "impossible to believe that these two directors did not then agree on the line of action which Mr. Nasar took." But it seems to me that even if there was no such evidence about Mr. Nasar's consultation with Mr. Malek before he proceeded to Kumasi to take steps to prevent the company's branch office in Kumasi being closed down indefinitely, in so far as Mr. Nasar was admittedly the pro tem acting managing director, his general authority to act in the best interest of the company to prevent part of the company's business from being closed down, appears to me to be beyond question.

⁸⁶⁰ [1963] 2 GLR 231.

In my opinion there was abundant and ample evidence to justify the learned judge's finding that Mr. Nasar as acting managing director for the time being had authority to enter into the agreement exhibit C and that the same was binding on the company, and I am therefore unable to accept learned counsel's arguments and contentions to the contrary."

In addition to the powers to the board of directors to revoke the appointment of the managing director, the Act provides that the automatic termination of the appointment of a director who is appointed a managing director will terminate his position as the managing director. That is, the termination of the position of director will automatically terminate the position of managing director, unlike other executive director position. However, as the appointment of the managing director is subject to terms of agreement with the company, if the automatic termination resulted in a breach of the agreement, the terminated managing director is entitled to bring an action for damages. Put differently, the board of directors may terminate the position of a managing director and the person remains a director. However, once terminated as a director, that person ceases to be the managing director.

13.12.3 Substitute Directors

The Companies Act, 2019 permits companies to appoint a director who acts as a deputy for a named director and in place of the director when the director is absent. That director is called the substitute director. Section 180 of the Act provides:

- "(1) Except as otherwise provided in the constitution of a company, a company may appoint substitute directors in accordance with this section.*
- (2) A substitute director is one who is appointed to act as a deputy for another named director and as a substitute in the absence of that director.*
- (3) A substitute director shall not be counted as a director for the purposes of a provision in this Act or the constitution of a company prescribing a minimum or maximum number of directors, other than a provision relating to quorum.*
- (4) A substitute director is not entitled to vote at a meeting of directors or a committee of directors at which the director for whom that person is a substitute is present.*
- (5) Subject to subsection (3) and (4), a substitute director is a full director of the company for all purposes and shall be appointed and may be removed in the same way as directors are required to be appointed and removed.*
- (6) Subject to subsection (3) and (4), a substitute director shall not cease to be a director by reason of the fact that the director for whom that person is a substitute ceases to be a director."*

Unless the constitution expressly prohibits it, a company may appoint a substitute director. The appointment is made by the company in the same way that a substantive director is appointed by the company. The substitute director is to deputise for a named director and in absence of the named director, the substitute director will act as a director. The Act requires a substitute director to be treated in all respect as a director except as expressly provided in section 180 of the Act. The substitute director is not to be counted for the purpose of determining the minimum and maximum number of directors of a company, except the determination of a quorum of directors' meeting. This means that for a directors' meeting at which both the substitute and substantive directors are present, they will both be counted for the purpose of determining a quorum, even though the substitute director is not entitled to vote at a meeting when the substantive director is present. This may however produce an absurd effect. Given the application may lead to an absurd result, the court may apply purposive interpretation to prevent counting both the substitute director and the director to whom he is a substitute for the purposes of a quorum. The position may also be modified under the registered constitution of a company.

The substitute director is appointed and removed the same way a substantive director is appointed and removed. The substitute director must have the same qualification as a substantive director unless otherwise stated in the constitution of a company subject to the mandatory disqualification criteria under section 173 of the Act. A substitute director does not cease to be a substitute director where the substantive director to whom the substitute director is to act as a deputy ceases to be a director.

The appointment of a substitute director is used as a tool in succession planning to train the persons appointed as substitute directors to take on the role as substantive directors upon the vacation of the office by the substantive director. A substitute director by deputizing for a named director understudy the substantive director and move on to the role of the substantive director seamlessly when the substantive director ceases to be a director of the company.

13.12.4 Alternate Directors

Unlike substitute directors, alternate directors are appointed by a director who is incapable of acting as a director or will be absent from Ghana for a short period. The alternate director is therefore appointed to act in the absence of a director who is unable to act or absent from Ghana. Section 181(1) of the Act says that: *"Except as otherwise provided in the constitution of a company, a director may, appoint another director or any other person approved by a resolution of the board of directors, as an alternate director to act as a director in respect of a period not exceeding six months in which that director is absent from the Republic or unable for a reason to act as a director."*

The subsection permits the appointment of an alternate director unless the constitution expressly prohibits the appointment. The appointment is made by the director who will be absent from Ghana or incapable of acting as a director. The director can appoint another person as an alternate director or appoint an existing director as his alternate director. In the event of appointing another person who is not already an existing director, the appointment is subject to approval by a resolution of the board of directors.

In *Okudjeto and Others v. Irani Brother and Others*⁸⁶¹, where in order to establish that the conduct of the affairs of the company by the respondents was oppressive on the ground that it was wrong for the directors to refuse recognition of the applicant as an alternate director of a director of the company absent from Ghana, Hayfron-Benjamin J. stated @ pg. 386 that:

"The refusal of the directors to accept the applicants' attorney as an alternate director, cannot also be impugned. Section 188 (1) provides that:

"Unless prohibited by the Regulations a director may, in respect of any period not exceeding six months in which he is absent from Ghana or unable for any reason to act as a director, appoint another director or any other person approved by a resolution of the board of directors, as an alternate director."

The attorney was not a director, and there was no resolution of the board approving him [as alternate director]. Neither he nor the applicants can therefore complain."

The maximum period permitted to appoint an alternate director is six months at a time. The only ground for the appointment of an alternate director is the inability of a director to act as a director or the absence of the director from Ghana.

Subsection (2) of section 181 requires the appointment of the alternate director to be in writing signed by the appointor and appointee and lodged with the company. A number of conditions apply to an alternate director:

- (a) An alternate director for the period of his appointment is a director and officer of a company for all purposes and not an agent of the appointor.⁸⁶²
- (b) An alternate director need not satisfy any share qualification even if the constitution of the company requires directors to satisfy any such share qualification.⁸⁶³
- (c) An alternate director cannot appoint another alternate director.⁸⁶⁴

⁸⁶¹ [1974] 1 GLR 381.

⁸⁶² Section 181(3)(a) of Act 992.

⁸⁶³ Section 181(3)(b) of Act 992.

⁸⁶⁴ Section 181(3)(c) of Act 992.

- (d) An alternate director is not counted as a director for the purpose of determining the minimum or maximum number of directors except only in determining a quorum.⁸⁶⁵
- (e) The company is not liable to pay additional remuneration to the alternate director. The constitution may however provide for payment of the amount to be paid to the appointor to be given to the alternate director. In the absence of such provision, the alternate director is not entitled to payment.⁸⁶⁶
- (f) An alternate director who is an existing director is entitled to an additional vote for each director who appointed him an alternate director for every meeting of the directors.⁸⁶⁷

The appointment of an alternate director terminates in the following instances⁸⁶⁸:

- (a) at the expiration of the period of appointment which in all cases cannot exceed six months.
- (b) a written notice of termination of appointment is given by the appointor to the company.
- (c) the appointor ceases to be a director. The termination of directorship of the appointor automatically terminates the appointment of the alternative director.
- (d) a written notice of resignation is given by the alternate director to the company.

The Act does not provide for the remuneration of alternate directors unless otherwise stated in the constitution of the company. Section 181(4) of Act 992 states “(4) *The company shall not be liable to pay additional remuneration by reason of the appointment of an alternate director.*” A company, therefore, does not need to make additional payment to an alternate director unless the constitution of the company so requires. In order not to burden the company in making double payment to both the appointor and the alternate director, the constitution of the company can provide that the amount payable to the appointor be paid to the alternate director. Section 181(5) of Act 992 provides that:

“(5) *The registered constitution of a company provides that*

- (a) *the alternate director shall be entitled to receive from the company during the period of the appointment, the remuneration to which the appointor, but for the appointment, would have been entitled, and*
- (b) *the appointor shall not be entitled to remuneration for that period.*”

Section 181 of Act 992 further provides that “(6) *in the absence of a provision in the registered constitution referred to in paragraph (b) of subsection (5), the alternate director is not entitled to be remunerated otherwise than by the director appointing the alternate director.*” The subsection thus emphasizes that the alternate director is not entitled to remuneration from the company unless the constitution of the company so provides. However, the alternate director may be entitled to

⁸⁶⁵ Section 181(3)(d) of Act 992.

⁸⁶⁶ Sections 181(5) and (6) of Act 992.

⁸⁶⁷ Section 181(7) of Act 992.

⁸⁶⁸ Section 181(8) of Act 992.

remuneration from the director who appointed the alternate director if they agree on such payment either expressly or impliedly.

13.13 Remuneration and benefits of directors

Directors of a company do not have a right to be remunerated for services that they may render to the company unless otherwise determined or approved by the ordinary resolution of the company. In other words, directors are not as of right entitled to payment for acting as directors in the same manner as an employee may be entitled to payment for being in the employment of the employer. In the case of the employee, even where no payment was agreed or stated in the employment contract, the employee will still be entitled to payment on a quantum meruit basis. However, in relation to directors, no such right accrues unless the determination is made by the ordinary resolution of the company.

In *Re George Newman & Co*⁸⁶⁹, Lindley LJ stated @ pg. 686 that:

“Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company’s assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting.”

*Dunston v. Imperial Gas Light and Coke Company*⁸⁷⁰ - the company was incorporated by an Act of Parliament to undertake the business of lighting and sale of materials. The Act empowers the company to make by-laws under seal for its governance and regulating proceedings of its directors. There were eighteen shareholders of the company who all constitute the directors of the company. The eighteen passed a resolution which was not under the company’s seal providing for payment of remuneration for directors for attending meetings of the directors and carrying on duties on behalf of the company. The directors subsequently sued for the payment of accrued but unpaid remuneration and the company was bound to pay them just like any other servant would sue for payment of remuneration. It was argued on behalf of the company that the sum claimed was a mere gratuity and could not in itself be the subject of an action. That the directors are not in the situation of servants to the company; they are themselves the masters, and their labour is nothing more than they are bound to give by their duty as pointed out by the statute when they accept the office of directors. That the directors are not entitled as of right to payment but if they were to be paid, it must be in accordance with the Act which requires a valid by-law under the seal of the company. It was held that the directors are not entitled to the payment for attending a meeting of directors based on resolution. The resolution was not a by-law within the Act nor a contract binding on the company.

⁸⁶⁹ [1895] 1 Ch 674.

⁸⁷⁰ (1882) B & Ad 125.

That the directors were not mere servants of a company entitled to remuneration for their service according to its value. Lord Tenterden C.J. stated @ pgs. 131 to 132 that:

"I am of opinion that this action was not maintainable. I wish, however, to be understood as by no means deciding the question, whether third persons, who may sell coal or other materials to the company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal. ... On this point I give no opinion. But here is a statute which provides, that certain persons in this corporation shall be directors, and, in sect. 71, points out some of their duties and powers: and they are duties and powers as unlike those of a servant as they can well be. They are, in fact, those of managers or governors. The Act itself says nothing of remuneration; and I cannot see how, in point of law, persons in the situation of these directors could maintain any action for a recompense, at least unless there had been a resolution under seal in the nature of a by-law. Looking at the character of their duties, I am of opinion that these directors, however convenient it might be that some remuneration should be awarded them for their services, were not entitled to it by the resolution given in evidence in this cause."

Parke J. stated @ pg. 132 that:

"As to the objection, that the bankrupt in this case was a member of the corporation, and, therefore, could not sue them; a member of a corporation is, for this purpose, a distinct from the corporate body as any third person. It is not necessary to decide, whether an action would lie at the suit of a clerk or servant employed in the trade of a company like this, under a contract not sealed. Here, the character of the party for whom remuneration is claimed, is not that of a servant, but of a manager. He can, therefore, recover no recompense from the company, unless by virtue of an express resolution in the nature of a by-law according to the directions of the statute. And even supposing the seal of the company were not absolutely requisite, I do not see any contract with the bankrupt in this case; the resolution only amounts to a determination by those who pass it, that a certain gratuity shall be given to the directors."

In *Hutton v. West Cork Railway Co*⁸⁷¹, Bowen LJ said @ pg. 625 that:

"A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, that he is to have right to be paid for it. In some companies ... there is a special provision for the way in which the directors should be paid, in others there is not. If there is a special provision for the way in which they are to be paid, you

⁸⁷¹ (1883) 23 Ch. D 654.

must look to the special provision to see how to deal with it. But if there is no special provision, their payment is in the nature of gratuity."

*Guinness Plc v. Saunders*⁸⁷² - the two defendants and another director of the plaintiff company, as a committee of the board of directors, agreed to pay the second defendant £5.2 million for his services in connection with a take-over bid being made by the plaintiffs. Following the successful completion of the bid, the plaintiffs paid the money. They claimed recovery of the money on the ground that the second defendant had received the payment in breach of his fiduciary duty as a director. In holding that the defendants were not entitled to the money, Lord Templeman stated @ pg. 667 that:

"The starting-point in general law is that a director, as a fiduciary, is not entitled to profit from his position. This rule can be mitigated by the consent of the company. That consent can be given in a number of different ways: either ad hoc in a general meeting or, more conveniently, by providing a mechanism under the articles by which directors can contract with the company and receive remuneration. The question whether the second defendant was entitled to retain the money that he received is therefore to be decided primarily on the basis of the plaintiffs' articles of association. Nothing in a company's articles, of course, can relieve a director of his duty to act honestly and in good faith in the interests of the company, but honesty and good faith are not in question at this stage."

And @ pgs. 676 to 677 that:

"...the basic principle is that a trustee may not receive trust property for his own benefit save under the authority of the trust instrument or with the full, free and informed consent of his beneficiaries, they being of full age and sui juris. ("Trustee" in this context means the director; "beneficiaries" means the shareholders in general meeting; and "trust deed" means the articles of association.) If he does, he must return it. Nor is he entitled to receive remuneration unless authorised to do so by the trust instrument. ("Authority" means, here, the authority of the articles or the free and informed consent of the company acting by a majority of the shareholders in general meeting.)"

The determination of remunerations payable to directors, particularly executive remuneration, is one of the critical aspects of corporate governance since it relates to the ability of the company to attract and retain capable directors to direct and administer the business of a company. Even though Act 992 does not confer rights on directors to be paid, in order to get persons with the requisite skills to serve as a director entails offering remuneration to attract such individuals. This does not discount the fact that some directors serve on board gratuitously. However, attracting well qualified and capable directors entails offering a remuneration – cash and non-cash – that attracts and retains such individuals. It is in the light of this position that Act 992 permits payment of remuneration to

⁸⁷² [1990] 2 AC 663.

directors under only one circumstance. That is, if so determined from time to time ordinary resolution of the company in accordance with the Act.⁸⁷³

A number of ways have been developed to determine how the members by ordinary resolution determine remuneration payable to directors of a company, both executive and non-executive directors. These include both monetary based payments based on stated entitlements and bonus schemes, as well as other non-monetary benefits including shares or stock options, pension scheme, and others. The details of the various options for determining director's remunerations fall outside the scope of this book. However, Act 992 has a number of prescriptions on remunerations of directors. For executive directors, a critical prescription is provided in section 183(d) of the Act which requires that the determination of the amount of remuneration payable to executive directors must relate to the value of services provided by the executive director. This requires that performance must be linked to the amount of remuneration payable to the executive director. This, in some instances, may require the remuneration payable to directors to be linked to the income of the company. In addition, section 183(c) of the Act provides that for an executive director, the remuneration may be by way of salary, commission, share of profits, participation in pension and retirement schemes or a combination of all of them.

For both executive and non-executive directors, section 185 of the Act requires that remuneration of directors must be determined from time to time by ordinary resolution of the company and not a provision in an agreement. Section 185 of the Act provides that:

“(1) Subject to this section, the fees and any other remuneration including salary payable to the directors in whatever capacity, shall be determined from time to time by ordinary resolution of the company and not by a provision in an agreement.

(2) The fees payable to the directors as directors shall be determined from time to time by ordinary resolution of the company and not in any other way.”

The only valid way for the determination of remuneration payable to directors whether executive and non-executive directors is by ordinary resolution of the company from time to time. Any other manner of determination of remuneration of directors without the approval by ordinary resolution of the company is not effective and not binding on the company.

*Quarcoopome v. Sanyo Electrical Trading Co. Ltd and Another*⁸⁷⁴ - the plaintiff was a director of the first defendant from 1965 to 1972. The defendant was the shareholder of Ghana Sanyo Electrical Trading Manufacturing Co Ltd, which was the second defendant. The plaintiff alleged he was appointed by the first defendant and has acted as director of the second defendant from 1974 to 2001 but has not received agreed remunerations in breach of an oral agreement between the plaintiff and

⁸⁷³ Section 185 of Act 992.

⁸⁷⁴ [2009] SCGLR 213.

the first defendant. There was enough evidence to indicate the plaintiff acted as director for the second defendant but there was no evidence of a resolution appointing the plaintiff and there was no prior written consent of the plaintiff to the appointment as required under section 181 of the Companies Act, 1963 (Act 179). The High Court gave judgment for the plaintiff that he has acted as director and awarded the plaintiff compensation of GHS35,000, which was not based on the breach of the agreement but the alternative claim of adequate remuneration based on quantum meruit. The defendant appealed and the Court of Appeal set aside the judgment that it was in contravention of section 194 of Act 179 since the award amounted to the usurpation of the powers of the members to set the remuneration of directors. On further appeal to the Supreme Court, it was held on the issue of whether the plaintiff was a director that the plaintiff was not a director as there was no resolution appointing the plaintiff and the plaintiff did not provide a prior written consent required under Act 179. That under section 194, the only way to determine the remuneration of a director is by ordinary resolution of the members and the court cannot set remuneration based on quantum meruit basis. Ansah JSC stated @ pgs. 226 to 229 as follows:

“The issue in this appeal was could such [de facto] a director be held entitled to any remuneration: The answer is provided in section 194(1) and (2) of Act 179 which provides that:

- “(1) Subject to this section, the fees and other remuneration payable to the directors in whatsoever capacity, shall be determined from time to time by ordinary resolution of the company, and not by a provision in the Regulations or in any agreement, which provision or agreement is void.*
- (2) The fees payable to the directors as directors shall be determined from time to time by ordinary resolution of the company and not in any other way.”*

Regulations 66 of the regulations of the company, Ghana Sanyo Electrical Manufacturing Co Ltd, exhibit B, was couched in similar terms. ...

The trial judge held that the plaintiff was not entitled to the first claim endorsed on his writ of summons [damages for breach of oral contract] but rather on quantum meruit....

The Court of Appeal was, however, of the view that:

“The law on the issue to be resolved by this appeal is that fees or other remuneration payable to directors are to be determined by ordinary resolution of the company and not by any provision in the company’s regulations or in any agreement.”

In our view, the trial judge should have adverted her judicial mind to the provisions of the Companies Act that regulated all relevant issues in the alternative claim she was considering; to be very precise, section 194(1) and (2) on remuneration for directors. ... We would affirm the judgment of the Court of Appeal that the

judgment of the trial court was clearly in contravention of section 194(10) of the Companies Act and pro tanto unlawful, and unjustified."

With executive directors, the board of directors may make the determination of remuneration as part of the terms of appointment of the director into an executive position. However, the terms of appointment relating to the remuneration must be approved by the ordinary resolution of the company. Section 185(4) of Act 992 provides that *"Where a director holds any other office or place of profits under the company in accordance with sections 183 and 184, the terms of the appointment may provide for the remuneration in respect of the appointment but that director is not entitled to be a remuneration additional to the fees to which that person is entitled as director unless the terms of the appointment to that office have been approved by ordinary resolution of the company."* Unless such remuneration stated in the terms of appointment is approved by the ordinary resolution of the company, the director will only be entitled to the payment approved for all directors and not payment due to such director in his executive capacity.

Executive directors are entitled to directors' fees, remunerations and benefits. In addition, there are entitled to remunerations attached to the office they occupy as per the agreement between the executive director and the company. The remunerations attached to the executive office is determined in the terms of the appointment but it is not payable unless approved by the ordinary resolution of the company.

Act 992 provides in section 185(3) of the Act provides that *"Unless otherwise resolved, the fees payable to directors accrue from day to day and the directors are entitled to be paid the travelling and other expenses properly incurred by the directors in attending and returning from meetings of the directors or a committee of the directors or general meeting of the company or otherwise in connection with the business of the company."* The fees of directors accrue daily and directors are entitled to travelling and other expenses incurred in acting in the business of the company. A director must, therefore, be reimbursed for travelling and other expenses incurred in connection to carrying on the business of the company.

The Act also provides that the registered constitution of a company may list the benefits due to directors to include compensation for loss of employment as directors or former directors, insurance benefits and other indemnities.⁸⁷⁵ The payment to directors for loss of office in the company or associated company is subject to approval by ordinary resolution of the company.⁸⁷⁶ In addition, section 207 of the Act set out rules applicable in relation to payments to be made to directors in connection with takeover bids.

⁸⁷⁵ Section 185(5) of Act 992.

⁸⁷⁶ Section 206 of Act 992.

The Act prohibits the payment of tax-free remuneration to directors. Section 214 of the Act provides that:

“(1) A company shall not pay a director or Company Secretary of the company remuneration free of income tax or otherwise calculate that remuneration be reference to or varying the amount of income tax payable by the director or Company Secretary.

(2) A provision contained in

(a) the constitution of a company

(b) a resolution of a company or of the directors of a company; or

(c) a contract entered into by a company

for the payment or remuneration shall have effect as if the provision requires the payment as a gross sum, subject to income tax, or the net sum for which the provision actually requires.”

Directors are therefore liable to pay tax on income received as directors of a company.

As indicated, as part of setting out the corporate governance system, it is important for the members to set out the parameters for the determination of the remunerations payable to both executive and non-executive directors. Whilst there are many bases for determination of such remunerations – both monetary and non-monetary – of directors, a balance must be determined to be able to attract and retain qualified experts to manage the business of the company whilst at the same time, not to over-compensate such persons at the expense of shareholders of a company.

13.14 Directors’ Meetings

Directors acting together constitute the board of directors of a company and can exercise the powers conferred on them by the Act and the constitution of the company through directors’ meetings. The Companies Act, 2019 and the constitution of a company regulate the convening and conduct of meetings of directors of the company. There are three principal functions for Board meetings.⁸⁷⁷ The board meeting is:

- (a) to be the formal occasion recognised and regulated by company law for the valid decision making which is binding on the company;
- (b) to be the forum in which the directors on equal terms can debate, determine and drive forward the long-term strategy for the company; and
- (c) to be the forum where the directors listen to, constructively challenge and hold to account the executive directors, and in particular, the chief executive whether in terms of the long-term strategy or short-term events that need rapid decisions at the board level.

⁸⁷⁷ Richard Smerdon, A Practical Guide to Corporate Governance (4th edn. Sweet & Maxwell, 2010).

Even though directors can in some instances act without a meeting, good corporate governance dictates that directors must have formal board meetings to deliberate and set the overall objectives of the company, make binding decisions, strategize for the company, and hold accountable management executives. In view of this, Act 992 mandates that directors must meet at least once every six months in each year. Section 188(1) of the Act provides that *“The directors of a company shall meet at least once every six months in each year to consider financial and operational affairs of the company.”* It is, therefore, mandatory for the directors to have a meeting once every six months to consider the financial and operational affairs of the company.

Per Act 992, unless otherwise stated in the constitution, the directors may meet in Ghana or elsewhere for the dispatch of business.⁸⁷⁸ This provision seems to conflict with the requirement that at least one director must be resident in Ghana at all times under section 182 of Act 992 if resident requirement is interpreted to mean being physically present in Ghana. If all the directors are to meet outside Ghana, it presupposes that no director is present in Ghana leading to default under section 182 of the Act. However, a meeting of directors does not necessarily mean two or directors physically present at the same place and time in order to constitute a board meeting. As held in the case of *Byng v. London Life Associated Ltd*⁸⁷⁹, a shareholders’ meeting could be properly constituted where there are fully functional audio-visual links between the members of a company where everyone can be seen and heard and can speak. This may be applicable to board meetings. Advancement and deployment of communication technology have made it easy and possible for meetings to be held without physical presence at the same location. The outbreak of the covid-19 pandemic has also shown that online meetings are acceptable and efficient just as physical meetings. Directors are, therefore, able to have meetings through audio-visual links or platforms. It is, however, suggested that to avoid leaving the determination of the validity of such audio-visual board meetings to the court, the constitution of the company must provide for such meetings and state the modalities of such meetings, or the rules regulating meetings of the board of directors must indicate the modes of the meeting.

In holding a directors’ meeting, the Act gives freedom to the directors to regulate the conduct of their own meeting as the directors think fit. Section 188(2) of Act 992 states that *“(2) Subject to a contrary provision in the constitution of a company, (a) the directors may ... (ii) ... regulate the meetings of the directors as the directors think fit”*. The directors are, therefore, free to determine the rules of procedure by which the meetings of directors should be conducted unless otherwise stated in the constitution of the company. In practice, the rules of procedure are drafted and adopted by the directors at the first meeting of the directors. Such rules regulate subsequent meetings of the directors. The discretion given to directors under the Act to regulate their own meeting does not mean that the directors should adopt different rules at each meeting to regulate the conduct of the

⁸⁷⁸ Section 188(2)(a)(i) of Act 992.

⁸⁷⁹ [1990] Ch. 170.

meeting. Good corporate governance will require certainty in such rules subject to provisions on amending the rules when necessary.

13.14.1 Summoning directors' meetings

Under section 188(2)(b) of Act 992, a director of a company may at any time summon a meeting of the directors. A Company Secretary has no power on his own to summon a meeting of directors. However, a Company Secretary, on the requisition of a director of the company, is required to summon a meeting of the directors of the company.⁸⁸⁰ Where directors set up a committee of directors, a director who is a member of a committee may summon a meeting of the committee. A Company Secretary, on the requisition of a member of the committee, must summon a meeting of a committee of the directors.⁸⁸¹

Unlike the repealed Companies Act, 1963 (Act 179), the Companies Act, 2019 (Act 992) provides that notice of a meeting of directors must be given to all directors even though the director may not be present in Ghana. Section 188(2)(c) of Act 992 provides that *"it is necessary to give notice of a meeting of directors or a committee of directors to a director for the time being absent from the country."* Notice of directors' meeting must therefore be given to all the directors of the company.

The constitution of a company can provide a contrary position to the above positions relating to summoning, requisitioning and giving notice of directors' meeting. The constitution may for example provide that a meeting of directors can only be summoned by at least two directors in which case one director is unable to summon a board meeting as provided in the Act. In the absence of a contrary position on any of the above in the constitution of a company, the position under the Companies Act, 2019 is applicable.

13.14.2 Quorum of directors' meetings

A quorum for a directors' meeting refers to the minimum number of directors required to be present for the meeting to commence and validly proceed. Under Act 992, the directors must determine the quorum necessary for the meeting of directors.⁸⁸² Section 188(2)(d) of the Act provides that *"(2) Subject to a contrary provision in the constitution of a company, ... (d) the quorum necessary for the transaction of business of the directors and of a committee of directors may be fixed by the directors, and unless so fixed shall be two, or, in the case of a one-person committee, one"*. The quorum may also be stated in the constitution of a company. In the absence of stating the quorum in the constitution of the company or determination of the quorum by the directors, the Act provides

⁸⁸⁰ Section 188(2)(b) of Act 992.

⁸⁸¹ Ibid.

⁸⁸² Section 188(2)(d) of Act 992.

that the quorum necessary for the transaction of business of the directors shall be two directors or in the case of a one-man committee, one director.⁸⁸³

Not only is quorum required at the commencement of each business of the meeting, but the quorum must be present throughout the meeting for the conduct of the meeting to be valid. Paragraph (e) of section 188(2) of the Act provides that *"except as provided in paragraph (f), a business shall not be transacted in the absence of a quorum although a quorum was present at the commencement of the meeting."* This position is different from the quorum requirement of a general meeting where the quorum is only required at the commencement of the discussion of a business.⁸⁸⁴ In relation to directors' meeting, any business transacted at a time where there is no quorum is invalid and may be set aside.

The meeting of directors does not require the presence of all directors once the required quorum is present. Therefore, where there is a vacancy on the board, the continuing directors may act despite the vacancy once the required quorum is obtained. However, where due to the vacancy, the required quorum cannot be obtained, the Act permits the continuing directors to act for four weeks after the number is so reduced below the required quorum. After the four weeks, the directors are permitted to act only for the purpose of appointing other directors so as to be able to have a quorum or to summon a general meeting for the company for the purpose of appointing directors to meet the quorum.⁸⁸⁵

The constitution of the company may provide for a different position from the ones stated above. For example, the constitution may base the quorum on the presence of a director appointed by a specific class of shareholder or may provide for what should be done when there is no quorum different from what is provided by the Act. Where different positions from the above are stated in the constitution, the positions in the constitution are applicable. The positions stated above are the default positions applicable in the absence of provisions in the constitution of the company dealing with quorum. Where a different position is provided in the constitution as the examples indicated, the position in the constitution of the company will be applicable.

Attendance and voting by proxy at a meeting of directors are prohibited.⁸⁸⁶ Unlike general meetings where members of a company can appoint a proxy to attend, speak and vote at the general meeting on their behalf, directors cannot do so.

⁸⁸³ Ibid.

⁸⁸⁴ Paragraph 8 of the Eighth Schedule of Act 992.

⁸⁸⁵ Section 188(2)(f) of Act 992.

⁸⁸⁶ Section 188(2)(i) of Act 992.

13.14.3 Chairperson of board meeting

Good corporate governance requires the board of directors to have a chairperson to superintend and regulate the conduct of the meeting of directors. The chairperson plays important role in the governance system of a company. The chairperson regulates the conduct of board meetings, liaise between the board of directors and shareholders, the board of directors and management, and balance the relationship between executive directors and non-executive directors. In addition to these functions that the chairperson must play, the chairperson is also a director and must perform the duties of directors as imposed under the Act and the constitution of the company.

The Act states a number of specific duties imposed on the chairperson of the board of directors' meeting, and the constitution of a company may state specific roles of the chairperson of the board of directors. Whilst per the Act, the chairperson as a director has no special power or authority above that of other directors, the chairperson in practice assumes enormous responsibility which requires specific provisions in the constitution of a company to provide for the specific authority of the chairperson. The Act for example provides for a second or casting vote of the chairperson in the event of deadlock at a general meeting⁸⁸⁷ or in the event of deadlock upon voting at a meeting of directors⁸⁸⁸. In short, the chairperson plays very vital roles in the governance of a company.

Act 992 provides that *"Subject to a contrary provision in the constitution of a company, the directors and a committee of directors may elect a chairperson of their meetings and determine the period for which the chairperson is to hold office, but if a chairperson is not elected, or if at a meeting, the chairperson is not present within five minutes after the time appointed for holding the meeting, those present may choose one of their number to be the chairperson of the meeting"*⁸⁸⁹. The default position under the Act is for the chairperson to be elected by the directors among themselves. The directors may opt to elect a chairperson at every meeting or elect a chairperson for a duration. The directors are to determine the duration an appointed chairperson must hold the position. If a chairperson is not elected or one is elected but not present at a meeting within five minutes of the time for a meeting of the board, those present, provided they form a quorum, may elect another person to chair the meeting. Again, as with other provisions under section 188 of Act 992, the constitution of the company may otherwise provide. For example, the constitution of the company may require the shareholders or class of shareholders to appoint the chairperson and may indicate the terms of the appointment of the chairperson.

⁸⁸⁷ Paragraph 16(m) of the Eighth Schedule of Act 992.

⁸⁸⁸ Section 188(2)(h) of Act 992.

⁸⁸⁹ Section 188(2)(g) of Act 992.

13.14.4 Decision-making at meetings of directors

Decisions at the meeting of directors or committee of directors are to be determined by a simple majority unless the constitution of the company otherwise indicated. Section 188(2)(h) of Act 992 provides that *“Subject to a contrary provision in the constitution of a company, (h) question arising at a meeting of the directors or a committee of directors shall be decided by a majority of votes and in the case of an equality of votes the chairperson shall have second or casting vote”*. The constitution of a company may provide for other methods of deciding on questions at meetings of directors or committee of directors. Where the constitution so provides, the provisions of the constitution on decision making is applicable. In the absence of provisions in the constitution of a company, the decision is reached by a majority of votes cast by directors present and voting on the matter provided there is a quorum. The majority is not the majority of all directors of the company but the majority in relation to valid votes cast provided there is a quorum. For example, on a board of seven directors where a quorum is set at four directors, in voting on a matter where only one director voted and the rest refused to vote, the resolution will pass provided the quorum is present. The decision is based on the majority of the votes cast, not the majority of the directors of the company or directors present at the meeting, provided there is a quorum. If there is only one vote for the resolution and none against, the resolution is passed. The decision is not based on the majority of directors the company has but on the number of votes actually cast. Where there is a tie, the chairperson has a second vote, that is where the chairperson first voted and if not, he exercises a casting vote to decide on the matter. As indicated, the Act prohibits attendance and voting at meetings of directors or committee of directors by proxy.

The directors may also make a decision without a meeting but by a written resolution signed by all the directors. Section 188(2)(j) of Act 992 provides that *“Subject to a contrary provision in the constitution of a company, (j) a resolution in writing, signed by the directors for the time being entitled to receive notice of a meeting of the directors, or of a committee of directors, is as valid and effectual as if it had been passed at a meeting of the directors or a committee of directors duly convened and held.”* For directors to decide without a meeting of directors or committee of directors, two conditions must be satisfied, the decision must be in writing and must be unanimous. The unanimity must be evidenced by the signature of all directors to the written resolution. The directors do not necessarily need to sign a single document, but a document signed in counterparts may suffice once the signature of all directors on the resolutions are collated by the company.

13.14.5 Minutes of Meetings

There must be evidence of a meeting of directors or committee of directors, and more importantly of what happened at the meeting. Act 992, therefore, requires that a company must cause minutes of the proceedings of meetings of the directors or a committee of directors to be entered in a book or

books kept for that purpose.⁸⁹⁰ A minute signed or purported to be signed by the chairperson of the meeting at which the proceedings took place or of the next succeeding meeting, is prima facie evidence of the proceedings at the meeting.⁸⁹¹ The minutes taken in accordance with the above position, until the contrary is proved, is evidence that the meeting is duly convened, held and conducted and the appointments of directors are valid.⁸⁹² The minutes of meetings of directors or committee of directors is therefore not only important as records to the company, but a number of presumptions in law are based on the minutes. First, the minutes signed by the chairman is evidence of what happened at the meeting, unless the contrary is proved. Secondly, the duly signed minutes is prima facie evidence that the meeting was duly convened, which means the meeting was duly summoned, proper notice given and quorum obtained throughout the meeting. Thirdly, the duly signed minutes is prima facie evidence that the proceedings at the meeting were in accordance with the Act and the constitution of the company. Lastly, duly signed minutes is evidence that persons who attended the meeting as directors are duly appointed as directors in accordance with the Act and the constitution of the company. These are all rebuttable presumption in law. Even though the presumptions can be rebutted by contrary evidence, the reliance placed on the minutes makes it an important requirement of meetings of directors or committee of directors.

Given the importance attached to the minutes, the Act makes it an offence for a company and its officers to fail to keep the minutes in accordance with the law. Section 188(6) of the Act provides that *“Where a company fails to comply with subsection (3), the company and every officer of the company that is in default is liable to the Registrar an administrative penalty of five hundred penalty units.”*

In *Adehyeman Gardens Ltd v. Assibey*⁸⁹³, where the court sought for evidence of formal call for payment of shares by the board of directors, the Supreme Court per Sophia Akuffo JSC stated the importance of the minutes of the board @ pg. 1028 as follows:

“In governance of a company, the best evidence of proceedings and decisions of the board of directors is the minutes of its meetings and any resolutions reflected therein, or a signed resolution of the directors (pursuant to section 200(1) of the Code). Thus, regulations 66 and 67 of the regulations stipulate that proceedings of the directors of the company are regulated by section 200 of the Code, and minutes of directors’ meetings must be kept in accordance with section 201. Section 201 of the Code obliges the directors to keep minutes of their meetings (including committee meetings) which, when signed by the chairman of the proceedings, constitute prima facie evidence of the proceedings. The critical importance of this

⁸⁹⁰ Section 188(3) of Act 992.

⁸⁹¹ Section 188(4) of Act 992.

⁸⁹² Section 188(5) of Act 992.

⁸⁹³ [2003-2004] SCGLR 1016.

obligation may be gleaned from section 201(4) which imposes a penalty of a fine on a company and every defaulting officer in the event of non-compliance. There is no evidence of any such minutes or resolutions on the record before us. We only have exhibits Q and R, whereby the company's solicitors purported to offer respondent 20 percent shares in the company for which he must pay an unnamed price within fourteen days; and the second appellant, in his capacity as the managing director of the company, demanded from the respondent the sum of C47,410,258.20. These letters, whatever their purport, cannot constitute valid calls, or effectively result in a valid forfeiture of any shares. Clearly, therefore, at all material times, no valid calls have been made on the respondent's shares, and they have not been forfeited."

13.15 Powers and limitations on the powers of directors

The directors of a company are vested with the powers to manage the business of the company unless otherwise stated in the constitution of the company.⁸⁹⁴ This position is supported by the case of *John Shaw & Sons Co v. Shaw*⁸⁹⁵. Given the overall responsibility of the directors of a company is to manage the business of the company, the specific powers given to and duties imposed on directors must relate to the management of the business of the company. The powers conferred on the directors must be exercised for the sole purpose of managing the business of the company and not exercise for any other purpose, be it the personal interests of the directors or any other special interests. Section 191(1) of Act 992 provides that *"(1) The directors shall not without the approval of an ordinary resolution of the company, exceed the powers conferred on the directors by this Act, and the constitution of the company, or exercise those powers for a purpose different from that for which those powers were conferred, although the directors may believe the exercise of those powers is in the best interests of the company."* The dictate of the sub-section is that directors are not to exceed the powers conferred on them or exercise the powers for purposes other than the purpose for which the power is given. Under Act, the main function of a director is to manage the business of the company.⁸⁹⁶ A belief by the directors that it is in the interest of the company to exceed or exercise the powers for a different purpose will not justify exceeding the powers or exercising the powers for a different purpose.

*Howard Smith Limited v. Ampol Petroleum Limited and Others*⁸⁹⁷ - Ampol and Bulkships Ltd were majority shareholders of Millers. Ampol made an offer for all the issued shares of Millers. Howard Smith also then announced an intention to make a higher offer for those shares. The directors of Millers considered Ampol's offer too low and decided to recommend that the offer be rejected.

⁸⁹⁴ Section 144(3) of Act 992.

⁸⁹⁵ [1935] 2 KB 113.

⁸⁹⁶ Section 170(1) of Act 992.

⁸⁹⁷ [1974] AC 821.

Ampol and Bulkships, as the majority, decided to vote together on any future offer of takeover by Howard Smith. Howard Smith then made an offer for allotment of shares and the directors of Millers decided by a majority to make the allotment and immediately issued the shares. The effect of that issue was to give Howard Smith majority interest by diluting the shareholding of Ampol and Bulkships rendering them unable to vote to prevent a takeover by Howard Smith. Ampol challenged the validity of the issue of the shares to Howard Smith and sought an order in the Supreme Court for the rectification of the share register by the removal of Howard Smith as a member of Millers in respect of the allotted shares. Millers' directors contended that the primary reason for the issue of the shares to Howard Smith was to obtain more capital. Street J. found that directors of Millers had not been motivated by any purpose of personal gain or advantage or by a desire to retain their position on the board, that Miller needed capital, but that the primary purpose of the allotment was to reduce the proportionate shareholdings of Ampol and Bulkships so that Howard Smith could proceed with its takeover offer. The judge held that in those circumstances the directors had improperly exercised their powers and he ordered that the allotment of shares be set aside and the share register rectified. On appeal by Howard Smith to the Judicial Committee, it was held dismissing the appeal, that, although the directors had acted honestly and had the power to make the allotment, to alter a majority shareholding was to interfere with that element of the company's constitution which was separate from and set against the directors' powers and, accordingly, it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority; and that, since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid. Lord Wilberforce reading the judgement of the court stated @ pg. 835 that:

"In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.

"The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment." (Mills v. Mills, 60 C.L.R. 150, 185-186, per Dixon J.)"

Hogg v. Cramphorn Ltd⁸⁹⁸ - the directors devised a scheme and issued shares trust on the good faith belief that preventing a takeover bid from one Mr. B was for the benefit of the company. In so doing, the directors sought to remain in control of the affairs of the company. It was held that the power to issue shares was a fiduciary power, and if exercised for an improper motive the issue was liable to be set aside, it being immaterial that the issue was made in the bona fide belief that it was in the interests of the company. That the issue of the shares was liable to be set aside. Buckley J. stated @ pgs. 266 to 267 that:

"Accepting as I do that the board acted in good faith and that they believed that the establishment of a trust would benefit the company, and that avoidance of the acquisition of control by Mr. Baxter would also benefit the company, I must still remember that an essential element of the scheme, and indeed its primary purpose, was to ensure control of the company by the directors and those whom they could confidently regard as their supporters. Was such a manipulation of the voting position a legitimate act on the part of the directors? [after stating the decisions of Piercy v. S. Mills & Co. Ltd. [1920] 1 Ch. 77 @ 84, he continued] With those observations I respectfully agree. Unless a majority in a company is acting oppressively towards the minority, this court should not and will not itself interfere with the exercise by the majority of its constitutional rights or embark upon an inquiry into the respective merits of the views held or policies favoured by the majority and the minority. Nor will this court permit directors to exercise powers, which have been delegated to them by the company in circumstances which put the directors in a fiduciary position when exercising those powers, in such a way as to interfere with the exercise by the majority of its constitutional rights; and in a case of this kind also, in my judgment, the court should not investigate the rival merits of the views or policies of the parties."

As previously indicated, section 144 of Act 992 provides for the division of powers between the members and the board of directors. Specifically, section 144(3) provides that *"Except as otherwise provided in the constitution of the company, the business of the company shall be managed by the board of directors who may exercise the powers of the company that are not by this Act or the constitution required to be exercised by the members in general meeting."* The constitution of a company may provide for a different allocation of powers than as stated in the Act. The Act and the constitution of a company may also provide for the powers to be exercised by members in a general meeting and those powers cannot be exercised by the board of directors. Similarly, the members cannot also exercise the powers conferred on the board of directors unless expressly permitted by the Act or the constitution of a company.⁸⁹⁹

⁸⁹⁸ [1967] Ch. 254.

⁸⁹⁹ John Shaw & Sons Co v. Shaw [1935] 2 KB 113.

Act 992 confers a number of powers on directors for the purposes of managing the business of the company. The corporate powers allocated to the various organs of the company requires some checks and balances to avoid the abuse of the powers. In relation to the powers of directors in managing the business of the company, Act 992 imposes specific limitations on the stated powers either by requiring authorisation from the members or prescribing the procedure to be followed. In addition, the Act imposes duties on directors in the exercise of the powers. The constitution of a company also provides for details of the powers of directors and may provide limitations on those powers beyond what is stated in Act 992. It is therefore critical that in seeking to determine the nature of the powers of directors or a company in the management of the business of a company, the Companies Act, 2019 and the constitution of a company are examined together.

Below are examples of some of the powers conferred on the board of directors and the limitations imposed on the exercise of those powers by the board of directors.

13.15.1 Issue of new or unissued shares

In the exercise of the power to manage the business of a company with shares, directors are vested with the power to raise capital for the business. The purpose of the exercise of the power to issue the shares of the company is, therefore, to raise capital for the company. However, it has also been held that there may be other related reason why the directors may issue the shares of the company.

In *Howard Smith Limited v. Ampol Petroleum Limited*⁹⁰⁰, it was held that it would have been bona fide if the reason for the issue of shares in Millers was to raise capital for the company and not to remove the majority voting rights of shareholders, Ampol and Bulkships in order to enable Howard Smith to proceed with a takeover.

*Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L.*⁹⁰¹, in this case, an issue of shares was made to a large oil company in order, as was found, to secure the financial stability of the company. This was upheld as being within the power although it had the effect of defeating the attempt of the plaintiff to secure control by buying up the company's shares. In the joint judgment of Barwick C.J., McTiernan J. and Kitto J., it was stated @ pg. 493 that:

"The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An inquiry as to whether additional

⁹⁰⁰ [1974] AC 821.

⁹⁰¹ (1968) 121 C.L.R. 483.

capital was presently required is often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company. Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts. Thus in the present case it is not a matter for judicial concern, if it be the fact, that the allotment to Burmah would frustrate the ambitions of someone who was buying up shares as opportunity offered with a view to obtaining increased influence on the control of the company, or even that the directors realised that the allotment would have that result and found it agreeable to their personal wishes ..."

The above case shows that the purpose of issuing shares by directors may go beyond obtaining capital for the business. However, it is a breach of the fiduciary duty of directors to issue shares in order to shift the balance of power between the majority and minority shareholders or for their personal benefit to enable the directors remain in control of the affairs of the company even if the directors believe in good faith that such action is in the interest of the company.

In *Punt v. Symons & Co. Ltd*⁹⁰², the directors had issued shares with the object of creating a sufficient majority to enable them to pass a special resolution depriving other shareholders of special rights conferred on them by the company's articles. It was held that the directors had acted improperly. Byrne J. said @ pg. .506:

"A power of the kind exercised by the directors in this case, is one which must be exercised for the benefit of the company: primarily it is given them for the purpose of enabling them to raise capital when required for the purposes of the company. There may be occasions when the directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised; but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bona fide exercise of the power."

In *Piercy v. S. Mills & Co. Ltd*,⁹⁰³ the directors had issued shares with the object of creating a sufficient majority to enable them to resist the election of three additional directors, whose appointment would have put the two existing directors in a minority on the board. The directors

⁹⁰² [1903] 2 Ch. 506.

⁹⁰³ [1920] 1 Ch. 77.

were held to have acted improperly. Peterson J., after citing *Fraser v. Whalley*⁹⁰⁴ and *Punt v. Symons & Co. Ltd.* said @ pg. 84:

"The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action."

Generally, capital required by the company may be raised through the issue of shares by the company or borrowing by the company. It should be noted that the power to raise capital through the issue of shares is only applicable to business companies, which is companies with shares, and not a company limited by guarantee. Even though directors as part of their powers to manage the business of the company may issue new or unissued shares to raise capital, the Act places a number of limitations on the power to issue new or unissued shares. Section 189(1)(a)(i) of the Act provides that:

- "(1) Subject to this Act, the directors of a company with shares shall not, without the approval of*
 - (b) an ordinary resolution of the company,*
 - (ii) issue new or unissued shares, other than treasury shares, in the company unless the shares have first been offered on the same terms and conditions to all the existing shareholders or to all the holders of the shares of the class or classes being issued in proportion as nearly as may be to their existing holdings".*

As noted, this provision is not applicable to companies limited by guarantee as such companies are not registered with shares.⁹⁰⁵ The section impliedly gives directors the power to issue shares to raise capital for the company. However, the section subjects the power of directors to issue new or unissued shares of the company to two limitations. First, the directors in issuing new or unissued shares of the company must issue the shares to existing shareholders or class of shareholders in

⁹⁰⁴ (1864) 2 H. & M. 10.

⁹⁰⁵ Section 7(8) of Act 992.

proportion to their current shareholding on the same terms and conditions as the directors will offer to issue the shares to third parties. This limitation restricts the power of directors in relation to the persons to whom the directors can issue the shares of the company. The second limitation is that in the event directors decides to issue the new and unissued shares to non-shareholders (that is persons other than existing shareholders), the directors must seek approval from the existing shareholders which approval must be by ordinary resolution. The requirement of approval by ordinary resolution is not required where directors in issuing the shares to non-shareholders first offer to issue the shares to existing shareholder but such offer has not been taken by existing shareholders. For that position to be applicable the shares must be issued to the non-shareholders on the same terms and conditions that the shares were offered to the existing shareholders.

The power of directors to issue shares to non-shareholders is not limited in relation to treasury shares which are shares issued by the company and acquired back by the company.⁹⁰⁶ In issuing treasury shares, directors do not need to first offer to issue the shares to the shareholders or seek approval by ordinary resolution prior to issuing it to non-shareholders. The rationale for this may be because the existing shareholder could have purchased the shares in the first instance rather than the company acquiring the shares and putting them in treasury.

A resolution issued by shareholders approving the issue of new or unissued shares by directors to non-shareholders without first offering to issue to existing shareholders shall not be effective as approving the issue to non-shareholders unless the resolution approves the specific transaction issuing the shares to the particular non-shareholders.⁹⁰⁷ Secondly, the resolution must not be passed more than a year prior to the issue of the shares unless the shares are issued in accordance with a scheme in place for issuing shares for the benefit of employees of the company or associated company.⁹⁰⁸ This requirement is not applicable to a public company whose shares is traded on the stock exchange.⁹⁰⁹

The Act also prohibits the company from issuing any type of shares to directors or past directors of the company or of an associated company or nominee of that director or body corporate controlled by that director unless it is first offered on the same terms and conditions to all the existing shareholders or class of shareholders of the shares being issued or in case of a public company to the members of the public.⁹¹⁰ This is applicable notwithstanding anything in the Act, constitution or resolution of the company.⁹¹¹ In relation to the public company whose equity shares, part or all, are traded on an approved stock exchange or application has been made to a stock exchange to trade

⁹⁰⁶ Section 61(5) of Act 992.

⁹⁰⁷ Section 189(2) of Act 992.

⁹⁰⁸ Section 189(3) of Act 992.

⁹⁰⁹ *Ibid.*

⁹¹⁰ Section 189(5) of Act 992.

⁹¹¹ *Ibid.*

the shares, an ordinary resolution may exempt the preceding requirement of first offering the shares to the members of the public.⁹¹² The preceding requirements do not apply to the issue of shares under genuine underwriting agreement or shares issued to a director at a fair price if the constitution of the company provides for share qualification the directors.

13.15.2 Entry into major transactions

In the exercise of the powers to manage the business of a company, the board of directors may enter or authorise the entry into transactions relating to the business of the company. Generally, the entry into transactions by the company relates to the business of the company. As the repository of the power to manage the business of the company, the directors are the organs to determine the transactions to be entered into by the company. Directors, therefore, have the powers, as part of the power to manage the business of the company, to transact business on behalf of the company. Section 145 of Act 992 imposes limitations on the power of directors to enter into transactions on behalf of the company. The section implies that the directors have the power without limitation to enter into transactions that may be considered as a minor transaction, unless the specific subject requires otherwise, without the approval of the members of a company. That is unless there is any express provision in the Act or the constitution requiring the directors to obtain approval from shareholders of the company, directors have the power to enter in minor transactions without requiring any approval from shareholders. Section 189(1)(b) of Act 992 provides that *“Subject to this Act, the directors of a company with shares shall not, without the approval of (b) a special resolution, pursue a major transaction under section 145.* The section makes it clear that it is directors that have the power to pursue transaction on behalf of a company. However, in relation to major transactions, the section restricts the power of directors by subjecting the validity of the transaction to the special resolution of the members approving or ratifying the transaction.⁹¹³ Section 145(1) of the Act provides that:

*“(1) A company shall not enter into a major transaction unless the transaction is
(a) approved by special resolution; or
(b) contingent on approval by special resolution.”*

The import of section 145(1) of the Act, read together with section 144 of the Act is that unless the constitution otherwise gave the power to manage the business of a company to members of a company, the directors have the power to enter into transactions on behalf of the company. However, in entering into a major transaction, the directors require the approval by special resolution of the members of the company for the validity of the transaction. Where no approval is obtained prior to entering into the transaction, the validity of the transaction must be subject to

⁹¹² Section 189(6) of Act 992.

⁹¹³ Even though the section 189(b) of the Act is limited to companies with shares, the application of section 145 is to all company as there are no limitation in section 145.

obtaining approval by special resolution of the member of the company. In entering into what constitutes a minor transaction, no approval of the members is required unless the specific subject matter requires such approval under any other sections of the Act or so requires by the constitution of the company. However, a major transaction requires approval by special resolution prior to the entry into the transaction to be valid, or at a future day after the entry into the transaction for the major transaction to be valid. Whilst the application under section 189(1)(b) of Act 992 is limited to a company with shares, the scope of application of section 145 of the Act is not limited. It stands to reason that section 145 of the Act applies to all company. Directors of all companies must, therefore, obtain approval by special resolution of the company prior to entering into major transactions, or where not so obtained, subject such major transaction to approval by special resolution in order to be valid.

A major transaction has been defined under subsection (2) of the section as follows:

“(2) For the purposes of this section,

(a) ‘assets’ include property of any kind whether tangible or intangible;

(b) ‘a major transaction’ means

(i) the acquisition of, or an agreement to acquire, whether contingent or otherwise, assets, the value of which is more than seventy-five percent of the value of the assets of the company before acquisition; or

(ii) the disposition of, or an arrangement to dispose of, whether contingent or otherwise, assets of the company the value of which is more than seventy-five percent of the value of the assets of the company before the disposition; or

(iii) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is seventy-five percent of the value of the assets of the company before the transaction; and

(c) the assets of the company as regards major transaction under paragraph (b), include the assets of the company and that of the subsidiaries.

(4) In assessing the value of a contingent liability for the purposes of subparagraph (iii) of paragraph (b) of subsection (2), the directors

(a) shall have regard to every circumstance that the directors know, or ought to know, affects, or may affect, the value of the contingent liability;

- (b) may rely on estimates of the contingent liability that are reasonable in the circumstances; and*
- (c) may take account of*
 - (i) the likelihood of the contingency occurring; and*
 - (ii) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability."*

A major transaction is therefore any agreement by which either gains or liabilities are imposed on the company where the value of such gains or liabilities are more than seventy-five percent of the value of the assets of the company. In ascertaining the total value of assets of the company for the purpose of determining the seventy-five percent value of the assets of a company, the assets of the company must include the assets of the subsidiary companies. In certain instances, the liability may be a contingent liability. That is the liability is not due but may become due based on the occurrence of uncertain future event or events. An example may include where a company provides a guarantee for the performance of an obligation. It is uncertain whether the company will have to actually pay the amount due under the guarantee for the failure of the performance of the obligation. In the event the liability is contingent, the value is determined based on a reasonable estimate of the value in the instance the contingent event does occur. In so determining the estimates, the section requires that the likelihood of the event occurring and any factor that may reduce or extinguish the contingent liability may be considered.

There are two exceptions where a transaction that ordinarily qualifies as a major transaction does not require the approval of members by special resolution. In cases where the company created a charge over the assets of the company to secure the repayment of money or the performance of an obligation, section 145 approval is not required even though the value of the charged assets is more than seventy-five percent of the assets of the company.⁹¹⁴ Notwithstanding the charge alone will not require approval section 145(1) of the Act, it should be noted that the underlying transaction entered into by the company either as a loan agreement or the agreement requiring performance will require approval if the value of the loan or the obligation is more than seventy-five percent of the assets of the company. Secondly, section 145(5) of the Act provides that the section is not applicable to major transactions entered into by a receiver appointed pursuant to a document creating a charge over all or substantial part of the property of a company.

13.15.3 Voluntary contributions to charitable or other funds

Companies as part of their corporate social responsibility or for the benefit of employees may contribute part of the income of the company or spend the resources of the company to undertake

⁹¹⁴ Section 145(4) of Act 992.

activities that are not related to the business of the company. The power to make such voluntary contributions or donations is vested in the directors. However, in the exercise of such power, the Act limits the powers of the directors. It is logical for such a limitation since the income otherwise voluntarily contributed may be payable to shareholders as dividends. The Act, therefore, requires shareholders' approval by ordinary resolution where the aggregate of the contribution to be made in a financial year will exceed two percent of the retained earnings of the company for the previous financial year.

Section 189(1) of Act 992 provides that *"(1) Subject to this Act, the directors of a company with shares shall not, without the approval of (a) an ordinary resolution of the company (ii) make voluntary contributions to a charitable or any other fund, other than pension funds for the benefit of employees of the company or an associated company, of the amounts the aggregate of which will, in a financial year of the company, exceed two percent of the retained earnings of the company at the end of the preceding financial year"*. The directors thus have the power to make voluntary contributions to charity and any other funds without the approval of the shareholders if the aggregate of the amount in a financial year is less than two percent of the retained earnings of the company for the previous financial year. Secondly, the directors do not require approval when the contribution is for a pension fund which is for the benefit of employees of the company or an associated company notwithstanding the aggregate will exceed the two percent mark. Other than a contribution to pension funds for the benefit of employees, where the voluntary contribution to be made in aggregate with other such contribution made in the financial year will exceed two percent of the retained earnings of the company for the preceding financial year, the directors must seek the approval of the shareholders. Such approval must be by ordinary resolution of the company.

13.15.4 Exercise of borrowing powers

As indicated above, companies raise money either through the issue of shares or borrowing. As an incorporated entity, the company has the capacity to borrow. As the organ responsible for managing the business of the company, the directors are responsible for raising the capital required for the business of the company. The power of the company to borrow is therefore exercisable by the directors on behalf of the company. The Act, however, limit the extent of the power of the directors to borrow on behalf of the company. Section 189(9) of Act 992 provides that: *"(9) Except as otherwise provided in the constitution of a company, the directors of a company with shares shall not, without the approval of an ordinary resolution of the company, exercise the powers of the company to borrow money or to charge any of the assets of the company where the moneys to be borrowed or secured, together with the amount remaining undercharged of moneys already borrowed or secured, apart from temporary loans obtained from the bankers of the company in the ordinary course of business, will exceed the stated capital for the time being of the company."*

The subsection confirmed the directors are to exercise the powers of the company to borrow or charge the assets of the company for repayment of sums of money or performance of obligation owed to a third party. The subsection, however, limits the exercise of the company's power to borrow by the directors by requiring approval by ordinary resolution in the event the amount borrowed or the amount secured by the charge together with existing indebtedness of the company will exceed the stated capital. In computing the existing indebtedness, temporary loans obtained by the company from its bankers in the ordinary course of business is not to be included. There is, therefore, no limit where the amount to be borrowed together with existing indebtedness is less than the stated capital. The constitution of the company may either state a contrary term where no approval is required notwithstanding the amount to be borrowed or state an amount different from the stated capital as the amount above which the approval is required. The constitution may, therefore, not require any approval or require approval for specified borrowing which may either be below the stated capital or above the stated capital.

*Barclays Bank (D.C.O.) Ltd. v. Perseverance Transport Services Ltd*⁹¹⁵ – even though it was in the case held, based on the presumption of regularity, that the approval by ordinary resolution was not obtained when the defendant-company borrowed in excess of the amount stated in its Regulations without the required approval of the shareholders, the case illustrates that the Regulations, now the constitution, of the company may state limits based on which approval from shareholders will be required to be valid.

13.15.5 Recommendation and payment of dividend

Shareholders invest in a company through acquisition of the shares of the company in expectation of returns on investment in the form of dividends. Share of a company is defined as *“the interest of members of a body corporate who are entitled to share in the capital or income of the body corporate”*. The part of the income of a company with shares shared by the shareholders is the dividend. Dividend is paid out of the retained earnings of the company when the company is a going concern. Dividend is that part of the retained earnings that is distributed among the shareholders of a company as their share of the income of the company. Such dividend is payable only when declared by the company in accordance with the Act and the constitution of the company. Under Act 992, the power to declare dividend is vested in the shareholders. However, the declaration of dividend by the shareholders is dependent on the recommendation by the directors of a stated amount to be declared by the shareholders. Section 76(1) of Act 992 provides that: *“(1) Subject to sections 72 and 75, and in the case of a private company, its registered constitution where applicable, a company may, by ordinary resolution, declare dividends in respect of a year or any other specified period, but dividend shall not exceed the amount recommended by the directors.”*⁹¹⁶

⁹¹⁵ [1961] GLR 665.

⁹¹⁶ Emphasis mine.

Since dividend cannot be declared unless recommended by the directors of a company, the directors indirectly have the power to determine whether dividend is paid to shareholders or not paid. It is pursuant to the recommendation of the directors that the shareholders can proceed to make a declaration. The shareholders may declare an amount less than what is recommended by the directors but cannot declare an amount above what is recommended. For the director to make the recommendation, it is for the directors to ensure that the company complies with the distribution test.

Section 72(1) of Act 992 provides that: *“(1) Except in winding up, a company shall not pay dividend to shareholders of the company ... unless, the company has complied with the distribution test.”* The First Schedule of Act 992 provides that *“distribution test” includes circumstances where*

- (a) a company is able to pay its debts as they fall due; and*
- (b) the amount or value of any payment, return or distribution made by the company does not exceed its retained earnings immediately before the making of the payment”.*

The directors are thus required to examine the past by looking at the financial statement of the company to ensure it has retained earnings. The company must have retained earnings before the directors can make the recommendation of declaration of dividend, as the amount recommended cannot exceed the retained earnings. Secondly, the directors must look forward to ensure that if the directors recommend payment of dividend and it is done, the company will be able to pay its debt when the debts fall due. Without the recommendation of dividend after this determination by the directors, no dividend can be declared by the shareholders and paid by the company. Even where declared, the power to pay the dividend is that of the directors. Although it is shareholders who declare dividend based on the recommendation of directors, the actual payment can only be done on the authority of the directors. The directors are the organ responsible for ensuring that the payment is properly done.

*In Re Exchange Banking Co. (Flitcroft's Case)*⁹¹⁷ – the financial statements prepared and presented by the directors of the Exchange Banking Company to shareholders based upon which the shareholders declare dividend were untrue. Between 1873 and 1878 the directors paid half yearly dividends totalling £3,192 to the shareholders when the directors knew items in the accounts were bad debts, irrecoverable and consequently there were no distributable profits. The shareholders acted on the reports and declared dividends. The liquidator brought an action against the directors to recover the amount paid to the shareholders as dividend. It was held that the directors were liable to repay the unlawful dividends. On appeal, it was held dismissing the appeal that the capital invested by shareholders could not be returned to them, and dividends should be paid out of profits only, although the courts deferred to company directors to define their own rules for determining when that was so.

⁹¹⁷ (1882) 21 Ch. D 519.

Unlawful dividend paid to shareholders must be returned by the shareholders failing which the directors must refund the amount with interest.⁹¹⁸

However, the dividend declared and payable to shareholders becomes a debt owed by the company to the shareholders. The shareholders can bring a claim against the company to recover the dividend from the company. As a debt, the action to recover is subject to the statutory limitation period of six years under the Limitation Decree, 1972 (NRCD 54).⁹¹⁹

13.16 Bona fide third parties not affected by lack of approval

Notwithstanding that approval is required in the above circumstances, the Act does not require that a person dealing with a company must check if the required approval is obtained for the directors to exercise any of the above powers. The person so acting and the transaction in respect of which the directors act outside the limitation will be protected under the doctrine of presumption of regularity. Section 189(10) of Act 992 states that *“(10) A person dealing with the company in good faith or registering a disposition of, or title to, property shall not be concerned to see whether the conditions of this section have been fulfilled, and sections 147 to 151 shall apply to a transaction of the typed referred to in this section although the conditions have not been fulfilled.”*

13.17 Duties of directors

Directors are appointed by the members of the company or any other person named in the registered constitution of the company. However, once appointed, the directors owe duties to the company and not the person who appointed them. The directors, therefore, owe a duty to only one person when appointed. That is the company, and not the shareholders or members of the company or any other person. The relationship created is not a relationship with the appointor but a relationship between the directors and the company.

That relationship imposes a number of duties on the directors when acting for or on behalf of the company, or when exercising the powers of a company on behalf of the company. The duties generally refer to the obligations or responsibilities that the directors owe the company in acting for or against the company. The duties imposed on directors of a company are generally a development from the principles of equity and common law, which has now been given statutory backing under Act 992. The duties of directors are based on the equitable principles of fiduciary responsibility. The

⁹¹⁸ Section 72(2) of Act 992.

⁹¹⁹ Section 4 of NRCD 54 provides *“(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued: — (f) actions to recover any sum recoverable by virtue of any enactment (other than actions to which sections 2 and 5 apply).”*

relationship between a director and a company is a fiduciary relationship. A fiduciary relationship refers to a relationship of trust and confidence where one person, called the fiduciary, who acts for or on behalf of another person, called the beneficiary, is required to act in the interest of the beneficiary.

The directors are appointed to a position of trust and confidence and charged with the responsibility to act in the interest of the company. As such the directors owe fiduciary duties to the company. The principles of equity and common law on fiduciary duties have been restated under Act 992, where specific duties are imposed on the directors of the company. The general import of the statutorily restated fiduciary duties is for directors to exercise their powers for the purpose for which it is given, that is in the interest of the company, and not to be derelict in the performance of their duties. Section 190(1) of Act 992 provides for the general fiduciary duty of directors by stating “(1) *A director of a company stands in a fiduciary relationship towards the company...*”. The fiduciary relationship places onerous responsibilities on the director for which the director is personally liable where there is a breach of such duties.

*In Re Westmid Packing Services Limited*⁹²⁰, Lord Woolf stated that:

“It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that there are inescapable personal liabilities.”

In *Aberdeen Railway Company v. Blackie Brothers*⁹²¹, Lord Cranworth L.C. stated in relation to the position occupied by the director @ pg. 399 as follows:

“The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust, which it was impossible to obtain. It may sometimes happen that the terms on which a trustor has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee,

⁹²⁰ [1998] 2 BCLC 646.

⁹²¹ (1854) 1 Macq HL 461.

have been as good as could have been obtained from any other person—they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted.”

In *Regal (Hastings) Ltd v. Gulliver and others*⁹²², Lord Russell of Killowen stated @ pg. 9 that:

“The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.”

In *Automatic Self Cleansing Filter Syndicate Co Ltd v. Cuninghame*⁹²³, Lord Collins MR stated in relation to the position occupied by the directors as follows:

“It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes, directors are agents. For whom are the agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors, it is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents... There are provisions by which the minority may be overborne, but that can only be done by special machinery in the shape of special resolutions.”

In *Dikyi & Others v. Ameen Sangari Industries Ltd*⁹²⁴, Kpegah J stated in relation to the position and duties of director @ pg. 69 that:

“I would like to view this against his statutory duties to the company on behalf of which he negotiated with his family. By the provisions of section 203 of the Companies Code, 1963 (Act 179) a director of a company stands in a fiduciary relationship with the company and he must observe the utmost good faith in his dealing with the company or on its behalf. And under the provisions of section 206

⁹²² [1942] UKHL 1; [1967] 2 AC 134.

⁹²³ [1906] 2 Ch 34 CA.

⁹²⁴ [1992] 1 GLR 61.

of Act 179, a director of a company shall not, without the company's consent, place himself in a situation where his duty to the company conflicts with or may conflict with his personal interest or his duties to other persons.

These two provisions find expression in the words of Lord Cranworth L.C. in the case of Aberdeen Rail Co. v. Blaikie Brothers [1843-60] All E.R. Rep. 249 at 252, H.L. This is what he said:

"A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect." It should be said that conflict of duties is just as objectionable as a conflict of interests. However, there is no breach of this duty when the company consents. The evidence in this case does not point to the contrary and I am therefore not prepared to hold otherwise."

In *Great Eastern Railway Company v. Turner*⁹²⁵, Lord Selborne LC stated @ pg. 152 that:

"The directors are the mere trustees or agents of the company – trustees of the company's money and property – agents in the transactions which they enter into on behalf of the company. In this case, without legal authority, and therefore without the consent of the corporation, whose trustees and agents they were, the directors took a part of the company's money and therewith purchased a property which this contest proves to be of the same value – shares in the Lynn and Hunstanton Railway Company. Those shares so bought – not a farthing of any other person's money having contributed to the purchase – were placed in the name of three successive chairman of the company, and were uniformly dealt with as that which they were, the property of the company."

In *re City Equitable Fire Insurance Company, Limited*⁹²⁶ - Romer J. stated @ pgs. 426 to 427 that:

"It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the

⁹²⁵ [1872] 8 Ch 149.

⁹²⁶ [1925] Ch. 407.

duties of a trustee of a will or of a marriage settlement. It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another. In one company, for instance, matters may normally be attended to by the manager or other members of the staff that in another company are attended to by the directors themselves. The larger the business carried on by the company the more numerous, and the more important, the matters that must of necessity be left to the managers, the accountants and the rest of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines."

ACT 992 lists the specific duties resulting from the general fiduciary relationship that must be observed by the directors. It should be noted that the restatement of the specific fiduciary duties does not exclude the application of the principles of equity and common law on fiduciary duties in so far as the principles are not inconsistent with ACT 992. Section 217 of Act 992 provides that *"The rights, duties and liabilities of officers and agents of companies shall continue to be governed by the rules of the common law and equity relating to principal and agent, and master and servant except in so far as those rules are not inconsistent with the express provisions of this Act."*

The sub-chapters below will discuss the fiduciary duties listed under Act 992. Even though the duties are discussed under separate headings, it should be borne in mind that the duties are closely related in the sense that a single act on the part of the director may amount to breaches of a number of the duties.

13.17.1 Duty to act with utmost good faith

Section 190(1) of Act 992 provides that *"(1) A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in transaction with or on behalf of the company."* As indicated above, a fiduciary relationship is based on trust and confidence which requires the fiduciary to act in the interest of the beneficiary. Directors are required to act in the best interest of the company and in so doing must act not only in good faith but with utmost good faith. Good faith means acting honestly and sincerely. The Act, therefore, requires the directors to act with the highest standard of honesty towards the company or when acting on behalf of the company. The opposite of good faith is bad faith. A director will be in breach of the duty imposed on the director when the act done by the director towards the company or on behalf of a company is done in bad faith. That is, the act is not in the interest of the company

but in the interest of the director or another person other than the company. The breach of duty to act in utmost good faith will entitle the company to resort to available remedies under the Act depending on the specific act engaged in by the director resulting in the breach. Such remedy may include damages, rescissions of contract, injunction to restrain the threatened breach or recovery of profit made by the director from the breach.

*In Re Smith & Fawcett Ltd*⁹²⁷, the issued share capital of a company was held 50% each by its two directors. One director died and his executor applied to have his shares registered in his name. The remaining director refused but offered to register half the shares and to buy the remainder at a fixed price. The executor sought rectification of the register of members alleging breach of fiduciary duty in refusing to register the shares of the deceased director. It was alleged that the surviving director was motivated by a collateral purpose, namely the desire to acquire half of the deceased director's shares at an undervalue. The articles provided that "the directors may at any time in their absolute and uncontrolled discretion refused to register transfer of shares". Despite such a wide power, the court held that the director was still subject to fiduciary duties which required him to exercise his powers "bona fide in the interest of the company". The court held that this meant "bona fide in what the director considered – not what a court may consider – is in the interest of the company, and not for any collateral purpose". However, based on the evidence, the court was not satisfied that the surviving director was not acting in what he considered to be the interests of the company, and so the application to rectify the register by the executor failed. Lord Greene M.R. stated @ pg. 306 that:

"The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles on their true construction permit them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. [@ 308] The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion. ... It is said that on the evidence before us we ought to infer that the directors here were

⁹²⁷ [1942] Ch 304.

purporting to exercise their power to refuse a transfer not bona fide in the interests of the company but for some collateral purpose, namely, the desire of the leading director to acquire part of the shares for himself at an under-value. ... [at pg. 309] Accordingly, on the evidence I am satisfied, as the learned judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been due to anything but a bona fide consideration of the interests of the company as the directors see them. That being so, and that being, on the true construction of the article, the only matter to which the directors have to pay regard, I am of the opinion that the learned judge was right in the conclusion to which he came and that this appeal fails."

*JJ Harrison (Properties) Ltd v. Harrison*⁹²⁸ – JJ Harrison (Properties) Ltd owned farmland with a number of buildings and a barn. The company has applied for a permit to convert the barn into residential properties as part of its general policy to develop such land and sell them at a higher value. Before the permit was obtained, the manager on the instruction of Mr. Harrison, a director of a company, caused a valuation to be obtained and proceeded to cause a contract to be prepared to acquire some land from the company at a price which reflected the fact that planning permission had been refused to develop the land. However, at the time of the acquisition, it was established that the planning permission to convert the barn into residential properties was likely to be granted which will increase the value of the land substantially. The director was aware that the prospect of planning permission being granted and the increase in the value of the land but did not disclose to the board at the meeting to approve the transaction. It was held that the director was in breach of his fiduciary duties to the company and held the property upon trust for the company. Accordingly, he was liable to account for the profits he made from the subsequent sale by him of the land. Chadwick LJ stated on the breach of duty to act bona fide that:

"The judge went on to consider whether, in addition to the breach of the statutory duties of disclosure, Mr. Harrison was in breach of his equitable duty to act bona fide in the best interests of the company. The judge held that he was, at paragraph 58 of the judgment: "Further, I accept that Peter Harrison was in breach of his duty to act bona fide in the best interests of Harrison Properties. It seems to me that his breaches included his failure to inform the other directors of the company fully of the facts about the planning status of the Development Land, his failure to do what he could to ensure that, if the company decided to sell the land, whether to him or to someone else, steps were taken such that it was sold at its full market value, and finally the use of the company's resources to prepare and apply for planning permission in the company's name at a time when Peter Harrison intended that he should buy the property and thus have the benefit of that work."

⁹²⁸ [2002] 1 BCLC 162.

Dorchester Finance Ltd and another v. Stebbing and Others⁹²⁹ - Stebbing, Parsons and Hamilton were directors of Dorchester Ltd, the first plaintiff, which was a subsidiary of the second plaintiff, Talbex Group Ltd. Stebbing and Parsons were chartered accountants and Hamilton had considerable accounting experience. Parsons and Hamilton were non-executive directors of Dorchester Finance Ltd and left the management of its affairs to Stebbing. Because Parsons and Hamilton infrequently visited Dorchester Finance Ltd's head office, they often signed cheques in blank to be signed by Stebbing at some later date. Dorchester Finance Ltd subsequently went into liquidation and brought an action against the three directors alleging that they were negligent as they failed to exercise proper skill or care in their performance of their duties as directors of Dorchester and that they knowingly and recklessly participated in the misapplication of Dorchester's assets. It was held that a director in carrying out his duties (i) was required to exhibit in the performance of his duties such a degree of skill as may reasonably be expected from a person with his knowledge and experience, (ii) had, in the performance of his duties, to take such care as an ordinary man might be expected to take on his own behalf, and (iii) must exercise any power vested in him in good faith and in the interests of the company. In applying these standards no distinction was to be drawn between executive and non-executive directors. On the facts, Parsons and Hamilton had been negligent in failing to carry out their duties as directors and in signing blank cheques which allowed Stebbing to act as he pleased. It was also clear that Stebbing had been negligent in the management of the company's affairs. Foster J. accepted the plaintiff's statement of the law as:

"A director must exercise any power vested in him as such honesty, in good faith and in the interests of the company and reliance was placed on Re City Equitable Fire Insurance Co Ltd [1925] Ch 407, [1924] All ER Rep 485, Re Sharpe [1892] 1 Ch 154, and Re Smith & Fawcett Ltd [1942] 1 All ER 542, [1942] Ch 304."

13.17.2 Duty to act in the best interest of the company

Section 190(2) of Act 992 provides that *"(2) A director shall always act in what the director believes is the best interest of the company as a whole so as to preserve the assets, further the business, and promote the purposes for which the company was formed, in the manner that a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and in doing so shall have regard to*

- (a) the likely consequence of any decision in the long term,*
- (b) the impact of the operations of the company on the community and the environment, and*
- (c) the desirability of the company maintaining a reputation for high standards of business."*

⁹²⁹ [1989] BCLC 498.

Fiduciary duties require the directors as fiduciary to act in the interest of the company, as the beneficiary.

Bhullar v. Bhullar⁹³⁰ - the claimant held 22 per cent of the shares in a family company (BL). His brother, the first defendant, and his mother held the remaining shares. The claimant's father and mother had been the majority shareholders before the father's death. BL had two wholly-owned subsidiaries, BDL and BBL, which were involved in property investment and development. The claimant, his brother and his mother were directors of all three companies. He claimed that BBL and BDL had suffered loss by making gifts of unsecured and interest-free loans to a company (Torex) of which the first defendant was the sole shareholder and director. It was said that Torex was unlikely to be able to repay the loans. He also claimed that BDL had suffered loss, and the first defendant had received a benefit, as a result of the transfer of a property to him, since the transfer was at an undervalue and deprived BDL of the opportunity of making a profit by developing the property itself. The claimant sought an account and inquiry in relation to the losses made by the relevant company and/or of the profits made by his brother. His claim against his brother asserting causes of action belonging to the two subsidiary companies was a 'double' derivative claim governed by common law principles. It was held that it appeared that it was the father who had taken the lead in relation to the decision that BBL and BDL should make payments to Torex. That there was a clear prima facie case that he did not honestly believe that the payments were in the interests of BBL or BDL. As the first defendant was also a director of BBL and BDL at the relevant times and knew the father's reasons for his actions, and because the first defendant's wholly-owned company was the beneficiary of the father's dishonesty, there was a prima facie case that the first defendant also committed a dishonest breach of fiduciary duty in relation to the payments to Torex. Morgan J stated @ pg. 113 that:

"A director, as a fiduciary, will be dishonest if he pursues a course of action, either knowing it is contrary to the interests of the company or being recklessly indifferent whether it is contrary to its interests. If a director acts in a way which he does not honestly believe is in the interests of the company, then he is acting dishonestly. These propositions are taken from Gwembe Valley Development Co Ltd v Koshy [2003] EWCA Civ 1048, [2004] 1 BCLC 131 at [131] applying Armitage v Nurse [1997] 2 All ER 705 at 711, [1998] Ch 241 at 251, 260."

The fiduciary duty is owed to the company and not the shareholders of the company.

Dawson International Plc v. Coats Patons Plc⁹³¹ - in a takeover process, the directors agreed with a potential buyer not to recommend a rival bid but later renege on that promise by considering a rival bid. In an action against the directors, the directors' defence was that it would have amounted to a

⁹³⁰ [2016] 1 BCLC 106.

⁹³¹ [1989] BCLC 233.

breach of their duties to their shareholders. On the issue of whether directors owe a duty to the shareholders, it was held that the directors do not owe a general duty to the shareholders but to the company. However, in a takeover situation where the shares of the shareholders are to be sold, the directors must consider the interest of the shareholder. That is the directors owe a duty to the shareholders which comes from the duty that the directors owe to the company. Lord Cullen stated @ pg. 243 that:

"In contrast, I see no good reason why it should be supposed that directors are, in general, under a fiduciary duty to the shareholders, and in particular current shareholders with respect to the disposal of their shares in the most advantageous way. The directors are not normally the agents of the current shareholders. ... Directors have one master ... the company. ... I think it is important to emphasize that what I am being asked to consider is the alleged fiduciary duty of directors to current shareholders as sellers of their shares. This must not be confused with their duty to consider the interests of shareholders in the discharge of their duty to the company. What is in the interests of current shareholders as sellers of their shares may not necessarily coincide with that is in the interests of the company."

*Percival v Wright*⁹³² - shareholders in Nixon's Navigation Co. wanted to sell their shares and requested that the company's secretary find purchasers. Some directors of the company purchased the shares at £12.10s per share, which price was based upon independent valuation. After the sale, the shareholders discovered that before and during the negotiations for that sale, the board of directors had been involved in other negotiations to sell the entire company, which would have made those shares substantially more valuable had they come to fruition. The plaintiff sued, claiming breach of fiduciary duty, in that the shareholders should have been told of these negotiations. It was held per Swinfen Eady J. that directors owed duties to the company and not shareholders individually. He stated:

"It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders inter se was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view... There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors, and named the price at which they were desirous of selling. The plaintiffs' case wholly fails, and must be dismissed with costs."

Act 992 permits the consideration of the interest of shareholders, creditors and other stakeholders in the discharge of the duties of the directors to the company. Section 190(4) of Act 992 provides that "(4) In considering whether a particular transaction or course of action is in the best interests of the

⁹³² [1902] 2 Ch 401.

company as a whole, a director may consider the interests of the employees, as well as the members of the company, and, where appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class."

Subsection (2) of section 190 of the Act requires that the interest to be pursued must be in the best interest of the company as a whole. First, the interest to be pursued is the interest of the company and not the interest of other stakeholders. Second, the interest must be the interest of the company as a whole.

In *Greenhalgh v. Arderne Cinemas Ltd*⁹³³, the issue was whether a special resolution has been passed bona fide for the benefit of the company. Evershed MR in his judgment stated @ pg. 291 that:

"The phrase, 'the company as a whole,' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."

The phrase, therefore, encompasses a wide interest including that of shareholders and other stakeholders such as employees with paramount importance given to the criteria stated in Act 992. In pursuing the interest of the company, the subsection provides for three yardsticks or criteria to determine whether the specific act or omission to act of the director is in the best interest of the company as a whole. That is the act, omission or decision taken must be to preserve the assets of the company, further the business of the company and promote the purpose for which the company formed. The requirement is for the director to assess whether the above yardsticks are attained in relation to each specific action or omission of the director.

In doing so, the directors are required to act in a manner that a *faithful, diligent, careful and ordinarily skilful director will act in the circumstances in which the director finds himself*. Directors are not required to have any special skill or knowledge. The standard required is that of a faithful, diligent, careful and ordinary skilled director in the circumstances within which the director is acting. The standard expected of the director is that of an ordinarily skilful director within the circumstances in which the director is acting. The emphasis in making the assessment as to what is in the best interest of the company as a whole by considering the three factors provided in the subsection must be based on the judgment of the director, and not what others think. The judgment required is the independent judgment of the director. Subsection (5) of section 190 provides that *"A director shall exercise independent judgment."* The directors must consider the long-term consequence of the act, the effect on the community and environment, and maintaining a reputation

⁹³³ [1951] Ch. 286.

for a high standard of business conduct. In addition, the directors may, even though not mandatory, consider the interest of employees and members of the company, and where appointed by or represented by a special class of members, employees, or creditors, give special but not exclusive consideration to the interest of the class.⁹³⁴

*In Re Smith & Fawcett Ltd*⁹³⁵, Lord Greene M.R. stated @ pg. 306 that:

"The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose. ... It is said that on the evidence before us we ought to infer that the directors here were purporting to exercise their power to refuse a transfer not bona fide in the interests of the company but for some collateral purpose, namely, the desire of the leading director to acquire part of the shares for himself at an under-value. ... [@ pg. 309] Accordingly, on the evidence I am satisfied, as the learned judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been due to anything but a bona fide consideration of the interests of the company as the directors see them. That being so, and that being, on the true construction of the article, the only matter to which the directors have to pay regard, I am of opinion that the learned judge was right in the conclusion to which he came and that this appeal fails."

*Howard Smith Ltd v. Ampol Petroleum Ltd*⁹³⁶ – in this case, it was found that the primary purpose of an allotment of shares by the directors was to dilute and remove the blocking stake of two other shareholders who had indicated the intention of rejecting an offer by another company to acquire the company, an offer which minority shareholders and a majority of the directors wished to accept. The judge held that the directors had not exercised their powers for a "proper purpose" since the aim, on the basis of the evidence, was to remove the blocking stake and not to act in the best interests of the company.

*Hogg v. Cramphorn Ltd*⁹³⁷ - the directors devised a scheme and issued shares to a trust on the good faith belief that preventing a takeover bid from one Mr. B was for the benefit of the company. In so

⁹³⁴ Section 190(4) of Act 992.

⁹³⁵ [1942] Ch 304.

⁹³⁶ [1974] AC 821.

⁹³⁷ [1967] Ch. 254.

doing, the directors seek to remain in control of the affairs of the company. It was held that the power to issue shares was a fiduciary power, and if exercised for an improper motive the issue was liable to be set aside, it being immaterial that the issue was made in the bona fide belief that it was in the interests of the company. That the issue of the shares was liable to be set aside. Buckley J. stated @ pgs. 266 to 267 that:

“Accepting as I do that the board acted in good faith and that they believed that the establishment of a trust would benefit the company, and that avoidance of the acquisition of control by Mr. Baxter would also benefit the company, I must still remember that an essential element of the scheme, and indeed its primary purpose, was to ensure control of the company by the directors and those whom they could confidently regard as their supporters.”

The Business Judgment Rule

In the determination of whether an act done by the directors was done in the best interest of the company, one must determine the reason for the judgment of the directors. Such determination is not a subjective determination or the correctness or otherwise of the decision but an objective determination based on the test of reasonableness. In so doing, the courts do not seek to second guess directors with the benefit of hindsight. The courts have, therefore, developed the business judgment rule for such determination. The rule is to the effect that the courts will not try to second guess the bona fide judgment of directors unless the business view was so extreme that no reasonable director would hold it, either by taking into account factors that they should not have considered or failed to take into account factors that they should have considered or if, having considered all the right factors, they have come to a conclusion so unreasonable that no reasonable person could have come to it.

*Howard Smith Limited v. Ampol Petroleum Limited and Others*⁹³⁸ - the business judgment rule was in effect applied in this case when it was stated @ pgs. 832 to 833 that:

“In order to assist him in deciding upon the alternative motivations contended for, the judge considered first, at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors bona fide considered that condition to be. Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management’s decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor

⁹³⁸ [1974] AC 821.

will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

This was, in their Lordships' view, the course taken by Street J. His conclusion as to the objective situation was expressed in these words:

"It is clear on the evidence that Millers was, as at July 6, 1972, in a position of tight liquidity. It did not have within its own funds sufficient money to cover its present and foreseeable financial commitments. It had, however, been in a position of tight liquidity for many months before July 6, 1972. There is a history of a series of financial crises; but at the same time there is a trend of improvement during the months preceding the meeting of July 6. ...

"In short, I am satisfied that as at July 6, 1972, there was a need for capital. I am satisfied that this need had been recognised for many months past and that a policy had been followed of meeting it by loan capital rather than by share capital. I am satisfied that progress was being made in meeting this need by this policy. I am not satisfied that the company's financial affairs were at crisis point due to unavailability of capital, or that there was a pressing need to obtain cash funds by a share issue."

Their Lordships accept that the general financial picture as drawn by the judge was correct. On this view of the situation in July 1972 the judge made his findings as to the purpose of the majority directors in voting for the issue.

After hearing and considering the evidence of Messrs. Taylor, Nicholl, Balhorn and Anderson, each asserting that his primary purpose in voting for the allotment on July 6, 1972, was to meet an urgent capital need of Millers, the judge found that he was unable to accept these assertions. He found that the primary purpose so far as the management team was concerned (this is not the directors, but the team headed by Mr. Taylor which negotiated with Howard Smith) was to issue shares to

Howard Smith so as to enable the Howard Smith takeover to proceed. As to the Millers' majority directors he said:

"They had found themselves enmeshed in a takeover struggle. The greater part, if not the whole, of their thinking in the critical days up to and including July 6 was directed to this takeover situation. It is unreal and unconvincing to hear them assert in the witness box that their dominant purpose was to obtain capital rather than to promote the Howard Smith's takeover offer, and I do not believe these assertions.

"The conclusion that I have reached is that the primary purpose of the four directors in voting in favour of this allotment was to reduce the proportionate combined shareholding of Ampol and Bulkships in order to induce Howard Smiths to proceed with its takeover offer. There was a majority bloc in the share register. Their intention was to destroy its character as a majority. The directors were, and had for some weeks been, concerned at the position of strength occupied by Ampol and Bulkships together. They were aware that in the light of the attitude of these two shareholders Howard Smiths could not be expected to proceed with its takeover offer that these directors regarded as attractive. They issued the shares so as to reduce the interest of these two shareholders to something significantly less than that of a majority. This was the immediate purpose. The ultimate purpose was to procure the continuation by Howard Smith's of the takeover offer made by that company."

Their Lordships accept these findings."

*Shuttleworth v. Cox Bros and Co (Maidenhead)*⁹³⁹ - Cox Bros and Co had appointed a board of directors for life and had fixed this under its articles of association. It was proposed to amend the articles so that a director would lose his position if the other directors requested in writing for him to resign. Shuttleworth, who was targeted by the changes, brought a claim alleging that the alteration of the articles was not bona fide for the benefit of the company as a whole. In dismissal the claim, Bankers LJ laid down the bona fide test @ pgs. 18 - 20 as follow:

"So the test is whether the alteration of the articles was in the opinion of the shareholders for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question? The alteration may be so oppressive as to cast suspicion on the honesty of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. In such cases the Court is, I think, entitled to treat the conduct of shareholders as it does the verdict of a jury, and to say that the alteration of a company's articles shall not stand if it is such that no reasonable men could

⁹³⁹ [1927] 2 KB 9.

consider it for the benefit of the company. Or, if the facts should raise the question, the Court may be able to apply another test - namely, whether or not the action of the shareholders is capable of being considered for the benefit of the company. I cannot agree with what seems to have been the view of Peterson J. in Dafen Tinplate Co. v. Llanelly Steel Co. that whenever the Court and the shareholders may differ in opinion upon what is for the benefit of the company, the view of the Court must prevail. In the present case it seems to me impossible to say that the action of these defendants was either incapable of being for the benefit of the company or such that no reasonable men could consider it for the benefit of the company. It is idle to say that their action was directed against the plaintiff, because the more outrageous the conduct of a director the more certain it is that his removal will be bona fide for the benefit of the company, and the more certainly will the efforts of the shareholders, acting bona fide and for the benefit of the company, be directed against him, because it is necessary to protect the company against such conduct for the future. For these reasons I am of opinion that this appeal must be dismissed."

*Associated Provincial Picture Houses Ltd v. Wednesbury Corp*⁹⁴⁰ - the plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the defendants who were the licensing authority for that borough under the Cinematograph Act, 1909, a licence to give performances on Sunday under section 1(1) of the Sunday Entertainments Act, 1932; but the licence was granted subject to a condition that "no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not." In these circumstances, the plaintiffs brought an action for a declaration that the condition is ultra vires and unreasonable. It was held, that the local authority had not acted unreasonably or ultra vires in imposing the condition. In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority to determine if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power. Lord Greene MR stated @ pgs. 228 to 229 as follows:

"When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have

⁹⁴⁰ [1948] 1 KB 223.

regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

*It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

A business judgment albeit a mistaken business judgment by a director in deciding in good faith and after exercising due care on whether a course of action is a sensible one for the company to take will not of itself result in liability. A mistaken exercise of judgment by a director in good faith does not impose liability on the director unless the director was negligent in his conduct.

*Re City Equitable Fire Insurance Co Ltd*⁹⁴¹, Romer J stated @ pgs. 427 to 429 that:

"In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer. It has been laid down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But as pointed out by Neville J. in In re Brazilian Rubber Plantations and Estates, Ltd. [1911] 1 Ch. 425, 437, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. For myself, I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expressions are used for the purpose of drawing a distinction between the duty that is owed in one case and the duty that is owed in another. If two men owe the same duty to a third person, and neglect to perform that duty, they are both guilty of negligence, and it is not altogether easy to understand how one can be guilty of gross negligence and the other of negligence only. But if it be said that of two men one is only liable to a third person for gross negligence, and the other is liable for mere negligence, this, I think, means no more than that the duties of the two men are different. The one owes a duty to take a greater degree of care than does the other: see the observations of Willes J. in Grill v. General Iron Screw Collier Co. (1866) L. R. 1 C. P. 600, 612. If, therefore, a director is only liable for gross or culpable negligence, this means that he does not owe a duty to his company, to take all possible care. It is some degree of care less than that. The care that he is bound to take has been described by Neville J. in the case referred to above as "reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this Neville J. was only following what was laid down in Overend & Gurney Co. v. Gibb L. R. 5 H. L. 480, 486. as being the proper test to apply, namely: "Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of

⁹⁴¹ [1925] Ch. 407.

prudence, acting on their own behalf, would have entered into such a transaction as they entered into?"

*There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1.) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley M.R.: "If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company": see *Lagunas Nitrate Co. v. Lagunas Syndicate*. [1899] 2 Ch. 392, 435. It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment. (2.) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3.) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."*

The duty to act in the best interest of the company cannot be excused either by a provision in the constitution of a company or contract, or a resolution of a company cannot relieve the directors of the duty imposed on the directors under section 190 of the Act.⁹⁴²

13.17.3 Duty to exercise diligent care and ordinary skill

Directors are not required to have any special skill or knowledge. The standard required is that of a faithful, diligent, careful and ordinary skilled director in the circumstances within which the director is acting. The standard expected of the director is that of an ordinarily skilful director within the circumstances in which the director is acting and not specific expertise or technical knowledge. The director is not required to have any special knowledge relating to the business.

⁹⁴² Section 190(6) of Act 992.

*Re Brazillian Rubber Plantations and Estates Ltd*⁹⁴³, Neville J stated @ pg. 437 that:

"A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualification to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such negligence."

*Dorchester Finance Ltd and another v. Stebbing and Others*⁹⁴⁴ - Forster J stated as follows:

"For a chartered accountant and an experienced accountant to put forward the proposition that a non-executive director has no duties to perform I find quite alarming. It would be an argument which, if put forward by a director with no accounting experience, would involve total disregard of many sections of the Companies Act 1948 (see in particular ss 176 to 204). The signing of blank cheques by Hamilton and Parsons was in my judgment negligent, as it allowed Stebbing to do as he pleased. Apart from that they not only failed to exhibit the necessary skill and care in the performance of their duties as directors, but also failed to perform any duty at all as directors of Dorchester. In the Companies Act 1948 the duties of a director whether executive or not are the same."

*Re D'Jan of London Ltd; Copp v D'Jan*⁹⁴⁵ – D'Jan a director of a company as well as a shareholder, signed an insurance proposal which had been completed by another person and which he did not read. The insurers repudiated liability under the policy on the grounds that the proposal as completed contained inaccurate information. The liquidator brought an action against D'Jan alleging negligence. It was held that D'Jan was negligent and liable to the company. Hoffmann LJ. stated @ pgs. 563 to 564 that:

"I think that in failing even to read the form, Mr. D'Jan was negligent. Mr. Russen said that the standard of care which directors owe to their companies is not very exacting and signing forms without reading them is something a busy director might reasonably do. I accept that in real life, this often happens. But that does not mean that it is not negligent. People often take risks in circumstances in which it was not necessary or reasonable to do so. If the risk materialises, they may have to pay a penalty. I do not say that a director must always read the whole of every document which he signs. If he signs an agreement running to 60 pages of turgid legal prose on the assurance of his solicitor that it accurately reflects the board's instructions, he

⁹⁴³ [1911] 1 Ch 425.

⁹⁴⁴ [1989] BCLC 498.

⁹⁴⁵ [1994] 1 BCLC 561.

may well be excused from reading it all himself. But this was an extremely simple document asking a few questions which Mr. D'Jan was the best person to answer. By signing the form, he accepted that he was the person who should take responsibility for its contents. In my view, the duty of care owed by a director at common law is accurately stated in s 214(4) of the Insolvency Act 1986. It is the conduct of –

'a reasonably diligent person having both – (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has.'

Both on the objective test and, having seen Mr. D'Jan, on the subjective test, I think that he did not show reasonable diligence when he signed the form. He was therefore in breach of his duty to the company.

*Mr. Russen said that nevertheless the company could not complain of the breach of duty because it is a principle of company law that an act authorised by all the shareholders is in law the act of the company: see *Multinational Gas and Petrochemical Co v Multinational Gas and Services Ltd* [1983] BCLC 461, [1983] Ch 258. Mr. D'Jan held 99 of the 100 issued ordinary shares and Mrs D'Jan held the other. Mr. D'Jan must be taken to have authorised the wrong answer in the proposal because he signed it himself. As for Mrs D'Jan, she had never been known to object to anything which her husband did in the management of the company. If she had known about the way he signed the form and it was too late to put the matter right the chances are that she would also have approved. She could hardly have brought a derivative action to sue her husband for negligence because he could have procured the passing of a resolution absolving himself from liability.*

*The difficulty is that unlike the *Multinational* case, in which the action alleged to be negligent was specifically mandated by the shareholders, neither Mr. nor Mrs D'Jan gave any thought to the way in which the proposal had been filled in. Mr. D'Jan did not realise that he had given a wrong answer until the insurance company repudiated. By that time the company was in liquidation. In my judgment the *Multinational* principle requires that the shareholders should have, whether formally or informally, mandated or ratified the act in question. It is not enough that they probably would have ratified if they had known or thought about it before the liquidation removed their power to do so.*

It follows that Mr. D'Jan is in principle liable to compensate the company for his breach of duty."

The duty imposed on directors is to use diligent and ordinary skills in making the assessment as to what is in the best interest of the company as a whole by considering the three factors provided in the subsection and having regard to the long-term strategy of the company, the community and environment, and the reputation of the company. No special skill or knowledge is required in the performance of the duties of the directors.

The Banking Business – Corporate Governance Directive, 2018 issued by the Bank of Ghana pursuant to its powers under section 92 of the Banks and Specialised Deposit-Taking Institution Act, 2016 (Act 930) expressly imposed a “duty of care” on the directors. “Duty of care” is defined under the Directive to mean *“to act in an informed and prudent basis in making decision”*. The specific requirements of acting on an informed and prudent basis already comes under the general requirement of due diligence as can be seen in the case of *Re D’Jan of London* above. The Directive only states this expressly.

13.17.4 Duty to exercise independent judgment

In determining what is in the interest of the company, the requirement of the Act is for directors to exercise independent judgment. Section 190(5) of Act 992 provides that *“A director shall exercise independent judgment.”* A director is therefore not to act on the instruction of another person. A good faith determination by a director that an act is or not in the best interest of a company by considering the factors provided in the section will absolve the director of liability even if it is later found that the determination is wrong. As provided above, the business judgment rule provides that even the courts will not second guess a director and held the director liable unless the director fails to consider factors that the director must consider or consider factors the director should not have considered, or after considering all the right factors, the decision taken is so unreasonable that no reasonable person will come to that conclusion. Per the section, such consideration must be based on the independent judgment of the director.

This does not exclude directors from receiving advice on specific matters. However, the advice, in the nature of legal, financial or operational advice, given to the director must be used to inform the director’s bona fide decision and not instruction based on which the director is to act.

13.17.5 Duty to act within powers and for the rightful purpose

Section 190(3) of Act 992 provides that:

“(3) A director of a company shall

(a) act in accordance with the constitution of a company, and

(b) only exercise the powers for the purposes for which the powers are conferred.”

Act 992 and the constitution the company provide for the powers on directors of a company. This includes the general authority of directors to manage the business of the company and the specific powers given that relate to the management of the business of the company as well as the manner of exercising those powers. Act 992 and the constitution of the company also impose limits on the powers of the directors in managing the business of the company. Subsection (3) of section 190 of the Act provides that the directors must act in accordance with the powers given to them under the constitution of the company and the Act. In other words, the directors must act *intra vires*. The directors must not act beyond or exceed the powers given to the directors under the constitution of the company and the Act. In addition to that, the directors must not exercise the powers for purposes other than that for which the powers have been given. That is, the powers must be exercised to manage the business of the company in the best interest of the company.

The directors cannot exceed the powers given to them under the constitution of the company or the Act even if the directors think it is in the interest of the company to do so.

In *Howard Smith v. Ampol Petroleum Ltd*⁹⁴⁶ where directors issued shares for the purpose of diluting the shareholding and removing the blocking votes of the majority shareholders, it was held not to be the “proper purpose” for the exercise of the power to issue shares which was to raise capital for the company.

In *Hogg v. Cramphorn Ltd*⁹⁴⁷, it was held that even though the directors believe the scheme would have benefited the company and preventing the acquisition was for the benefit of the company, the primary purpose was to ensure control of the company by the directors which was not the purpose for which the power was given.

Section 191(1) of Act 992 provides that “(1) *The directors shall not, without the approval of an ordinary resolution of the company, exceed the powers conferred on the director by this Act, and the constitution of the company, or exercise those powers for a purpose different from that for which those powers were conferred, although the directors may believe the exercise of those powers is in the best interest of the company.*” The duty imposed on directors is not to exceed the powers. However, in the event the directors intend to exceed the powers, the directors must obtain approval from the members by ordinary resolution. Without the approval by ordinary resolution of the company, the directors cannot exceed the power conferred on the directors, notwithstanding an honest belief on the part of the director that exceeding the powers is in the best interest of the company.

⁹⁴⁶ [1974] AC 821.

⁹⁴⁷ [1967] Ch. 254.

The directors are liable to compensate the company or any other person for the loss or damage suffered as a result of exceeding the powers conferred on the director or exercising the powers for the purpose for which the power is given.⁹⁴⁸ The liability of the directors for breach of the duty is joint and several.⁹⁴⁹ The liability is recoverable as debt in a civil action.⁹⁵⁰

13.17.6 Duty to avoid conflict of duty and interest

Section 192(1) of Act 992 provides that *“(1) Despite a provision in the constitution of a company to the contrary, a director shall not, without the consent of the company in accordance with section 193, place that director in a position in which the duties of the director to the company conflict with the personal interests or the duties to other persons ...”*. A critical duty imposed on each director is not to place himself in a position where his duties to the company conflict with his personal interest or duty he owes to another person. A director must therefore avoid a conflict of interest situation where his personal interest conflicts with the interest of the company. In addition, the director must not place himself in a situation where the duty he owes to another person conflicts with the duties he owes to the company. The Act requires the director to act in all instances in the best interest of the company. Where there is an opposing interest or the duty owed to the company conflicts with the duty owed to another person, the director will be deemed to be in a conflict of interest or duty situation respectively. The subsection requires directors not to put themselves in such a situation.

The prohibition on directors not to put themselves in a conflict of interest or duty situation cannot be derogated from based on provisions in the constitution of the company. However, the subsection excuses some conflict of interest situation by directors where the consent of the company is obtained in accordance with section 193 of the Act. Subsection (1) of section 192 of Act 992 requires that due to avoidance of conflict of interest or duty situation, directors shall not without the consent of the company:

- (a) use to the advantage of that director any money or property of the company or confidential information or special knowledge obtained by the director in his capacity as directors;⁹⁵¹
- (b) be interested directly or indirectly in a business that competes with the business of the company, except as shareholder or debenture holder of a public company; and
- (c) be personally interest directly or indirectly in a contract or transaction entered into by the company except as provided in section 194 of Act 992.

In other words, a director will be in a conflict of interest situation where the director uses information, property or money of the company for his advantage, or has an interest in a business

⁹⁴⁸ Section 191(2) of Act 992.

⁹⁴⁹ Section 191(3) of Act 992.

⁹⁵⁰ Section 191(4) of Act 992.

⁹⁵¹ The use of confidential information and special knowledge must be in accordance with section 198 of the Act.

that is similar and in competition with the business of the company, or personally interested in a transaction or contract entered into by the company. Without disclosure of that interest and obtaining the consent of the company, the director will not only be in breach of his duty not to put himself in a conflict of interest situation but will be liable to the company for the breach of the duty.

The disclosure requirement under section 193 of the Act requires the full disclosure of all material facts and the nature and extent of the directors' interest. Section 193 of Act 992 provides that:

- “(1) For the purposes of section 192, the company does not consent unless, after full disclosure of the material facts, including the nature and extent of the interests of the directors, the transaction concerned has been specifically authorised by an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or has been passed at a general meeting at which neither the director concerned nor the holders of the shares in which the director is beneficially interested, directly or indirectly, have voted as members on the resolution.*
- (2) Consent in accordance with subsection (1) may be given before or after the occurrence of the transaction to which the consent relates.*
- (3) A resolution of the company ratifying a transaction or a series of related transactions which has or have already taken place shall not be effective for the purposes of subsection (2) unless the resolution was passed not later than fifteen months after the date when the transaction or the first of those transactions took place.”*

Approval by ordinary resolution is only valid after full disclosure. The section further requires approval given must be by an ordinary resolution passed at a meeting that the director who is a member does not vote or a holder of shares that the director is beneficially interested in does not vote. The consent of the company may be given before or after the act.⁹⁵² The resolution must be passed not later than fifteen months after the transaction or the first of a series of transactions.⁹⁵³

*Commodore v. Fruit Supply (Ghana) Ltd*⁹⁵⁴ - in this case where Quarshie was held to be a *de facto* director, it was established that Quarshie received money meant for the company from a customer of the company and had a separate arrangement with the customer to sell fish made available to the customer by the company. He also deposited the money received on behalf of the company in the accounts of his private firm without accounting for the money to the company. It was held by the Court of Appeal that he was in breach of his duty not to place himself in a conflict of interest position. Lassey JA stated @ pgs. 254 to 255 and 266 as follows:

⁹⁵² Section 193(2) of Act 992.

⁹⁵³ Section 193(3) of Act 992.

⁹⁵⁴ [1977] 1 GLR 241.

“Under the doctrine of equity applicable to companies, Attoh Quarshie was not entitled in law to collect and retain for himself personally payments intended for the purposes of the company of which he was held out as a director. The general equitable principle is that a director of a company, by reason of his fiduciary position, is precluded from entering into a binding transaction on behalf of the company in which he himself has a personal interest which conflicts or may conflict with the interests of the company while he is bound, by his fiduciary duty, to protect. The normal consequence which follows from the application of the equitable doctrine is that if a person held out by a company to enter into business relations with a third party on its behalf, engages in private and separate business arrangements with the third party in such a manner as to place his own personal interests in conflict with those of the company he represents, he is not entitled in law to keep the benefit or profits for himself, unless he is allowed by the articles of association of the company so to do. A director who allows his personal interest to conflict with those of the company under the rule is accountable to the company to the extent to which he has enriched himself at the expense of the company.

In the present case Attoh Quarshie as director was allowed by the company to conclude his own private business arrangements with the defendant while he at the same time negotiated with the defendant business terms on the same lines on behalf of the company. He actually participated in the profits of the company, and, as compensation for his services to the company, Edward Ramia allowed him to have 50 per cent of the last consignment of the company's frozen fish for sale at a profit. Attoh Quarshie, under his own private arrangements with the defendant for the sale of his fish, delivered his half portion of the fish to the defendant, and directed her to pay the proceeds thereof into the account of Assatoh Ltd., his private firm.

... The question now is this: Was Attoh Quarshie allowed by law to pay himself out of moneys in his hands for the company and intended by the defendant in reduction of her indebtedness to the company? The answer would seem to me to be plain no! If he did, the legal consequences were that, unless it could be shown that the company at its board meeting approved or ratified what he had done, his fiduciary position as a director or a person held out by the company, disentitled him from keeping the payments for himself. Even though the company, acting by the managing director, Edward Ramia, in fact knew of and acquiesced in Attoh Quarshie conducting similar business privately with the defendant and receiving payments from her, the circumstance that there was some conflict between the company and the defendant as to the payments for the company's fish, and the fact that it was particularly stated in the evidence of the defendant that the payments she made to Attoh Quarshie were attributable to the company's accounts, precluded Attoh Quarshie from treating the moneys as his own. The legal position was that

although Attoh Quarshie was entitled to 50 per cent of the profits of the sale of the company's frozen fish, he was at the same time as director in the company under a legal duty not to have mixed up his share of the payments. As it was not shown in the instant case that the articles permitted him to have done so, he was an accountable person to the company for all the moneys paid to him by the defendant on the company's behalf."

In *JJ Harrison (Properties) Ltd v. Harrison*⁹⁵⁵, a director of a company acquired some land from the company at a price that reflected the fact that planning permission had been refused to develop the land. At the time of the acquisition, however, the director was aware that the prospect of planning permission being granted had improved. That awareness was not disclosed to the board at the meeting to approve the transaction. The court found that the director was in breach of his fiduciary duties to the company and held the property upon trust for the company. Accordingly, he was liable to account for the profits he made from the subsequent sale by him of the land. Chadwick LJ stated:

"I start with four propositions which may be regarded as beyond argument: (i) that a company incorporated under the Companies Acts is not trustee of its own property; it is both legal and beneficial owner of that property; (ii) that the property of a company so incorporated cannot lawfully be disposed of other than in accordance with the provisions of its memorandum and articles of association; (iii) that the powers to dispose of the company's property, conferred upon the directors by the articles of association, must be exercised by the directors for the purposes, and in the interests, of the company; and (iv) that, in that sense, the directors owe fiduciary duties to the company in relation to those powers and a breach of those duties is treated as a breach of trust..."

It follows from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust that a person who receives that property with knowledge of the breach of duty is treated as holding it upon trust for the company. He is said to be a constructive trustee of the property...

*It follows, also, from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust that, a director who is, himself, the recipient of the property holds it upon a trust for the company. He, also, is described as a constructive trustee. But, as Lord Justice Millett explained in *Paragon Finance plc v. D B Thakerar & Co* [1999] 1 All ER 400, at page 408g-409g, his trusteeship is different in character from that of the stranger. He falls into the category of persons who, in the words of Lord Justice Millett at [1999] 1 All ER 400, 408j: "... though not strictly trustees, were in an*

⁹⁵⁵ [2002] 1 BCLC 162.

analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves."

*Scottish Co-operative Wholesale Society Ltd v. Meyer*⁹⁵⁶ – the respondents were the shareholders of a partly-owned subsidiary company of the appellant. In an action for oppression by the respondents, it was alleged that the nominee directors of a partly-owned subsidiary had adopted a policy of starving the company of supplies of rayon cloth from the mill of the appellant, on which the subsidiary company was dependent. It was further alleged that the nominee directors of the company adopted a policy of passive support of the appellants by inactivity, allowing the company's trading activities to decline or vanish. The directors were held to be in breach of their duties to the subsidiary company by their inaction in failing to protect the company from the loss of business and therefore were liable to account for that loss. Viscount Simonds stated @ pgs. 70 to 71 that:

"At this time the three nominee directors of the company were aware (Mr Taylor by his own confession) of the policy of the society. It is undeniable that persons so placed may find themselves in a difficulty. But, in all the evidence, I have not been able to find the least trace that they regarded themselves as owing any duty to the company of which they were directors. They were the nominees of the society and, if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were to join in that work, and, when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they played their part by maintaining silence. That is how they conducted the affairs of the company, and it is impossible to suppose that that was not part of the deliberate policy of the society. As I have said, nominees of a parent company on the board of a subsidiary company may be placed in a difficult and delicate position. It is then the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing on their nominees the alternative of disregarding their instructions or betraying the interests of the minority. In the present case, the society pursued a different course. It was ruthless and unscrupulous in design, and it was effective in operation, and, as I have said, it was prompted by the action or inaction of the nominee directors. The company, which might have recovered its former prosperity, had "served its purpose". It could conveniently be liquidated."

*Bhullar v. Bhullar*⁹⁵⁷ - Bhullar Bros Ltd was owned by families of two brothers. Each side owned 50% of ordinary shares. The directors were Mr. Mohan Bhullar, his son Tim, Mr. Sohan Bhullar and his sons Inderjit and Jatinderjit. The company had a grocery store at 44 Springwood Street, Huddersfield. It also owned an investment property called Springbank Works, Leeds Road,

⁹⁵⁶ [1959] AC 324.

⁹⁵⁷ [2003] 2 BCLC 231; [2003] EWCA Civ 424.

which was leased to a bowling alley business called UK Superbowl Ltd. In 1998 the families began to fall out. Mohan and Tim told the board they wished for the company to buy no further investment properties. Negotiations began to split up the company, but they were unsuccessful. In 1999, Inderjit went bowling at the UK Superbowl Ltd alley. He noticed that the carpark next door (called White Hall Mill) was on sale. He set up a company called Silvercrest Ltd (owned by him and Jatinderjit) and bought, but did not tell Bhullar Bros Ltd. But Mohan and Tim found out and brought an unfair prejudice claim on the basis that Inderjit and Jatinderjit had breached their fiduciary duty of loyalty to the company. It was held that there was a clear breach of the rule that directors must avoid a conflict of interest. Jonathan Parker LJ stated:

"Like the defendant in Industrial Development Consultants Ltd v Cooley [1972] 1 WLR 223, the appellants in the instant case had, at the material time, one capacity and one capacity only in which they were carrying on business, namely as directors of the Company. In that capacity, they were in a fiduciary relationship with the Company. At the material time, the Company was still trading, albeit that negotiations (ultimately unsuccessful) for a division of its assets and business were on foot. As Inderjit accepted in cross-examination, it would have been "worthwhile" for the company to have acquired the Property. Although the reasons why it would have been "worthwhile" were not explored in evidence, it seems obvious that the opportunity to acquire the Property would have been commercially attractive to the Company, given its proximity to Springbank Works. Whether the Company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the Company to know, and it follows that the appellants were under a duty to communicate it to the Company. The anxiety which the appellants plainly felt as to the propriety of purchasing the Property through Silvercrest without first disclosing their intentions to their co-directors – anxiety which led Inderjit to seek legal advice from the Company's solicitor – is, in my view, eloquent of the existence of a possible conflict of duty and interest. I therefore agree with the judge when he said (in paragraph 272 of his judgment) that "reasonable men looking at the facts would think there was a real sensible possibility of conflict".

*Industrial Development Consultants v. Cooley*⁹⁵⁸ - The plaintiffs were one of a group of companies that offered to large industrial enterprises, both in the public and private sector, comprehensive construction services which included the services of architects, engineers, project managers, construction analysts and others involved in such work. The defendant was an architect of considerable distinction and attainment in his own sphere; he had worked in the gas industry for some 17 years, and prior to his appointment as managing director of the plaintiffs had been the chief

⁹⁵⁸ [1972] 2 All ER 162.

architect for the West Midlands Gas Board. The success which the plaintiffs had attained was largely in the private sector and they were anxious to enter the public sector. Because of the defendant's connections and contacts in the gas industry the chairman of the group offered the defendant the post of managing director of the plaintiffs. The defendant accepted and the appointment took effect from 5 February 1968. No service agreement was signed however with the result that whilst the defendant was with the plaintiffs there was no express provision as to notice and no covenants of any kind restrictive or otherwise. Within days of joining the plaintiffs, the defendant embarked on negotiations with the Eastern Gas Board in an effort to discharge his duty to the plaintiffs. In 1968 the Eastern Gas Board were contemplating building four depots and had not decided whether to farm out the work to other architects or do it themselves. The plaintiffs were interested in this work and with the aid of the defendant, they attempted to get at least one of the depots. That attempt failed. It became evident that the Eastern Gas Board disliked the set-up of the plaintiffs' organisation and were not prepared to deal with the plaintiffs in any capacity. In May 1969 the Eastern Gas Board finally decided on the location of their four depots. In addition, they decided to build a central store to support the four depots. At that time a new deputy chairman of the Eastern Gas Board was appointed and during discussions with his colleagues at the board about the projects the defendant's name was mentioned. The deputy chairman was of the opinion that the defendant was the right man for the job and so he telephoned him at his home and arranged a meeting. At the meeting, the defendant soon realised that he had a good chance of getting the work from the Eastern Gas Board for himself. The board made it clear that they were only interested in employing the defendant privately and that they did not want any trouble with his employers. They were also in a hurry to proceed with the projects. The defendant realised that if he was to get this work, he had to free himself from the plaintiffs as soon as possible. He, therefore, made an appointment to see the group chairman and at the interview told him that he wanted to resign on account of his health. Because of the defendant's representations as to the state of his health the group chairman got the impression that the defendant was on the verge of a breakdown and so agreed to release him quickly. The representations made by the defendant about his health were to his knowledge untrue. The defendant ceased to be managing director of the plaintiffs from 1 August. On 6 August the Eastern Gas Board wrote to the defendant offering him employment as project manager for four projects, the defendant to be totally responsible for the design and supervision of the four projects. This work was in substance the same work that the plaintiffs had unsuccessfully attempted to obtain in 1968. In an action by the plaintiffs for an account for breach of fiduciary duty, the defendant denied that there was any fiduciary duty or any breach of such duty, contending that if there were a remedy it lay in damages but that the plaintiffs had suffered no damage since they would not have obtained the work for themselves in any case. Held: (i) While the defendant was managing director of the plaintiffs a fiduciary relationship existed between him and the plaintiffs; accordingly, information that came to him while he was managing director and was of concern to the plaintiffs was information which it was his duty to disclose to the plaintiffs. He was under a duty therefore to disclose all information that he received in the course of his dealings with the gas board. Instead, he

had embarked on a deliberate course of conduct which had put his personal interests as a potential contracting party with the gas board in direct conflict with his pre-existing and continuing duty as managing director to the plaintiffs. He was therefore in breach of his fiduciary duty to the plaintiffs in failing to pass on all the relevant information received in the course of his dealings with the gas board and in guarding it for his own personal purposes and profit. (ii) Because of his breach of duty, the defendant was liable to account to the plaintiffs for all the benefit he had received or would receive under the contract with the gas board. The question of whether the benefit of the contract would have been obtained for the plaintiffs but for the defendant's breach of fiduciary duty was irrelevant. It was therefore irrelevant that, as a result of the order to account, the plaintiffs would receive a benefit which they would not otherwise have received.

Simtel Communications Ltd v. Rebak and others⁹⁵⁹ - Simtel was set up by the defendant and Mr. Djanogly. Simtel was also financed by Merchant Finance Holding Ltd, wholly owned by Mr. Djanogly. Simtel who traded for sometimes entered into difficulties and a receiver was appointed. In an action against the defendants, it was alleged among other wrongdoings that Rebak conspired with Mr Chan (a former employee) and others to set up a business in direct competition with Simtel. On that issue, it was held that Rebak was in breach of his fiduciary duty. The court established that "(i) I am satisfied that Mr Rebak and Mr Chan did keep secret from Mr Djanogly the extent of Mr Rebak's involvement prior to 14th January 2004, (ii) Mr Rebak did actively pursue setting up a business with Mr Chan prior to January 2004 and (iii) Mr Djanogly was not informed at the 14th January meeting that the new company was to have a mobile phone element; in fact, at the meeting, Mr Rebak carefully concealed this important fact from Mr Djanogly." The court examined the specific deals entered into by Rebak for which he must account to Simtel due to the breach of his fiduciary duty to the Simtel.

Asafu Adjaye v. Agyekum and others⁹⁶⁰ - there were three directors of a construction company, Asakum Engineering and Construction Co. Ltd. In an action by one shareholder-director, who was also an executive director, against the other two shareholder-directors, including the managing director, for oppression, it was alleged by the respondent had in breach of his duty to the company set up another company in competition with the company, it was held by Osei-Hwere JA @ pgs. 397 to 398 as follows:

"The contention by the appellants that the respondent's application was seethed in bad faith did not persuade the learned judge. That was quite unfortunate. Although he found that the respondent had formed a new company with other persons and that the objects of that company are in competition with those of the seventh appellant yet he seemed to have found nothing wrong with his conduct. He said:

⁹⁵⁹ [2007] 2 BCLC 202.

⁹⁶⁰ [1984-86] 1 GLR 382.

"The law does not forbid a director of one company from being the director of other companies. All that is required of such a director is for him to disclose his said interest; he must refrain from voting on contracts in which he has an interest; or whose performance conflicts with his other interests".

Section 203 of Act 179 defines the duties of directors. He stands in a fiduciary relationship towards the company and he is required to observe the utmost good faith towards the company in any transaction with it or on its behalf. He is to act in the best interests of the company to further its business and promote the purpose for which it was formed. Under section 205 he is not, without the consent of the company, to place himself in a position in which his duties to the company conflict or may conflict with his personal interests. Under section 206 he has no consent unless he makes full disclosure of all material facts, including the nature and extent of his interest, etc.

The respondent is not a mere dormant or cosmetic director. He is an executive director who has combined his skill and expert knowledge with those of the first appellant to promote the purposes of the business for which the seventh appellant company was formed. It is, in our view, the apogee of breach of trust for the respondent to set up a rival company unknown to the seventh appellant company. The ratio decidendi as gleaned from the case of *In re Thomson* [1930] Ch. 203 is that a trustee is not entitled to sever his connections with the business he controls in trust and compete in similar business.

This is exactly what the respondent has prepared himself to do. In the Form 3 filed with the Registrar of Companies the directors of Ladco are the respondent, Peter Kwaku Sarfo, and John Kwaku Adjei. At the time the Form 3 was filed Peter Kwaku Sarfo was the purchasing officer of the seventh appellant company and John Kwaku Adjei was also the plant manager of the company's irrigation project. This Sarfo, from the affidavits, is the gentleman against whom the first appellant as managing director had intended to take disciplinary action but the respondent had stoutly defended. The regulations of Ladco Ltd. were filed on 21 December 1982. It would seem, therefore, that the presentation of the names of Peter Kwaku Sarfo and John Kwaku Adjei as directors of Ladco Ltd. was to induce their breach of contract with the seventh appellant company.

It is significant to note that the respondent's wranglings with the first appellant started from early 1983 after Ladco Ltd. had been registered and culminated in the respondent's application filed on 15 December 1983. It becomes quite obvious, or at least one cannot escape the conclusion, that the application was filed for a collateral purpose detrimental to the interests of the seventh appellant company."

Part of the duty to avoid conflict of interest will be the duty not to accept benefits from third parties.

*Regal (Hastings) Ltd v. Gulliver and others*⁹⁶¹ - in this case, the action was based on the allegation that the directors and the solicitor had used their position to acquire the shares in Amalgamated, a subsidiary of Regal, for themselves. That they sold the shares at a very substantial profit which they have kept. That since they had obtained that profit by using their offices as directors and solicitor and, they were accountable for it to Regal, and that in so acting they had placed themselves in a position in which their private interests were likely to conflict with their duty to Regal. It was held that the directors were liable to account for the profit notwithstanding that they may not have acted mala fide or fraudulently or in the interest of the company. That they are liable on the ground that a person in a fiduciary relationship obtains profits in acting on behalf of a beneficiary. The liability, therefore, arises simply due to the position in which the profit was made. Lord Russell of Killowen stated @ pg. 9 that:

“The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.”

Subsection (2) of section 192 of Act 992 provides that “(2) *The duty of a director to avoid conflict is not infringed if:*

- (a) the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or*
- (b) the matter has been authorised by the directors.”*

The subsection limits the scope of what may be considered as conflict of interest situations. The section thus permits the application of the reasonable standard to the determination as to whether a situation in which the director finds himself amounts to conflict of interest or duty situation. In that respect, a director who finds himself in a conflict situation, but the situation is unlikely to give rise to conflict, the director may be excused. In addition, an ordinary conflict of interest situation may also be excused where the authorisation of the directors is obtained. Subsection (3) and (4) of section 192 of the Act provides for the requirement of the authorisation from the directors that excuses conflict of interest situations.

⁹⁶¹ [1942] UKHL 1; [1967] 2 AC 134.

Subsections (3) and (4) of section 192 of Act 992 provides:

“(3) Authorisation may be given by the directors

- (a) where the company is a private company and nothing in the constitution of the company invalidates the authorisation, by the matter being proposed to and authorised by the directors; or*
- (b) where the company is a public company and the constitution of the company includes provisions enabling the directors to authorise the matter being proposed to and authorised by the directors in accordance with the constitution.*

(4) The authorisation is effective only if

- (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and*
- (b) the matter was agreed to without the voting of the directors or would have been agreed to if the votes of the directors had not been counted.”*

For the authorisation to be effective, in the case of a private company, the constitution of the company must not prohibit the directors from giving such authorisation. For a public company, the constitution of the company must expressly empower the directors to give such authorisation to regularise a conflict of interest situation. The difference between a private company and a public company is that for a private company there is no need for the constitution to empower the directors, they have the power unless they are expressly prohibited, whilst for a public company, the constitution must empower the director. In addition, a quorum must be attained without the director in question and the matter was agreed upon without the vote of that the director.

The Act prohibits waiver of liabilities arising out of a breach of conflict of interest rules or from observing the rules of conflict of law. Thus, there cannot be a resolution, agreement or provision in the constitution of a company that seeks to relieve directors of liability for conflict of interest situation or exempt the director from observing the rules on conflict of interest. Section 190(6) of Act 992 provides that *“(6) A provision, whether contained in the constitution of a company, or in a contract, or in a resolution of a company shall not relieve the director from a liability incurred as a result of a provision of this section.”*

13.17.7 Duty to declare interest in contracts in which directors are interested

Act 992 permits directors to enter into contracts with the company except if prohibited by the constitution of the company. The Act, however, require compliance with stated conditions for the contract to be valid and enforceable. Once such conditions are complied with, the company cannot avoid the contract and the director will not be liable to account for benefits arising from the contract. Section 194 of Act 992 provides: *“(1) Except as otherwise provided in the constitution of a company, a director, despite section 192 is entitled to enter into a contract with the company and, subject to compliance with sections 190 and with subsections (2) and (7) of this section, the contract or any other contract by the company in which a director is in any way interested, shall not be liable to be avoided nor is a director liable to account for a profit made by reason of the director holding that office or of the fiduciary relationship so established.”* Directors can therefore enter into a contract with the company. This includes contracts of employment by executive directors, contracts for services, goods and works that the director may be personally interested in.

Subsection (2) of section 194 of Act 992 provides for one of the conditions that must be satisfied for the contract in which the director is interested to be valid. The director must disclose his interest in the contract for that contract to be valid. Section 194(2) of the Act provides that *“(2) A director who is directly or indirectly, interested in a contract or proposed contract entered into or to be entered into by or on behalf of the company shall declare the nature and extent of the interest at a meeting of the directors of the company.”* Disclosure is thus an important condition required for the validity of the contract. Failure to disclose the interest will render the contract a voidable contract and the director can be held liable to account for profit made. The requirement under the subsection is for the director to disclose the nature and extent of the interest of the director, whether the interest is direct or indirect. The non-disclosure will lead to the repudiation of the contract by the company.

*Aberdeen Railway Company v. Blaikie Brothers*⁹⁶² - in this case, Blaikie Bros had a contract with Aberdeen Railway Company to make iron chairs at £8.50 a ton. Blackie Brothers sued to enforce the contract. Aberdeen Railway Company argued they were not bound because at the time of entering into the contract, Sir Thomas Blaikie, the Managing Director of Blaikie Brothers, was also the chairman of the board of directors of Aberdeen Railway Company. The contract was thus affected by conflict of interest and not enforceable against Aberdeen Railway Company. Sections 40-1 of the Companies Act 2006 gives directors unlimited capacity to bind the company when the directors act in good faith provided that the act is within the powers of the company. But if an action by a director is beyond their authority or in breach of some fiduciary obligation, then they can be made personally liable. It was held that Aberdeen Railway Company was not bound by the contract. In so holding, Lord Cranworth L.C. stated in relation to the position occupied by the director @ pg. 399 as follows:

⁹⁶² (1854) 1 Macq HL 461.

“This, therefore, brings us to the general question—whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner?

The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust, which it was impossible to obtain. It may sometimes happen that the terms on which a truster has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted.”

In *JJ Harrison (Properties) Ltd v. Harrison*⁹⁶³, the court of appeal states the position of breach of duty to disclose by the trial court as follows:

*“The judge delivered a written judgment on 27 November 2000. He held that there had been a failure by Mr. Harrison, in February 1986, to disclose to his co-directors of Harrison Properties material facts in relation to the value of the land which he was buying; in particular, a failure to disclose that the planning position had changed, that there was a strong prospect that planning permission would be granted for the conversion of the barn and the development of the remainder of the site, and that Mr. Johnston’s valuation, made in July 1985, had taken no account of development potential and so could not be relied upon. In the light of that failure to disclose material facts, Mr. Harrison was in breach of the duties imposed upon him as a director by regulation 84(1) of Part 1 of Table A in the First Schedule to the Companies Act 1948 and section 199 of that Act (now section 317 of the 1985 Act). He was subject to the rule identified in *Aberdeen Railway Company v. Blaikie Bros* (1854) Macq. 461 see, in particular, the passage in the speech of Lord Cranworth, Lord Chancellor, at page 471, cited by Viscount Sankey in *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All ER 378, 382A-B, [1967] 2 AC 134n, 138. Subject*

⁹⁶³ [2002] 1 BCLC 162.

to any equitable defences, Harrison Properties was entitled to set the transaction aside or to other appropriate relief without any enquiry whether the sale was on proper or fair terms.”

The time of disclosure is the meeting at which the contract is first proposed for consideration. However, if the director is not present at the time or aware of his interest, the disclosure must be made at the first meeting after which the director becomes aware of his interest. A general notice of the interest of a director in a company or a firm will satisfy the disclosure requirement provided the notice states the nature and extent of the interest of the director in the company or firm, at the time of consideration of the proposed contract, the interest is not greater than disclosed, the notice was given at a meeting or brought to the attention of directors, and the notice is valid for twelve months at a time.

The law requires the other directors not to enter into a contract if the other directors are aware that a director of a company or associated company is materially interested⁹⁶⁴ in the contract unless a resolution is passed by the directors approving the contract. In addition to the disclosure requirement, before the consideration of the proposed contract in which a director is interested, the director must ensure that in addition to the disclosure requirement, the interest is entered in the Interest Register in accordance with section 195 of the Act.

A director who has disclosed his interest is required to observe the duty not to be present or vote at the meeting in which the contract is being considered. The repealed Companies Act, 1963 permits the director to be present but not vote on the matter, but the new Companies Act, 2019 prohibit the director from being present in the meeting considering the matter. As the director is not present, he is also not permitted to vote on the matter. The requirement is, however, not applicable to arrangements for granting security or indemnity to a director for obligations related to the company or a contract where the director subscribe for or underwrite shares or debentures of the company.

Directors acting in a professional capacity

As indicated, directors are permitted to enter into a contract with the company provided the directors satisfy the disclosure requirement. The Act expressly permits directors to act personally or through a firm in a professional capacity. Section 197 of Act 992 provides that ***“Except as otherwise provided in the constitution of a company a director may, despite section 192, act personally or by a firm of that director in a professional capacity for the company, except as auditor, and the director or the firm of the director is entitled to proper remuneration for professional services as if the***

⁹⁶⁴ Subsection (10) of section 194 of Act 992 provides that: ***“(10) For the purposes of this section, an interest merely as holder of debentures, or of not more than two percent of the shares or a class of shares, of a public company is not a material interest.”***

director were not a director, provided that disclosure is made under subsection (6) of section 194."

The section does not only permit directors to act in a professional capacity but requires that the director be remunerated appropriately. The directors can act in any position in the company except as auditor of the company. The director can either act personally or through a firm in which the director is a partner or shareholder. The constitution of a company can prohibit directors from acting in any professional capacity in the company, in which case any such purported contract will be voidable and the director held liable to account for any money received pursuant to such contract to the company. Where the constitution of a company does not provide any such prohibition, in entering into the contract pursuant to which the director will act in a professional capacity to the company, the director must comply with the disclosure requirement under the Act, and should not be present when the directors discuss the matter and abstain from voting on the matter. Any breach of this requirement will entitle the company to avoid the contract and the director may be liable to account and compensate the company if the company incurs a loss. The director continues to be under the fiduciary duty imposed.

Rolled Steel Products (Holdings) Ltd v. British Steel Corp⁹⁶⁵ - Rolled Steel Products Ltd gave security to guarantee the debts of a company called SSS Ltd to British Steel Corporation. This was a purpose that did not benefit Rolled Steel Products Ltd. Moreover, Rolled Steel's director, Mr Shenkman was interested in SSS Ltd (he had personally guaranteed debt to British Steel's subsidiary Colvilles, to which SSS Ltd owed money). The company was empowered to grant guarantees under its articles but approval of the deal was irregular because Mr. Shenkman's personal interest meant his vote should not have counted for the quorum at the meeting approving the guarantee. The shareholders knew of the irregularity, and so did British Steel. Rolled Steel Products wanted to get out of the guarantee and argued that it was unenforceable either because it was ultra vires or because the guarantee had been created without proper authority. At first instance Vinelott J held British Steel's knowledge of the irregularity rendered the guarantee ultra vires, void and incapable of validation with the members' consent. British Steel appealed. It was held by the Court of Appeal held that the transaction was not ultra vires and void. Simply because a transaction is entered for an improper purpose does not make it ultra vires. On whether the lack of failure to disclose affects reliance on the Turquand's rule to protect the third party, it was indicated that British Steel knew of the irregularity, could not rely on a presumption of regularity in the company's internal management. The import of the judgment was that the failure to disclose render ineffective the authorisation given, however, the constructive knowledge of British Steel prevented them from relying on the presumption of regularity.

⁹⁶⁵ [1986] Ch 246.

Interest Register

Act 992, in addition to maintaining the disclosure requirement in the repealed Act, provided for an additional requirement where the interest disclosed must be entered in a specific register called the Interests Register kept for that purpose. Section 195 of the Act provides that:

- “(1) A director of a company who has an interest that is likely to create a conflict of interest between that director and the company shall*
- (a) cause to be entered that interest in the Interests Register established under section 196; and*
 - (b) disclose that interest to the Board of the company at a meeting or by written notice given to the directors immediately after becoming aware of the fact of that interest.*
- (2) The director shall disclose the nature and extent of the interest.*
- (3) A director who fails to comply with a provision of this section commits an offence and is liable on summary conviction to a fine of not less than two hundred and fifty penalty units and not more than five hundred penalty units.”*

The section makes it mandatory for the director not only to disclose but to ensure the interest disclosed should be entered into the Interests Register. The company must maintain the Interests Register in accordance with section 196 of the Act.

Section 196 of Act 992 provides:

- “(1) A company shall maintain an Interest Register which shall record interests that directors disclose under subsection (6) of section 194.*
- (2) The Interests Register shall state the place where any document that contains the details of the interest may be inspected.*
 - (3) The Interests Register shall be kept at the same place as the register of members maintained in accordance with section 35.*
 - (4) The Interests Register shall be opened for inspection during business hours, subject to the reasonable restriction that the constitution of the company may impose.*
 - (5) The Interests Register shall be opened for inspection*
 - (a) not less than two hours in each day, other than a Saturday, a Sunday or a public holiday; and*
 - (b) during the continuance of a general meeting to a person attending the meeting.*
 - (6) The provisions of this section shall not apply if the members of a company by ordinary resolution so determine.*

- (7) Where a company or an officer of a company fails to comply with this section, the company and every officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units and if an inspection required under subsection (5) is refused, the Court may by order compel an immediate inspection of the register."*

The maintenance of the Interests Register is mandatory and the law imposes a fine on the company and its officers for failure to maintain the Interests Register. However, the members of a company by ordinary resolution may dispense with the requirement to maintain Interests Register.

13.17.8 Duty to keep company information confidential and not to use confidential information or special knowledge for a purpose other than the company's business

Directors of a company are under a duty to keep company information confidential and not to make use of that information for any purpose other than for the purpose of promoting the business of the company in a manner that is in the best interest of the company. Failure to keep company information confidential or making use of the information other than for the company's business is a breach of the duty imposed on the directors of a company. Section 198 of Act 992 provides that:

- "(1) A director of a company who has information in the capacity of that director as a director or employee of the company, being information that would not otherwise be available to that director shall not disclose that information to any person, or make use of or act on the information, except*
- (a) for the purposes of the company;*
 - (b) as required by law;*
 - (c) in accordance with subsection (2); or*
 - (d) in any other circumstances*
 - (i) authorised by the constitution of that company; or*
 - (ii) approved by the company by a written resolution circulated to all the members and signed by three fourths of all members entitled to attend and vote on the resolution at a general meeting; or*
 - (iii) approved by the company by an ordinary resolution of the company passed at a general meeting at which neither the director concerned, nor the holder of any share in which the director is beneficially interested, directly or indirectly, has voted as member on the resolution or where the holder has voted and the vote is not counted.*
- (2) The approval under subparagraph (iii) of paragraph (d) may be given before or after the occurrence of the transaction to which the approval relates.*

- (3) *The Board may authorise a director to disclose, make use of, or act on information where the board is satisfied that to do so is not likely to affect the company.*
- (4) *A director of a company may, if authorised by the Board under subsection (3), disclose information to*
- (a) a person whose interests the director represents; or*
 - (b) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the powers and duties of the director,*
- subject to the director entering the particulars of the authorisation and the name of the person to whom the information is disclosed in the Interests Register."*

The general duties imposed on directors of a company under this section is first to keep company information confidential and secondly not to make use of that information except for the purpose of the company. The duties are not imposed on all company information but company information that the director obtained in his capacity as director or employee of the company that he would not otherwise have obtained. The director is only permitted to disclose or make use of the information for the purpose of the company or in accordance with the law or subject to obtaining approval. The approval may be given by:

- (a) authorisation in the constitution of the company
- (b) written resolution signed by three fourth of the members of the company
- (c) ordinary resolution of the company passed at a general meeting that the director who is a member did not vote or a member with shares that the director is interested in did not vote.
- (d) authorisation by board provided the authorisation can only be given if the board is satisfied the disclosure or use will not adversely affect the company.

Any disclosure or use of the company information in breach of the above requires the director to account to the company for profit made.⁹⁶⁶

Bhullar v. Bhullar⁹⁶⁷ - Bhullar Bros Ltd was owned by families of two brothers. Each side owned 50% of ordinary shares. The directors were Mr. Mohan Bhullar, his son Tim, Mr. Sohan Bhullar and his sons Inderjit and Jatinderjit. The company had a grocery store at 44 Springwood Street, Huddersfield. It also owned an investment property called Springbank Works, Leeds Road, which was leased to a bowling alley business called UK Superbowl Ltd. In 1998 the families began to fall out. Mohan and Tim told the board they wished for the company to buy no further investment properties. Negotiations began to split up the company, but they were unsuccessful. In 1999, Inderjit went bowling at the UK Superbowl Ltd alley. He noticed that the carpark next door (called White

⁹⁶⁶ Section 198(5) of Act 992.

⁹⁶⁷ [2003] 2 BCLC 231; [2003] EWCA Civ 424.

Hall Mill) was on sale. He set up a company called Silvercrest Ltd (owned by him and Jatinderjit) and bought, but did not tell Bhullar Bros Ltd. But Mohan and Tim found out and brought an unfair prejudice claim on the basis that Inderjit and Jatinderjit had breached their fiduciary duty of loyalty to the company. It was held that there was a clear breach of the rule that directors must avoid a conflict of interest. Jonathan Parker LJ stated:

"Like the defendant in Industrial Development Consultants Ltd v Cooley [1972] 1 WLR 223, the appellants in the instant case had, at the material time, one capacity and one capacity only in which they were carrying on business, namely as directors of the Company. In that capacity, they were in a fiduciary relationship with the Company. At the material time, the Company was still trading, albeit that negotiations (ultimately unsuccessful) for a division of its assets and business were on foot. As Inderjit accepted in cross-examination, it would have been "worthwhile" for the company to have acquired the Property. Although the reasons why it would have been "worthwhile" were not explored in evidence, it seems obvious that the opportunity to acquire the Property would have been commercially attractive to the Company, given its proximity to Springbank Works. Whether the Company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the Company to know, and it follows that the appellants were under a duty to communicate it to the Company. The anxiety which the appellants plainly felt as to the propriety of purchasing the Property through Silvercrest without first disclosing their intentions to their co-directors – anxiety which led Inderjit to seek legal advice from the Company's solicitor – is, in my view, eloquent of the existence of a possible conflict of duty and interest. I therefore agree with the judge when he said (in paragraph 272 of his judgment) that "reasonable men looking at the facts would think there was a real sensible possibility of conflict".

*Industrial Development Consultants v. Cooley*⁹⁶⁸ - The plaintiffs were one of a group of companies that offered to large industrial enterprises, both in the public and private sector, comprehensive construction services which included the services of architects, engineers, project managers, construction analysts and others involved in such work. The defendant was an architect of considerable distinction and attainment in his own sphere; he had worked in the gas industry for some 17 years, and prior to his appointment as managing director of the plaintiffs had been the chief architect for the West Midlands Gas Board. The success which the plaintiffs had attained was largely in the private sector and they were anxious to enter the public sector. Because of the defendant's connections and contacts in the gas industry the chairman of the group offered the defendant the post of managing director of the plaintiffs. The defendant accepted and the appointment took effect

⁹⁶⁸ [1972] 2 All ER 162.

from 5 February 1968. No service agreement was signed however with the result that whilst the defendant was with the plaintiffs there was no express provision as to notice and no covenants of any kind restrictive or otherwise. Within days of joining the plaintiffs, the defendant embarked on negotiations with the Eastern Gas Board in an effort to discharge his duty to the plaintiffs. In 1968 the Eastern Gas Board were contemplating building four depots and had not decided whether to farm out the work to other architects or do it themselves. The plaintiffs were interested in this work and with the aid of the defendant, they attempted to get at least one of the depots. That attempt failed. It became evident that the Eastern Gas Board disliked the set-up of the plaintiffs' organisation and were not prepared to deal with the plaintiffs in any capacity. In May 1969 the Eastern Gas Board finally decided on the location of their four depots. In addition, they decided to build a central store to support the four depots. At that time a new deputy chairman of the Eastern Gas Board was appointed and during discussions with his colleagues at the board about the projects the defendant's name was mentioned. The deputy chairman believed that the defendant was the right man for the job and so he telephoned him at his home and arranged a meeting. At the meeting, the defendant soon realised that he had a good chance of getting the work from the Eastern Gas Board for himself. The board made it clear that they were only interested in employing the defendant privately and that they did not want any trouble with his employers. They were also in a hurry to proceed with the projects. The defendant realised that if he was to get this work, he had to free himself from the plaintiffs as soon as possible. He, therefore, made an appointment to see the group chairman and at the interview told him that he wanted to resign on account of his health. Because of the defendant's representations as to the state of his health the group chairman got the impression that the defendant was on the verge of a breakdown and so agreed to release him quickly. The representations made by the defendant about his health were to his knowledge untrue. The defendant ceased to be managing director of the plaintiffs from 1 August. On 6 August the Eastern Gas Board wrote to the defendant offering him employment as project manager for four projects, the defendant to be totally responsible for the design and supervision of the four projects. This work was in substance the same work that the plaintiffs had unsuccessfully attempted to obtain in 1968. In an action by the plaintiffs for an account for breach of fiduciary duty, the defendant denied that there was any fiduciary duty or any breach of such duty, contending that if there were a remedy it lay in damages but that the plaintiffs had suffered no damage since they would not have obtained the work for themselves in any case. Held: (i) While the defendant was managing director of the plaintiffs a fiduciary relationship existed between him and the plaintiffs; accordingly, information that came to him while he was managing director and was of concern to the plaintiffs was information which it was his duty to disclose to the plaintiffs. He was under a duty therefore to disclose all information that he received in the course of his dealings with the gas board. Instead, he had embarked on a deliberate course of conduct which had put his personal interests as a potential contracting party with the gas board in direct conflict with his pre-existing and continuing duty as managing director to the plaintiffs. He was therefore in breach of his fiduciary duty to the plaintiffs in failing to pass on all the relevant information received in the course of his dealings with the gas board and in guarding it for his own

personal purposes and profit. (ii) Because of his breach of duty, the defendant was liable to account to the plaintiffs for all the benefit he had received or would receive under the contract with the gas board. The question of whether the benefit of the contract would have been obtained for the plaintiffs but for the defendant's breach of fiduciary duty was irrelevant. It was therefore irrelevant that, as a result of the order to account, the plaintiffs would receive a benefit which they would not otherwise have received.

13.17.9 Duty not to compete against the company

As part of the duties of directors of a company not to place that director in a position in which the duties of the director to the company may conflict with the personal interests or the duties to other persons, the director is not to be interested directly or indirectly in a business which competes with that of the company.⁹⁶⁹ Directors cannot, therefore, set up another business that is in competition with the business of the company. The director cannot also be a shareholder or director of another company which is in competition with the company. The law, however, permits a director to be a shareholder or debenture holder in a public company that competes with the business of the company to which the person is a shareholder.

*Asafu Adjaye v. Agyekum and others*⁹⁷⁰ - there were three directors of a construction company, Asakum Engineering and Construction Co. Ltd. In an action by one shareholder-director, who was also an executive director, against the other two shareholder-directors, including the managing director, for oppression, it was alleged by the respondent had in breach of his duty to the company set up another company in competition with the company, it was held by Osei-Hwere JA @ pgs. 397 to 398 as follows:

"The contention by the appellants that the respondent's application was seethed in bad faith did not persuade the learned judge. That was quite unfortunate. Although he found that the respondent had formed a new company with other persons and that the objects of that company are in competition with those of the seventh appellant yet he seemed to have found nothing wrong with his conduct. He said:

"The law does not forbid a director of one company from being the director of other companies. All that is required of such a director is for him to disclose his said interest; he must refrain from voting on contracts in which he has an interest; or whose performance conflicts with his other interests".

Section 203 of Act 179 defines the duties of directors. He stands in a fiduciary relationship towards the company and he is required to observe the utmost good faith towards the company in any transaction with it or on its behalf. He is to act

⁹⁶⁹ Section 192(1)(b) of Act 992.

⁹⁷⁰ [1984-86] 1 GLR 382.

in the best interests of the company to further its business and promote the purpose for which it was formed. Under section 205 he is not, without the consent of the company, to place himself in a position in which his duties to the company conflict or may conflict with his personal interests. Under section 206 he has no consent unless he makes full disclosure of all material facts, including the nature and extent of his interest, etc.

*The respondent is not a mere dormant or cosmetic director. He is an executive director who has combined his skill and expert knowledge with those of the first appellant to promote the purposes of the business for which the seventh appellant company was formed. It is, in our view, the apogee of breach of trust for the respondent to set up a rival company unknown to the seventh appellant company. The ratio decidendi as gleaned from the case of *In re Thomson* [1930] Ch. 203 is that a trustee is not entitled to sever his connections with the business he controls in trust and compete in similar business.*

This is exactly what the respondent has prepared himself to do. In the Form 3 filed with the Registrar of Companies the directors of Ladco are the respondent, Peter Kwaku Sarfo, and John Kwaku Adjei. At the time the Form 3 was filed Peter Kwaku Sarfo was the purchasing officer of the seventh appellant company and John Kwaku Adjei was also the plant manager of the company's irrigation project. This Sarfo, from the affidavits, is the gentleman against whom the first appellant as managing director had intended to take disciplinary action but the respondent had stoutly defended. The regulations of Ladco Ltd. were filed on 21 December 1982. It would seem, therefore, that the presentation of the names of Peter Kwaku Sarfo and John Kwaku Adjei as directors of Ladco Ltd. was to induce their breach of contract with the seventh appellant company.

It is significant to note that the respondent's wranglings with the first appellant started from early 1983 after Ladco Ltd. had been registered and culminated in the respondent's application filed on 15 December 1983. It becomes quite obvious, or at least one cannot escape the conclusion, that the application was filed for a collateral purpose detrimental to the interests of the seventh appellant company."

*Simtel Communications Ltd v. Rebak and others*⁹⁷¹ - Simtel was set up by the defendant and Mr. Djanogly. Simtel was also financed by Merchant Finance Holding Ltd, wholly owned by Mr. Djanogly. Simtel who traded for sometimes entered into difficulties and a receiver was appointed. In an action against the defendants, it was alleged among other wrongdoings that Rebak conspired with Mr Chan (a former employee) and others to set up a business in direct competition with Simtel. On that issue, it was held that Rebak was in breach of his fiduciary duty. The court established that "(i) I am satisfied that Mr Rebak and Mr Chan did keep secret from Mr Djanogly the extent of Mr

⁹⁷¹ [2007] 2 BCLC 202.

Rebak's involvement prior to 14th January 2004, (ii) Mr Rebak did actively pursue setting up a business with Mr Chan prior to January 2004 and (iii) Mr Djanogly was not informed at the 14th January meeting that the new company was to have a mobile phone element; in fact, at the meeting, Mr Rebak carefully concealed this important fact from Mr Djanogly." The court examined the specific deals entered into by Rebak for which he must account to Simtel due to the breach of his fiduciary duty to the Simtel.

The above duty will not be infringed upon if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or authorisation is granted to the directors upon full disclosure in accordance with the Act.

13.14 Liabilities for breach of director's duties and enforcement of liabilities

The directors of a company are mandated by the Act to observe the fiduciary duties imposed on them under Act 992. The breach of those duties imposes liabilities on the directors. From the perspective of the persons affected by the breach and permitted by the Act to take action, these are the remedies provided by the Act for breach of the duties imposed on the directors. The duties are mandatory and directors are not permitted to derogate from the imposed statutory duties. A breach of the duties gives rise to civil liabilities imposed on the directors under the Companies Act, 2019. Even though section 199 of the Act is titled civil liabilities for breach of duty, it should be noted that the other sections of the Act, which imposes the duties on directors, state specific liabilities on a director for breach of those duties. A full understanding of the liabilities imposed on directors of a company for breach of duties stated under the Act must look at the specific duties and consequences under the specific sections imposing the duties in addition to section 199 of the Act. The following liabilities are imposed for breach of duties under the Act.

13.14.1 Compensation

A breach of duties imposed on directors resulting in loss to the company is required to be compensated personally by the director of the company whose breach of duty resulted in the loss. Section 199(a) of Act 992 provides that *"Where a director commits a breach of duty under sections 190 to 192, (a) the director and any other person who knowingly participated in the breach are liable to compensate the company for the loss the company suffers as a result of the breach"* A breach of the duty to act in utmost good faith, to act in the best interest of a company, to act in a manner a faithful, diligent, careful and ordinary skilful director will act, to exercise powers in accordance with the Act and the constitution of the company, and for the purposes for which the powers are given, to act within the scope of the powers given, or the breach of prescription on conflict of interest, will result in the director being liable to compensate the company for loss suffered as a result of the breach.

In *Dorchester Finance Ltd and another v. Stebbing and Others*⁹⁷², it was held that the directors were negligent and must compensate the company for damage suffered.

Not only can the company maintain an action for damages but can also recover from directors the benefit received in breach of the duties. Under section 200(1) of Act 992, it is stated that:

- “(1) Proceedings may be instituted by the company or by a member of the company,*
(a) enforce the liabilities referred to in section 199;
(b) restrain a threatened breach of a duty under sections 190 to 192; or
(c) recover from a director of the company a property of the company.”

In *Guinness PLC v. Saunders*⁹⁷³, where the company paid money to a director under an agreement with the company entered into when the director breached his duty to disclose, it was held that the director must refund the money to the director.

Under section 199(a) of Act 992, not only are the directors in breach liable to compensate the company but *“any other person who knowingly participated in the breach”* is liable to compensate the company for the loss suffered as a result of the breach. The person other than the director who can be held liable must have participated in the breach with the director knowingly. Knowledge is, therefore, a critical element to hold the person liable to compensate the company for the breach of the directors’ duties.

Further, Act 992, under section 191(3), requires that where directors exercise excess powers without ordinary resolution of the company, the directors are liable jointly and severally to compensate the company or any other person who incurred loss as a result of the failure of the directors to obtain the approval. The compensation is recoverable as a civil debt by the company or that other person.⁹⁷⁴

13.14.2 Liability to account for property and profit

Directors may obtain personal benefits as a result of a breach of the duties imposed on the directors under Act 992. Where the directors obtain such personal benefits, the Act requires the directors to account to the company for such personal benefits and the company is entitled to recover from the directors such benefits be it property, profit or money received by the directors or accruing to the director as a result of the breach of duties. The fiduciary is to act in the best interest of the beneficiary and is not required to personally gain for acting in a fiduciary capacity. If the fiduciary makes a secret profit, the profit is recoverable. Section 199(b) of Act 992 provides that *“Where a director*

⁹⁷² [1989] BCLC 498.

⁹⁷³ [1990] 2 AC 663.

⁹⁷⁴ Section 191(4) of Act 992.

commits a breach of duty under sections 190 to 192, (b) the director shall account to the company for a profit made by the director as a result of the breach”.

*Regal (Hastings) Ltd v. Gulliver and others*⁹⁷⁵ - in this case, the action was based on the allegation that the directors and the solicitor had used their position to acquire the shares in Amalgamated, a subsidiary of Regal, for themselves. That they sold the shares at a very substantial profit which they have kept. That since they had obtained that profit by using their offices as directors and solicitor and, they were accountable for it to Regal, and that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. It was held that the directors were liable to account for the profit notwithstanding that they may not have acted mala fide or fraudulently or in the interest of the company. That they are liable on the ground that a person in a fiduciary relationship obtains profits in acting on behalf of a beneficiary. The liability, therefore, arises simply due to the position in which the profit was made. Lord Russell of Killowen stated @ pg. 9 that:

“The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the Plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the Plaintiff, or whether he took a risk, or acted as he did for the benefit of the Plaintiff, or whether the Plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.”

*Attorney-General for Hong Kong v. Reid*⁹⁷⁶ - Reid was convicted of accepting bribes given to him in the course of his position as a public prosecutor in Hong Kong as an inducement to exploit his official position by obstructing the prosecution of certain criminals. He was sentenced to eight years' imprisonment and ordered to pay a fine to the Crown being the value of assets then controlled by him which could only have been derived from bribes. No payment to the Crown was made by Reid. The Attorney General for Hong Kong registered caveats on behalf of the Hong Kong government against the titles to three properties in New Zealand registered in the names of Reid and his wife or his solicitor which were alleged to have been bought with bribes received by Reid. In an application in the High Court of New Zealand to renew the caveats, the Attorney General claimed that the three properties, the value of which had increased since their purchase, were held on constructive trust in favour of the Crown. The respondents claimed that the Crown had no equitable interest in the properties. The judge held that the Crown could not establish it had a proprietary interest in the

⁹⁷⁵ [1942] UKHL 1; [1967] 2 AC 134.

⁹⁷⁶ [1994] 1 ALL ER 1.

three properties. On appeal by the Attorney General the Court of Appeal of New Zealand upheld the judge's decision on the grounds that as between principal and fiduciary the receipt of a bribe by the fiduciary only gave rise to the relationship of creditor and debtor and not trustee and cestui que trust as the principal had no proprietary interest in the bribe or sums of money or investments representing it. The Attorney General appealed to the Privy Council. It was held that when a fiduciary accepted a bribe as an inducement to betray his trust, he held the bribe in trust for the person to whom he owed the duty as fiduciary; and, if property representing the bribe increased in value, the fiduciary was not entitled to retain any surplus in excess of the initial value of the bribe because he was not allowed by any means to make a profit out of a breach of duty. A bribe was a secret benefit which the fiduciary derived from trust property or obtained from knowledge which he acquired in the course of acting as a fiduciary and he was accountable under constructive trust for that secret benefit to the person to whom the fiduciary duty was owed as soon as the bribe was received, whether in cash or in-kind, under the equitable principle that equity considered as done that which ought to have been done. If property representing the bribe increased in value or if a cash bribe was invested advantageously the false fiduciary was accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe since otherwise, he would receive a benefit from his breach of duty. Accordingly, the three properties so far as they represented bribes accepted by Reid were held in trust for the Crown, which was entitled to have the caveats renewed. The appeal would therefore be allowed. Lord Templeman stated @ pgs. 4 to 5 that:

"A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust. A secret benefit, which may or may not constitute a bribe, is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which consists of a bribe. In addition a person who provides the bribe and the fiduciary who accepts the bribe may each be guilty of a criminal offence. In the present case Mr. Reid was clearly guilty of a criminal offence.

Bribery is an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute. Where bribes are accepted by a trustee, servant, agent or other fiduciary, loss and damage are caused to the beneficiaries, master or principal whose interests have been betrayed. The amount of loss or damage resulting from the acceptance of a bribe may or may not be quantifiable. In the present case the amount of harm caused to the administration of justice in Hong Kong by Mr. Reid in return for bribes cannot be quantified.

When a bribe is offered and accepted in money or in-kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false

fiduciary by way of bribe vests in him. Equity however which acts in personam insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as Mr. Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So much is admitted. But, if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instantaneously to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in-kind, the false fiduciary held the bribe on a constructive trust for the person injured. Two objections have been raised to this analysis. First it is said that, if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery. If the property representing the bribe exceeds the original bribe in value, the fiduciary cannot retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors of the false fiduciary will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the cestui que trust and not to the trustee personally whether he is solvent or insolvent. Property acquired by a trustee as a result of a criminal breach of trust and the property from time to time representing the same must also belong in equity to his cestui que trust and not to the trustee whether he is solvent or insolvent. When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty."

Further, where a director uses information that came to the knowledge of the director as a result of being a director of the company, Act 992 requires under subsection (5) of section 198 that the director must account to the company for any monetary gain made by the director from the use of the information.

13.14.3 Rescission of contract

Where a director of a company enters into a contract with the company in a manner that breaches the duties imposed on the director under sections 190 to 192 of the Act, the Act provides that such a contract is a voidable contract. The company is entitled to rescind the contract on the ground of the breach of the duty imposed on the director. Section 199(c) of Act 992 provides that *“Where a director commits a breach of duty under sections 190 to 192, (c) a contract or any other transaction entered into between the director and the company in breach of that duty may be rescinded by the company.”*

A breach of the duty to act in utmost good faith, to act in the best interest of a company, to act in a manner a faithful, diligent, careful and ordinary skilful director will act, to exercise powers in accordance with the Act and the constitution of the company, and for the purposes for which the powers are given, to act within the scope of the powers given, or the breach of prescription on conflict of interest, will render the resultant contract between the director of the company in breach and the company voidable. The company is entitled to have such a contract set aside on the ground of a breach of the duty of the director of the company.

In *Hogg v. Cramphorn Ltd*⁹⁷⁷, shares issued in breach of the fiduciary duties of the directors was set aside by the court.

13.14.4 Injunction to restrain a threatened breach

There are instances where a breach of duty may not have occurred but either expressly or by conduct, the director has given indication of likely breach of the statutory duty imposed on the director under the Act. In that case, the Act permits the company or member of the company to act to prevent the breach from occurring by instituting action in court to restrain the breach. The remedy of injunction exists to prevent a person from engaging in an act that may adversely affect another person. Under section 200 of Act 992, which deals with the enforcement of liabilities imposed on directors, the section permits an action to be instituted for an order of injunction to prevent the occurrence of the breaches of sections 190 to 192 of the Act. Section 200(1) of Act 992 states that:

*“(1) Proceedings may be instituted by the company or by a member of the company,
(b) restrain a threatened breach of a duty under sections 190 to 192”*

⁹⁷⁷ [1967] Ch. 254.

13.15 Legal action to enforce liabilities

A breach of the statutory duty imposed on the directors will lead to the imposition of the liabilities indicated above on the directors. In other words, the company will be entitled to any of the remedies provided under the Act. However, directors will not voluntarily provide satisfaction by discharging the liabilities imposed on the director for the breach of the duty imposed on the director. The company or a member entitled must therefore take steps to seek the remedies or enforce the liabilities against the director. The action provided under section 200 of the Act is for either the company or a member of the company to take legal action in court to enforce the liability against the director.

Section 200(1) of Act 992 provides that:

- “(1) Proceedings may be instituted by the company or by a member of the company to*
- (a) enforce the liabilities referred to in section 199;*
 - (b) restrain a threatened breach of a duty under sections 190 to 192; or*
 - (c) to recover from a director of the company a property of the company.”*

The section allows either the company or a member to take legal action to enforce the liabilities against the director in breach. The company is a legal person and is entitled to sue to enforce the rights of the company. However, since the company is an artificial person and requires others to act on behalf of the company, subsections (2) & (5) of section 200 of the Act permit any of the following persons to take the legal action in the name of the company to enforce the liabilities against the directors.

- (a) Board of directors of the company;
- (b) Receiver and manager of the company;
- (c) Liquidator of the company;
- (d) Members by ordinary resolution; or
- (e) Registrar after an investigation of the affairs of the company under section 234 of the Act.

Any of the above persons may institute an action in the name of the company against directors for the enforcement of the duties of the company.

The Act also permits a member to institute an action, not in the name of the company, but in the name of the member, against the directors to enforce the liabilities against the directors for breach of the director's duty. This is an exception granted by the Act from the general principle that the company as an incorporated entity has the sole right to enforce liabilities for breach of a duty owed to the company. A member is, therefore, permitted to sue, in his own name, the directors of a company for breach of duties the director owes to the company. This is in addition to the fact that

the members can by ordinary resolution or in a derivative action sue in the name of the company to enforce liabilities of the company.

Where a member intends to sue a director, without the approval of other members, to enforce liabilities against a director, the member may bring the action in a representative capacity under section 205 of the Act or may bring the action as a derivative action under section 201 of the Act. Section 200(5) of Act 992 provides that *“Where proceedings are instituted by a member, that member may either bring a derivative action under section 201 or representative action under section 205 on behalf of that member and all other members, except members who are defendants to the action, and shall join the company as a defendant; and to that representative action the provisions of section 349, shall apply.”*

Members of a company can therefore bring an action against directors of a company to enforce liabilities for breach of the director’s duties in three ways:

- (a) by ordinary resolution institute the action in the name of the company against the director under subsection 200(2) of Act 992;
- (b) by a derivative action in the name and on behalf of the company under section 201(1)(a) of Act 992; or
- (c) By a representative action in the name of the member and other members except for those members that are defendants under section 205 of Act 992.

Derivative action refers to an action brought by a member pursuant to a leave granted by the court upon application by the member to pursue an action in the name and on behalf of the company. The Act provides for the conditions that must be satisfied for the leave to be granted and the rules applicable to the conduct of the proceedings upon grant of leave. Representative actions refer to where a member takes action for a wrong that affects the member as a group in his own name and on behalf of other affected members against the wrongdoer. In this case, the member takes action on his own behalf and on behalf of all other members of the company, except members who are named as defendants or choose to become defendants, against the director for breach of duty to the company. Section 205 of Act 992 provides that the member taking the action does not require the consent of the other members, bears the cost of the action alone and conducts the action alone, but the benefit accrues to all the members. In both derivative and representative actions, the action cannot be compromised, settled or withdrawn without leave of court. Derivative and representative actions are dealt with under the chapter of remedies for corporate improprieties.

In *Foss v. Harbottle*⁹⁷⁸, the court held that the proper plaintiff to bring an action for a wrong committed against the company is the company. However, as shown above, there are a number of

⁹⁷⁸ (1843), 2 Hare 461; 9 Digest (Repl.) 36.

exceptions created in the proper plaintiff rule under Act 992. This is discussed in more details under chapter 23.0 on remedies for corporate wrongs.

13.16 Vacation of office of directors

A person appointed to the office of a director of a company may cease to be a director of the company. The vacation may occur either by an act within the control of the director or outside the control of the director. However, a person appointed a director remains a director and continues to act as a director until vacation of office. A person appointed a director may cease to be a director of a company in five main ways under Act 992. In other words, a vacation of office of a director may occur in one of five ways under Act 992. The five ways are where a director:

- (a) becomes incompetent to act as a director under section 173 of the Act;
- (b) is unable to meet the share qualification required by the constitution of the company upon being appointed a director in accordance with section 174 of the Act;
- (c) resigns by notice in writing to the company;
- (d) is removed from office in accordance with section 176 of the Act; and
- (e) dies.

Section 175 of Act 992 which provides for the vacation of office of director provides that:

- “(1) The office of director shall be vacated if the director*
- (a) becomes incompetent to act as a director by virtue of section 173,*
 - (b) ceases to hold office by virtue of section 174, or*
 - (c) resigns from office by notice in writing to the company.*
- (2) The constitution of a company may provide for the termination or vacation of office in circumstances additional to those specified in subsection (1).”*

Section 176(1) of Act 992 which provides for the removal of directors provide:

- “(1) Subject to section 327 and to this section, a company may by ordinary resolution at a general meeting remove from office all or any of the directors despite anything in the constitution of that company or in an agreement with the director.”*

Per both sections, a person may thus cease to be a director where the director becomes incompetent, ceases to meet share qualification required under a constitution, resigns from office by notice in writing or is removed by ordinary resolution passed by members in a general meeting. In addition to the above, the death of a director automatically terminates his position as a director of the company. Subsection (2) of section 175 of Act 992 permits the constitution of a company to provide for additional circumstances or ways by which the office of a director may become vacant or may be terminated. The five ways stated above are therefore not exhaustive. However, any mode of vacation

or termination outside the five ways stated above will only be valid if provided in the registered constitution of the company.

As indicated, the Act under section 173 disqualifies five categories of persons from being appointed or acting as directors. These are infants, person adjudged to be of unsound mind, body corporate, person restrained under section 177 and an undischarged bankrupt. A person appointed as a director who, after his appointment is adjudged to be of unsound mind, or who is restrained to act as the director under section 177 or who is declared bankrupt, will automatically cease to be a director. Naturally, a person appointed a director cannot after an appointment become an infant, neither will that natural person change into a body corporate.

Per section 174 of the Act, even though a person appointed a director need not have shares or be a shareholder of the company, once the constitution requires the person to acquire a stated number of shares, the section requires the appointed director to acquire the shares within two months or the shorter period provided in the constitution. Where the person acquired the shares and subsequently ceases to have the stated number of shares, the person will cease to be a director. This is also applicable where the constitution of the company is amended to require a director to acquire a stated number of shares. Failing to acquire the shares within two months or a shorter period stated in the constitution, the appointed director will cease to be a director.

A director of a company may resign from his position as a director of a company. Section 175(1) of the Act provides that the condition of retirement of a director is for the notice of resignation to be in writing and the notice must be given to the company. The death of a director without more automatically terminates his position as director of the company. Directors may also be removed from office. The removal of the director will not be effective unless the requirements under section 176 of the Act are complied with.

*Adehyeman Gardens Ltd v. Assibey*⁹⁷⁹ - in an action disputing the shareholding of the respondent, it was exhibited that the appellant filed at the Companies Registry a form of notification of change of directors which notified the Registrar of Companies of appointment of five new directors. On the issue of whether the respondent ceased to be a director, the Supreme Court per Sophia Akuffo JSC stated @ pg. 1030 that:

“The second matter is in respect of the question of the respondent’s directorship in the company. It is clear from regulation 4 of exhibit 1 [regulations of the company] that the respondent was one of the first directors of the company and this was reflected in exhibit D. It is clear from regulation 61 of exhibit 1 that a director of the company need not be a shareholder. Thus, as far as the company is concerned, there is no nexus between being a shareholder and directorship. By virtue of regulation

⁹⁷⁹ [2003-4] SCGLR 1016.

62, a director may cease to hold office only in accordance with section 184 or 185 of the Code, i.e. either by vacation (by operation of law or resignation) or by removal (pursuant to a resolution of the members in general meeting). There is nothing on record that establishes that the respondent has by any means vacated his office, nor is there any evidence that he has been validly removed as a director; and it is quite baffling that the trial judge held that he has ceased to hold such office."

Act 992 permits termination and vacation of the office of director in any other additional manner as provided in the constitution of a company. Section 175(2) of the Act provides that *"(2) The constitution of a company may provide for the termination or vacation of office in circumstances additional to those specified in subsection (1)."* Thus, where the constitution of the company specified additional grounds upon which a director ceases to be a director of the company, the director will cease to be a director once the ground is satisfied. The constitution may provide for a specific term for which a person may be appointed a director. A director appointed for a specific term will also cease to be a director upon the expiration of the term of appointment.

Sector specific legislation may also provide for additional grounds for the vacation of office of a director. The Banking Business – Corporate Governance Directive, 2018 issued by the Bank of Ghana pursuant to its powers under section 92 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) provide for term limits for directors. Paragraph 42 of the Directive provides for a term of three years for directors of banks and specialised deposit-taking companies. The term can be renewed for a maximum of three terms. For directors who are managing directors or chief executive officers, paragraph 41 provides for a term of four years with a maximum of three terms.

13.17 Removal of directors

Directors can be removed from office at any time by the members of the company notwithstanding any contrary provision in the constitution or the terms of appointment of the director.⁹⁸⁰ In addition, any person given the power to appoint and remove directors of a company is permitted to remove the director of the company.⁹⁸¹ Section 176 of Act 992 provides for the power of members and the procedure for the removal of a director of a company. Section 176 of the Act states *"(1) Subject to section 327 and to this section, a company may by ordinary resolution at a general meeting remove from office all or any of the directors despite anything in the constitution of that company or in an agreement with the director."* The members of a company, therefore, have the power to remove directors. The power is exercised by ordinary resolution which must be passed at a general meeting. The requirement of ordinary resolution is not applicable to public companies in the event the

⁹⁸⁰ Section 176(1) of Act 992.

⁹⁸¹ Section 29(2) of Act 992.

constitution of the public company provides for cumulative voting for the removal of directors, in which case section 327 of the Act will be applicable.

The requirement of a general meeting means even if all the members of the company are unanimous in their resolve to remove a director, without a general meeting, the director cannot be removed from office. The powers of the members of a company to remove the director from office in accordance with the section cannot be taken away by the constitution or any agreement with the company. Therefore, even if the members or the company enter into an agreement with the director to exclude the powers of the members to remove the director, the agreement will not affect the powers of the members to remove the directors. In the same vein, if a director is appointed for a fixed term, the members can remove the director before the expiration of the fixed term. But the affected director may be entitled to compensation for breach of the agreement.⁹⁸² It is also important that the procedure for the general meeting and the manner of conduct of removal as stated in the section must be strictly complied with for the removal of the director to be valid. Any derogation from the requirement and procedure of the removal may render the removal invalid and unlawful and the director will continue to be a director of the company.

*Heinrich Koch & Another v. Horteng Limited & Another*⁹⁸³, PK Twumasi stated that:

"In my view Horteng Limited did not fully comply with the provisions of sections 185 subsections 2, 3 and 4 thereof and consequently Heinrich Koch was not given notice of the fact that a resolution for his removal as Director was going to be moved. In all such cases, which involves the exercise of domestic jurisdiction by artificial institutions or human beings and corporate bodies, the notice must specify that a Director is going to be removed and it is necessary to state the grounds for his removal. The Director concerned must then be given a right to be heard in his defence to any charges that may be preferred against him. No stage during the trial did the company tender the statutory notice required. Consequently, the removal breached the rules of natural justice of "audi alteram partem". Only the removal letter was tendered, not the notices to attend the meeting or its proof of service. The removal of Heinrich Koch was therefore null and void for breach of the provisions of section 185 of the Companies Code 1963 (Act 179)."

Act 992 mandates that the removal of a director is subject to notice given to the company by a member who proposed for the removal and subsequent notice to all the members together with the notice of a general meeting. A notice must also be given to the affected director. The requirement for

⁹⁸² Section 176(9) of Act 992 expressly entitles executive directors to compensation if the termination or removal is in breach of agreement.

⁹⁸³ [15/01/04] Suit No. FTC14/2001 15th January 2004.

notices under the section must be complied with for any removal of a director to be effective. In relation to notices, section 176 of Act 992 further provides:

- “(2) A resolution to remove a director shall not be moved at a general meeting unless notice of the intention to move the resolution has been given to the company not less than thirty-five days before the meeting at which the resolution is to be moved.*
- (3) If after notice of intention to move the resolution is given to the company, a meeting is called for a date thirty-five days or less after the notice has been given, the notice is properly given for the purposes of subsection (2).*
- (4) The company shall give the members notice of the resolution at the same time and in the same manner as the company gives notice of meeting or, if that is not practicable, shall give the members notice of the resolution in the same manner as notices of meetings are required to be given not less than twenty-one days before the meeting.*
- (5) On receipt of notice of an intended resolution to remove a director under this section, the company shall immediately send a copy of the notice to the director concerned”.*

A director cannot be removed at a general meeting where no notice of intention to remove the director is given by a member to the company prior to the meeting. Subsection (2) requires the notice of intention to remove a director is given by a member to the company thirty-five days to the day of the general meeting. This prevents a situation where after a general meeting is called, a member subsequently gives notice of intention to remove a director at that general meeting. However, under subsection (3), if after the notice of intention to remove a director is given to the company when no general meeting has been called, but the company called a general meeting for a day less than thirty-five days from the day the notice was given, the resolution to remove the director can be moved at the meeting even though thirty-five days have not lapsed.

The company must in addition to giving notice of a general meeting to members give to the members the notice of the intention to remove a director. If possible, the two notices must be given together and in the same manner. However, if it is not practicable, then the notice of intention to remove a director must be given in the same manner as notice of the general meeting and at least twenty-one days prior to the general meeting. Thus, if the notice of the general meeting is personally delivered to the members, the notice of intention to remove a director must be given in the same manner.

Subsection (5) requires the notice of intention to remove a director be given to the affected director immediately. Even though the subsection uses the word immediate rather than a reference to a specific time, it is suggested it is reasonable to expect the notice to be given prior to or at the same time as the notice of intention to remove a director is given to the members. Failure to give the notice

to the director will render the removal of the director at the general meeting ineffective. The courts have held that not only is the requirement to give the notice required, but the reason for the removal must be stated. This is because the reason for the notice is for the director to be heard under the rule of natural justice "*audi alteram partem*". This point was made in the case of *Heinrich Koch & Another v. Horteng Limited & Another*⁹⁸⁴, as indicated above. Even though the case implied the reason or ground for removal must be provided, the Act does not provide for such requirement. It may well be the case that where a charge is leveled against a director as a basis for removal, the director must be made aware of such charge by stating so in the notice. However, removal of a director may not be due to any charge or misconduct leveled against the director. The Act does not restrict the powers of members to remove a director by stating that the removal should be based on a particular ground or grounds. The statement in the Heinrich case cannot, therefore, be generalized to require a notice to always indicate the ground or reason for removal of a director. The Act only requires a notice to be given to the director of a proposed resolution to remove the director. There is no requirement for such notice to state the reason for the removal of the director.

*Kwame Charles Serbeh-Yiadom v. Stanbic Bank Ghana Limited*⁹⁸⁵ - the plaintiff and four others incorporated the Union Mortgage Bank (UMB) (later named Stanbic Bank (Gh) Ltd) in 1994 with 10 million shares valued at ₵1,000 each. All the five were made directors of the bank and the plaintiff and one other were the subscribers of the regulations of the company. Following differences between the plaintiff and other members of the board, an extraordinary meeting of the board was scheduled for 25 March 1997 to, inter alia, pass a resolution for the removal of the plaintiff as a director of the bank. Notice of the meeting was duly served on the plaintiff who was then in Lagos. However, when the plaintiff came down for the meeting, he learnt that the meeting had already been held on 12 March 1997. The plaintiff was not informed of any change of date for the meeting. He went to the Registrar-General's Department where he learnt, to his surprise, that a return had been filed indicating that he had been removed as a director of Union Mortgage Bank Ltd with effect from 12 March 1997. The court found on the evidence, inter alia, that the notice for the change in the date of the meeting had been posted on 10 March and had been delivered at the plaintiff's address in April, that is, after the meeting. Counsel for defendant relying on Section 156 of Act 179, contended in his address that the defendant-company duly complied with the provisions of Act 179 as to the giving or service of notice of meetings. Held by the Court per Amonoo-Monney JA @ pgs. 105 to 106 that:

"Section 156 of Act 179 provides that: "The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting." Regulation 68 of the company's regulations, exhibit C, also provides that: "The office of director shall be vacated in accordance with section 184 of the Code and any director may

⁹⁸⁴ [15/01/04] Suit No. FTC14/2001 15th January 2004.

⁹⁸⁵ [2003-2005] 1 GLR 86.

be removed from office in accordance with section 185 of the Code.” The provisions of section 185 of Act 179 are in these terms:

“185. (1) Subject to the provisions of section 300 of this Code and to the following subsections, a company may by ordinary resolution at any general meeting remove from office all or any of the directors notwithstanding anything in its Regulations or in any agreement with any director ...

(4) On receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned and such director, whether or not he is a member of the company, shall be entitled,

- (a) to be heard on the resolution at the meeting; and*
- (b) to send to the company a written statement, copies of which the company shall send with every notice of the general meeting or, if the statement is received too late, shall forthwith circulate to every person entitled under section 154 of this Code to notice of the meeting in the same manner as notices of meetings are required to be given.”*

It is a salutary and well-known principle of law that a person should be given the opportunity of being heard when he is accused of any wrong doing before any action is taken against him. Sections 155 and 156 of Act 179 are general provisions that deal with service of notice for meetings generally, while section 185 deals specifically with the matter of removal of directors. When dealing therefore with the question of the removal of a director of a company one has to consider the combined effect of these sections of the Code. In order that proper effect may be given to section 185(4)(a) of Act 179, I am of the opinion that where, as in this case, an extraordinary general meeting of a company is held to remove a director and that director does not attend the meeting at which a resolution to remove him is to be moved, care must be taken to ascertain that he has in fact been properly made aware of the meeting. This is so because to enable him defend himself the law stipulates that even where the director to be removed is not a member or shareholder of the company he shall nevertheless “be entitled” to be heard at the meeting ... The spirit of section 185(4)(a) of Act 179 assumes greater relevance where, as in this case, the notice of the change in the date of the meeting was sent to the address of the plaintiff in Lagos and also where the change of date of the meeting meant that the meeting was going to be held about two weeks earlier and not later than the original date notified. I am also of the opinion that the defendant-company did not fully comply with the mandatory provisions of section 185(4) of Act 179, which provides that: “On receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned ... The “copy” of what is to be sent forthwith to the director concerned is not something that emanates or originates from the company itself. The notice that

informed the plaintiff of the original date of the meeting (exhibit K) is a one-sheet one-page document or letter under the hand of the secretary of the company. That letter was not received by the company from some other source and the copy that should be sent to the "director concerned" is "notice of an intended resolution to remove a director" which the company receives, obviously from the intended mover of the removal resolution who, himself, must give to the company the notice stated in section 185(2) of Act 179.

Having regard to all the circumstances of the case that I have discussed under this head of claim or relief, I hold that the defendant-company did not comply with the letter and spirit of section 185(4)(a) of Act 179 and I therefore make a declaration in favour of the plaintiff that his removal as a director of Union Mortgage Bank Ltd, now Stanbic Bank (Gh) Ltd on 12 March 1997 was wrongful and null and void..."

The Act permits the director to respond to the notice of intention to remove the director in two ways. The director may provide a written response to the notice and submit the written response to the company for circulation by the company prior to the meeting. In addition, the director has the right to be heard at the meeting which right includes reading the written response at the meeting prior to the determination of matter. Section 176 of Act 992 provides that "(5) *On receipt of an intended resolution to remove a director under this section, the company shall immediately send a copy of the notice to the director concerned and that director, whether or not is a member of the company, is entitled,*

- (a) to be heard on the resolution at the meeting; and*
- (b) to send to the company a written statement, copies of which the company shall send with each notice of the general meeting or, if the statement is received too late, shall immediately circulate to each person entitled under subparagraph (f) of paragraph 1 of the Eighth Schedule, to notice of the meeting in the same manner as notices of meetings are required to be given."*

The written statement of the director in response to the notice of intention to remove the director must be circulated together with the notice of the general meeting, but if received too late, probably after the notice of general meeting is given, must subsequently be circulated to persons entitled to notice of a general meeting in the same manner as the notice of the general meeting.

However, under subsection (6) of section 176 of Act 992, the company need not send or circulate the written statement of the director in two instances:

- (a) if it is received by the company less than seven days before the meeting; or
- (b) if the Court, on an application being made by the company or any other person who claims to be aggrieved, so orders upon being satisfied that the statement is unreasonably long or that the rights conferred by this section are being abused to secure needless publicity for

defamatory matter; and the Court may order the costs of the applicant to be paid in whole or in part by the director notwithstanding that the director is not a party to the application.

A written statement by a director in response to a notice of intention to remove the director does not need to be circulated in two instances only, when received less than seven days to the meeting and where a court orders that it need not be circulated. The application to the court may be made by the company or any person who claims to be aggrieved by the circulation. The court will give that order if satisfied that the statement is unreasonably long or the director is abusing the right conferred on the director in order to circulate defamatory matters. In addition to the right to be heard orally at the general meeting, the director may, unless the Court has made an order, also require that the written statement by the director be read to the meeting.⁹⁸⁶

A vacancy created by the removal of a director unless filled at the general meeting may be filled as a casual vacancy under section 172 of the Act.⁹⁸⁷ Where the termination or removal under this section results in a breach of service agreement, the director is entitled to compensation.⁹⁸⁸ Under subsection (9) of section 176 of Act 992, if the director has a service contract with the company, the termination or removal under section 176 will not deprive the director of any right to compensation and damages if the removal or termination results in a breach of the service contract.

*Pinamang v. Abrokwa*⁹⁸⁹ - the parties to the suits were all directors and shareholders of A.F.C. Ltd. The appellant was however the majority shareholder and managing director of the company. The respondents in their capacities as shareholders, claiming that the appellant was conducting the affairs of the company in a manner oppressive to them and in disregard of their interests, sought by originating summons pursuant to section 218 of the Companies Code, 1963 (Act 179) for, inter alia, the removal of the appellant from the board of directors of the company. It was held on appeal that the High Court had no jurisdiction under section 218 of Act 179 to hear and determine the relief seeking to remove the appellant as director and chairman because section 185 of Act 179 specifically provided for the procedure and mode for the removal of the director of a limited liability company. It was only after an unsuccessful exercise pursuant to section 185 that resort to section 218 of Act 179 could be justified. Since there was no evidence to show that the respondents had unsuccessfully attempted to remove the appellant pursuant to section 185, that complaint should have been refused and dismissed in limine by the trial judge. Lamptey J.A. stated @ pgs. 389 to 390 that:

“One of the reliefs sought by the applicants was formulated as relief (b) as follows:

“(b) an order that the current chairman of the board of directors of the company be removed from the board.” The first observation I wish to

⁹⁸⁶ Section 176(7) of Act 992.

⁹⁸⁷ Section 176(8) of Act 992.

⁹⁸⁸ Section 176(9) of Act 992.

⁹⁸⁹ [1991] 2 GLR 284.

make is that Act 179 specifically provided for the procedure and the mode for the removal of a director of a limited liability company under section 185. Prima facie, to remove a director of a company from the office of a director, the procedure spelt out under section 185 of Act 179 must be followed by the company. It seems to me that the applicants must satisfy the court that resort to section 218 of Act 179 had become necessary as a final and last resort. In other words, the affidavits of the applicants must on the face of it show that the applicants resorted to section 185 without avail and without success. That as a last resort, the almighty power of the court must of necessity be called in aid of the applicants. There was no evidence to show that the applicants had unsuccessfully attempted to remove the named director chairman pursuant to section 185 of Act 179. It is only after this unsuccessful exercise pursuant to section 185 of Act 179 that resort to section 218 of Act 179 could be justified. The lower court, in my opinion, had no jurisdiction to hear and determine the relief sought under head (b) of the reliefs. The complaint made under head (b) is not one envisaged by section 218 of Act 179 and should have been refused and dismissed in limine by the learned trial judge."

The power to remove the directors under section 176 of the Act does not deprive a person of the power given under section 29(2) of the Act to remove a director. Section 29(2) of Act 992 provides that *"(2) Where the constitution empowers a person to appoint or remove a director or any office of the company, that power is enforceable by that person although that person is not a member or officer of the company."* A person who is not a member of a company may be given the power to remove a director from office. However, the power given to that person under the constitution of the company will not prohibit members from exercising the powers given to them under section 176 of the Act.⁹⁹⁰ Where the constitution gives a person the power to remove a director, the person can enforce the power to remove the director. The manner of exercise of the power by that person must be stated in the constitution for the removal to be valid. More importantly, the manner of exercise must afford the affected director the opportunity to be heard in accordance with the rule of natural justice *"audi alteram partem"*. However, the removal does not need to be in accordance with section 176 of the Act. In view of this, if the constitution gives a member or members of the company the power to remove the director of the company in a manner different from the manner provided under section 176 of the Act, removal in the manner provided in the constitution will be effective notwithstanding it is contrary to section 176 of the Act.

⁹⁹⁰ Subsection (1) of section 176 of Act 992.

If members are given the power under the constitution of a company to remove a director pursuant to section 29(2) of the Act, the members essentially have two processes by which the members can remove a director. First, in accordance with the registered constitution of the company and second, in accordance with section 176 of Act 992. In that case, the removal may not need to be in accordance with the procedure under section 176 of the Act where the members seek to exercise the powers conferred on them under the constitution as provided in section 29(2) of the Act. The power may be given to persons who are not members. Such persons can also remove directors and in so removing the directors, the persons do not need to follow the procedure under section 176 of the Act. Any interpretation to require members to exercise the power conferred pursuant to section 29(2) of the Act will only lead to the absurd result. That is members will be required to comply with section 176 of the Act whilst if a non-member is given the power, the non-member will not be required to satisfy the requirement of section 176 of the Act. This is consistent with the position of the court that the removal of directors from office need not necessarily be in accordance with section 176 of the Act.

*In re West Coast Dyeing Industry Ltd: Adams and Another v. Tandoh*⁹⁹¹ - the appellant was the managing director of a subsidiary company in a group of companies and a director of other sister companies. After his dismissal as the managing director, he brought an action under section 218 of the Companies Act, 1963 (Act 179) for oppression against the shareholder and chairman of the board of directors who has taken over the affairs of the company. The respondent alleged and established that the appellant has engaged in a number of fraudulent activities based upon which he was dismissed. The appellant did not lead any evidence to disprove the findings. The court on its motion found that the appellant had engaged in fraudulent activities in relation to the management of the company. On his dismissal, the court held that by the provisions of section 216 of Act 179 the relationship of the appellant as an officer of the company, that is, managing director of S.C.C. and a director of the other three sister companies, continued to be governed by the common law rules of master and servant, irrespective of section 185 of Act 179 whose provisions were not in conflict with the common law rules. There was therefore no obligation whatsoever on the part of the company to resort to the procedure under section 185 of Act 179 before the appellant could be dismissed as a director or as a managing director. The company might choose either to adopt the procedure under section 185 or might proceed in accordance with the principles of the common law and equity as provided by section 216, depending on the circumstances of each case. On the evidence, the appellant did not only breach his fiduciary obligations to the company as required by section 203 but also committed such acts of serious fraud and criminal misconduct in his dealings with the company that it would have been highly prejudicial to the interests of the W.C.G.C. to keep him. His summary dismissal was therefore justified under the common law. Abban JA stated @ pgs. 580 to 582 that:

⁹⁹¹ [1984 – 86] 2 GLR 561.

"The shareholders resolved, in view of the very serious and fraudulent nature of Mr. O.S. Adams' actions against the company and his decision as contained in his undated reply to the executive chairman's letter of 7 June 1979 to sever his business connections with the executive chairman, that Mr Adams be removed as a director of Solid Construction Co. Ltd. and the other companies within the West Coast Group."

It was obvious that the appellant wanted the trial court to declare his summary dismissal as a director from all the four sister companies "unlawful and null and void and of no legal effect." But the respondent in his affidavit in opposition insisted that the appellant's said dismissal was lawful. From the above analysis it is clear that the appellant himself put the management of the affairs of all the four sister companies, as well as his summary dismissal as director from all the four companies, in issue. In the circumstances, the learned trial judge was in duty bound, after hearing evidence and arguments, to pronounce on the validity or otherwise of the summary dismissal from the directorship of all the four sister companies. Indeed, the learned trial judge could not possibly pronounce on the validity of the appellant's summary dismissal as a director of West Coast Dyeing Industry Ltd., and, on the same facts and in the same breath, hold as unlawful the appellant's dismissal from the directorship of the other three sister companies. The learned trial judge was in the circumstances right in holding that the appellant's summary dismissal as a director of the other three companies was also proper.

I will deal with the submission of learned counsel for the appellant that in any case the summary dismissal was unlawful in as much as section 185 of Act 179 was not complied with. The submission, with respect to learned counsel, is misconceived. The learned trial judge held that the summary dismissal of the appellant, in the circumstances of the case, was justified under section 216 of the Code. The said section reads:

"216. The rights, duties and liabilities of officers and agents of companies shall continue to be governed by the rules of the common law and equity relating to principal and agent and master and servant save in so far as such rules are inconsistent with the express provisions of this Code."

The appellant was an officer of the company. That is he was the managing director of Solid Construction Co. Ltd. and a director of the other three sister companies; and his relationship with those companies continued to be governed by the common law rules of master and servant, irrespective of section 185 whose provisions are not in conflict with the common law rules. There was therefore no obligation whatsoever on the part of the company to resort to the procedure under section 185 of the Code before the appellant could be dismissed from his office as a director or as a managing director. The company may choose either to adopt the procedure

under the said section 185 or may proceed in accordance with the principles of common law and equity as provided by section 216, depending on the circumstances of each case.

In this particular case, the appellant, as found by the learned trial judge, had not only breached his fiduciary obligation towards the company as required by section 203 of the Code, but had also committed acts of serious fraud and criminal misconduct in his dealings with the company. As disclosed by the evidence, the appellant had been guilty of immoral and untrustworthy conduct that it would have been highly prejudicial to the interests of the West Coast Group of Companies to keep him. Prompt and swift action was therefore absolutely necessary to safeguard the interests of the four sister companies. Immediate summary dismissal was the right answer and that was justified under the common law.

In Gower, The Principles of Modern Company Law (3rd ed.), the learned editors have stated at p. 557 as follows:

"It is, however, of considerable importance in the case of other officials of the company and of directors who hold some other office such as that of managing director. So far as their offices are concerned it is clear that, notwithstanding that they may hold long-term agreements, they can be dismissed immediately if guilty of misconduct. Any breach of their fiduciary duties clearly suffices."

The well-known authority in support of this proposition is Boston Deep Sea Fishing and Ice Co v. Ansell (1888) 39 Ch.D. 339, C.A. In that case the defendant was the managing director of the plaintiff company. He contracted on behalf of the company for the construction of certain fishing-smacks, and, unknown to the company, took a commission from the shipbuilders. The defendant was also a shareholder in an ice company and a fish carrying company which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing-smacks and employed the companies. The defendant employed these companies for the plaintiff's smacks but received the bonuses for himself. It was held that the receipt of the commission from the shipbuilding company was a good ground for the dismissal of the defendant from office and that he had to account to the plaintiff company, for the bonuses received from the ice and fish carrying companies. Bowen L.J. in the course of his judgment said at 363-364:

"[T]here can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to

him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all."

And in Pearce v. Foster (1886) 17 Q.B.D. 536 at 539-540, C.A. Lord Esher M.R. had this to say:

"But the question is, whether the breach of duty is a good ground for dismissal. I have never hitherto heard any doubt that that is [p.583] the true proposition of law ... Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him."

Lopes L.J. also said at 542:

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing servant

14.0 COMPANY SECRETARY

14.1 Introduction

A company incorporated under the Companies Act, 2019 (Act 992) is required to have a Company Secretary. This is a mandatory requirement at the time of application for incorporation as section 13(2) of Act 992 requires the application for incorporation to disclose particulars of the proposed Company Secretary. The application will be deemed incomplete if the particulars of the proposed Company Secretary is not disclosed. In addition, section 211(1) of Act 992 states *“(1) A company shall have a Company Secretary who shall possess the qualification specified in subsection (3).”* A company must therefore have a Company Secretary.

14.2 Definition and status of a Company Secretary

The First Schedule of Act 992 which defines terms used in the Act provides that *“‘Company Secretary’ includes a person occupying the position of a secretary by whatever name called”*. The First Schedule in essence does not define who a Company Secretary is but indicates any person occupying a position of a secretary by whatever name or designation will qualify as a Company Secretary. The First Schedule, however, defines “officer” of the company to include the secretary. A Company Secretary is, therefore, an officer of a company.

The use of the word secretary may wrongly connote a Company Secretary as a mere clerk or secretarial staff of a company. A Company Secretary is an important officer of the company that the Act requires to perform a number of important functions under the Act including in the governance of a company. It is, therefore, important not to confuse a Company Secretary with secretarial staff who may include typist, receptionist, personal assistants, office clerks and person in related positions.

Generally, a Company Secretary is the chief administrative officer of the company. As the chief administrative officer, the Company Secretary is responsible for the administrative management of the company and ensuring compliance with applicable rules and laws affecting the company. In that position, a Company Secretary has, as regards matters concerned with the administration of the company, ostensible authority to enter into contracts on behalf of the company.

In *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd*⁹⁹², Bayne, the Company Secretary of Fidelis Furnishing, hired cars from Panorama Development's business, Belgravia Executive Car Rental. Bayne used the papers of Fidelis and falsely represented that he was hiring a number of Rolls-Royce and Jaguars for the business while his managing director was away. The cars were used by Bayne personally. Bayne was prosecuted and imprisoned, and

⁹⁹² [1971] 2 QB 711.

Panorama Development sued Fidelis Furnishing for the outstanding amount on the hire. Fidelis claimed that it was not bound to the hire contracts because Bayne never had the authority to enter them. It was held that Fidelis was nevertheless bound on the contract to Panorama. Mr Bayne, as company secretary had implied actual authority or ostensible authority by virtue of his position as Company Secretary to enter into such agreements. The court stated that times had changed since 1887 when company secretaries could not be assumed to have authority for anything. The secretaries are certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff and ordering cars, and so forth. Lord Denning stated @ 715 to 717 that:

*"Mr. Hames, who appears for the Fidelis company, takes two points. His first point is that the contracts for hire were made with Mr. Bayne personally and not with the company: and so the company are not liable on them. He points out, quite rightly, that, on the face of each of these hiring agreements, the hirer is specifically stated to be "R. L. Bayne." He says that they were regular documents, duly executed, which were intended to embody the agreement that was made: and Belgravia cannot gainsay them. I was much impressed by that argument. It appears that in these "self-drive hire" transactions, Belgravia, for insurance purposes, always want the driver to be named as the hirer. So they deliberately inserted Mr. Bayne's name as the hirer. Can they now go back on their own documents? Belgravia have to prove that the Fidelis company was in fact the party which hired the cars. For this, they have to go outside their own regular hiring agreements. Can they do this? I think they can. I regard these hiring agreements as part and parcel of a contract contained in correspondence: so much so that you must not look at the hire agreement alone, but at all that took place. "In order fairly to estimate what was arranged and agreed, ... you must look at the whole of that which took place and passed between them": see *Hussey v Horne-Payne* (1879) 4 App Cas 311, per Earl Cairns LC at p 316. Applying those considerations, it is clear that these cars were hired as a result of letters which described Fidelis Furnishing Fabrics Ltd. as the contracting party. The cars were booked by letters written on the paper of the Fidelis company and signed by Mr. R. L. Bayne, with the words underneath "Company Secretary." References were given as to the credit and standing of the Fidelis company. In these circumstances, the hiring agreements were mere machinery for carrying the correspondence into effect. One of them was over stamped with the signature: "Fidelis Furnishing Fabrics Ltd. - R. L. Bayne, Company Secretary." Clearly that agreement was with the company. It would be absurd to draw a distinction between that agreement and the others. The contract for each of them was with the company and not with Mr. Bayne.*

Mr. Hames' second point is this: he says that the company is not bound by the letters which were signed by Mr. Bayne as "Company Secretary." He says that, on the authorities, a company secretary fulfils a very humble role: and that he has no

authority to make any contracts or representations on behalf of the company. He refers to Barnett, Hoares & Co v South London Tramways Co (1887) 18 QBD 815 where Lord Esher M.R. said at p. 817:

"A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; ..."

Those words were approved by Lord Macnaghten in George Whitechurch Ltd v Cavanagh [1902] AC 117, 124. They are supported by the decision in Ruben v Great Fingall Consolidated [1906] AC 439. They are referred to in some of the textbooks as authoritative.

But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of a company's secretary.

Accordingly I agree with the judge that Mr. R. L. Bayne, as company secretary, had ostensible authority to enter into contracts for the hire of these cars and, therefore, the company must pay for them. Mr. Bayne was a fraud. But it was the company which put him in the position in which he, as company secretary, was able to commit the frauds. So the defendants are liable. I would dismiss the appeal, accordingly."

The above position must be contrasted with the position stated by the Ghanaian case below bearing in mind the case was decided in 1978.

*In the Matter of Northern Engineering Co., Ltd and In the Matter of the Companies Code, 1963 (Act 179), Section 217 and Luguterah v. Northern Engineering Co., Ltd. and Others*⁹⁹³ - in this case where it held that a secretary cannot issue a notice for a general meeting without being required to do by directors, Taylor J. stated @ pgs. 492 to 493 that:

"It is I think clear from this provision that only the directors of the company are entitled to convene an extraordinary general meeting. A shareholder qua shareholder without any prior requisitioning of the directors in terms of section 271

⁹⁹³ [1978] GLR 477.

*of the Code, has no statutory right to convene an extraordinary general meeting. All that a shareholder as a member can do is to prevail on the directors by requisition to convene one and it is only after failure to secure one that the member may then convene one in accordance with the provisions of section 271(3) of the Code. In this particular case the meeting was convened by the secretary apparently on his own without any directive from the directors. It seems to me very essential that secretaries of companies should be alive to the nature of their duties and responsibilities. In *George Whitechurch Ltd. v. Cavanagh* [1902] A.C. 117 at p. 124, H.L., Lord Macgaghten described these duties as "of a limited and of a somewhat humble character" and the great common law judge Lord Esher M.R. in *Barnett, Hoares, & Co. v. South London Tramways Co.* (1887) 18 Q.B.D. 815, C.A. spelt out the status of a company secretary. He said at p. 817:*

"A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry . . ."

*Quite clearly by the provisions of section 271 of Act 179 the secretary of the N.E.C. has no legal power to summon an extraordinary general meeting on his own authority. This has in fact been the case under the English Companies Act, 1900 (63 & 64 Vict., c. 48), s. 13 as was held in *In re State of Wyoming Syndicate* [1901] 2 Ch. 341 and our Companies Code merely codified the English position."*

The duties imposed on the Company Secretary under Act 992 make the position that the Company Secretary is a "mere servant" as may have been the position in the nineteenth century and relied on in the above case. It is suggested that the position in *Luguterah's* case is no longer attainable in today's corporate governance system and under Act 992.

The case of *Barnett, Hoares, & Co. v. South London Tramways Co.*⁹⁹⁴ referred to by Taylor J. in the case of *Luguterah v. Northern Engineering Co. Ltd* is the same case overruled by Lord Denning in the case of *Panorama Developments (Guildford) Ltd v. Fidelis Furnishing*. It stands to reason that the Ghanaian courts must take into account the change in time as indicated by Lord Denning in the *Panorama case* and not hold a Company Secretary as a mere servant. This is especially the case given the onerous duties imposed on a Company Secretary under section 212 of the Companies Act, 2019 (Act 992). A Company Secretary is no longer a mere servant, employee, clerk or officer of the company. From the provisions in the Companies Act, 2019, the Company Secretary is a key officer with extensive duties and responsibilities imposed on him or her which duties are important for effective governance of the company and compliance requirements with the law.

⁹⁹⁴ (1887) 18 QBD 815.

14.3 Requirement, appointment and qualification of Company Secretary

Section 211 of Act 992 deals with the requirement, appointment, and qualification of Company Secretary. Section 211 of Act 992 provides that:

- “(1) A company shall have a Company Secretary who shall possess the qualification specified in subsection (3).*
- (2) The Company Secretary may be a body corporate except that the body corporate must have as one of its promoters, subscribers, directors or operating officers, a person who is qualified to be a Company Secretary.*
- (3) The directors shall not appoint a person as a Company Secretary unless that person*
- (a) has obtained a professional qualification or a tertiary level qualification that enables that person to have the requisite knowledge and experience to perform the functions of a Company Secretary,*
 - (b) has held office, before the appointment, as a Company Secretary trainee or has been articulated under the supervision of a qualified Company Secretary for a period of at least three years,*
 - (c) is a member in good standing of*
 - (i) the Institute of Chartered Secretaries and Administrators,*
 - or*
 - (ii) the Institute of Chartered Accountants, Ghana,*
 - (d) having been enrolled to practice, is in good standing as a barrister or solicitor in the Republic, or*
 - (e) by virtue of an academic qualification, or as a member of a professional body, appears to the directors as capable of performing the functions of secretary of the company.*
- (4) For the purposes of paragraph (a) of subsection (3), a professional or tertiary level qualification is a discipline with an offering in company law practice and administration.*
- (5) Unless the constitution of a company otherwise provides, the Company Secretary shall be appointed by the directors for the term, at the remuneration and on the conditions that the directors consider fit, and may be removed by them, subject to the right of the Company Secretary to claim damages from the company if removed in breach of contract.*
- (6) Where a company carries on business for more than six months without a Company Secretary, the company and every officer of the company that is in default is liable to pay to the Registrar an administrative penalty of twenty-*

five penalty units for each day that the company continues to carry on business without a Company Secretary after the expiration of the period of six months.

- (7) *An act required or authorised to be done by or to the Company Secretary may, if the office is vacant or there is not for any other reason, a person capable of acting as Company Secretary, be done by or to an assistant or a deputy Company Secretary or any other officer of the company appointed by the directors to be acting Company Secretary.*
- (8) *The Company Secretary shall, before assuming office, lodge with the company for onward transmission to the Registrar, the writing consent to serve as a Company Secretary."*

Subsection (1) of section 211 of the Act requires every company to have a qualified Company Secretary. If any company fails to have a qualified Company Secretary and carries on business for more than six months, every officer of the company who is in default is liable to pay an administrative penalty to the Registrar for each day that the company continues to carry on business without a Company Secretary after the expiration of the six months.⁹⁹⁵ As indicated earlier, the application for incorporation under section 13(2) of the Act requires the particular of the proposed Company Secretary to be provided prior to Registrar for purposes of incorporation. The Registrar is entitled to refuse to issue a certificate of incorporation certifying the incorporation of the company if the particulars on the Company Secretary is not provided.⁹⁹⁶ The first Company Secretary is, therefore, named in the application for incorporation. The first Company Secretary can be removed and replaced by another person in accordance with section 211(5) of the Act. Subsection (7) of section 211 of the Act permits that anything required or authorised to be done by or to the Company Secretary may, if the office is vacant or there is for any other reason no secretary capable of acting, be done by or to an assistant or deputy secretary or any officer of the company appointed by the directors to be acting secretary.

It is the directors of the company that appoint a Company Secretary unless the constitution of the company provides otherwise. Section 211(4) of the Act provides that the Company Secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as the directors may think fit, and may be removed by the directors, subject however to the right of the Company Secretary to claim damages from the company if removed in breach of contract. The Company Secretary may be a body corporate.⁹⁹⁷ Where the Company Secretary is a body corporate, the Act requires a promoter, subscriber, director or operating officer of the body corporate to have the qualification required under subsection (3) of section 211 of the Act.⁹⁹⁸

⁹⁹⁵ Section 211(6) of Act 992.

⁹⁹⁶ Section 14(1) of Act 992.

⁹⁹⁷ Section 211(2) of Act 992.

⁹⁹⁸ Ibid.

A director can also be appointed to double as a Company Secretary. However, where a director is appointed to double as a Company Secretary, section 213 of the Act prohibits the performance of an act that must be done by both a director and a Company Secretary to be done by one person, even if that one person occupies both positions. Section 213 of Act 992 provides that *“Where a person acts as both director and Company Secretary of a company, a provision requiring or authorizing an act to be done by or to a director and a Company Secretary shall not be considered as done if the act is done by or to the person acting in both capacities.”* Even though Act 992 permits a person to act as both a director and a Company Secretary, it is generally not advisable to allow a director to double as a Company Secretary in view of the functions of a Company Secretary. There may be instances where his duty as a Company Secretary may conflict with his duty as a director.

Section 211(8) of Act 992 provides that prior to assuming office as a Company Secretary, the Company Secretary must lodge with the company a written consent to serve as a Company Secretary which must be submitted to the Registrar. Section 215 of Act 992 requires the company to have a register of directors and secretary, in which the particulars of the Company Secretary must be entered. The company under section 216 of Act 992 must register any change in the particulars of a Company Secretary with the Registrar within twenty-eight days

The Company Secretary is in practice responsible for advising the board of directors on all governance matters. Act 992 unlike the repealed Companies Act, 1963 (Act 179) expressly states the qualification of a person to be appointed a Company Secretary. Under section 211(3) of Act 992, a person will qualify to be a Company Secretary if the person:

- (a) has obtained a professional qualification or a tertiary level qualification in a discipline offering company law practice and administration to give that person the requisite knowledge and experience to perform the functions of a Company Secretary,
- (b) has held office, before the appointment, as an apprentice or has been articulated under the supervision of a qualified Company Secretary for a period of at least three years,
- (c) is a member in good standing of (i) the Institute of Chartered Secretaries and Administrators, or (ii) the Institute of Chartered Accountants, Ghana,
- (d) having been enrolled to practice is in good standing as a barrister or solicitor in the Republic, or
- (e) by virtue of an academic qualification, or as a member of a professional body, appears to the directors as capable of performing the functions of secretary of the company.

Given the nature of duties imposed on a Company Secretary, it is prudent for the Act to state the qualification of a person to be appointed as a Company Secretary. The above qualification requirements cover both having an academic or professional qualification and/or practical experience that equip a person to be able to act as a Company Secretary. Chartered Accountants and Secretary with their respective institutes qualify to be appointed as Company Secretaries. Lawyers in good standing in Ghana qualify to be appointed as a Company Secretary. A graduate of a tertiary

level institution or who has obtained a professional qualification in which company law and practice was one of the subjects qualifies to be appointed a Company Secretary. This will mean a holder of a Bachelor of Laws degree who has taken company law will qualify to be appointed a Company Secretary. A person who has trained under a qualified Company Secretary for at least three years also qualifies to be appointed as a Company Secretary. The directors also have the discretion to appoint a person with academic qualification or who is a member of a professional body, who appears to the director to be capable of performing the duties of a secretary to appoint such a person. Therefore, a medical doctor with the Ghana Medical Association may be appointed as a Company Secretary if it appears to the directors that he is capable of performing the functions of a Company Secretary.

14.4 Duties of a Company Secretary

Unlike the repealed Companies Act, 1963 (Act 179), the Companies Act, 2019 (Act 992) expressly states the duties to be performed by the Company Secretary. Section 212 of Act 992 provides that:

“The duties of a Company Secretary include

- (a) assisting the Board to comply with the constitution of the company and with any relevant enactment;*
- (b) keeping the books and records of the company;*
- (c) ensuring that minutes of the meetings of the shareholders and the directors are properly recorded in the form required by this Act;*
- (d) preparing and issuing out notices in the same of the company;*
- (e) ensuring that the annual financial statements of the company are dispatched to every person entitled to the statements as required by this Act;*
- (f) ensuring that all statutory forms and returns are duly filed with the Registrar;*
- (g) maintaining the statutory registers of the company;*
- (h) providing the Board with guidance as to the duties, responsibilities and powers of the Board and on the changes and development in the laws affecting the operation of companies;*
- (i) informing the Board of legislation relevant to or affecting meetings of shareholders and directors and their failure to comply with the legislation and reporting accordingly at any meeting; and*
- (j) advising the directors on their responsibilities as directors.”*

The above duties are important in the governance of a company and compliance requirements of a company. A Company Secretary must therefore be knowledgeable enough to be able to advise the Board on governance issues including the duties, responsibilities, powers, and limitation on the

powers of directors under the constitution of the company, the Companies Act and other relevant legislation. The Company Secretary must also ensure various statutory compliance requirements are satisfied by the company including the filing of statutory forms, maintaining the various statutory registers and books to be kept by the company. Related to that duty, the Company Secretary is responsible for keeping the books and records of the company. Various documents that are to be dispatched to stakeholders including notices and financial statements must be done by the Company Secretary including filing the annual returns. The Company Secretary is also responsible for taking minutes of meetings of directors and shareholders or members of the company, as well as keeping those minutes in accordance with the provisions of Act 992.

Even though the section states it is the duty of the Company Secretary to issue notices including notices of general meetings and meetings of directors, the Company Secretary has no authority to call a meeting on his own. Under sections 157 and 158 of Act 992, an annual general meeting and extraordinary general meeting are convened by the directors of the company. The director may require the Company Secretary to issue notices for the meeting. The Company Secretary can only issue the notice if so required by the directors of the company.

The above duties are onerous responsibilities imposed on a Company Secretary. It is, therefore, important that the person appointed by the directors to act as a Company Secretary must have the knowledge and time to perform the above duties.

In *Luguterah v. Northern Engineering Co. Ltd*⁹⁹⁹, it was held that a secretary cannot issue a notice of a general meeting without being required to do so by directors.

However, the directors can under section 148 of Act 992 ratify the issue of notice without authorisation thereby regularizing the act of the Company Secretary.

14.5 Power of the Company Secretary to bind the company

The Company Secretary under the First Schedule of Act 992 is an officer of the Company. Under section 144(1) of Act 992, a company may act through a subordinate organ which consists of officers or agent appointed by or under the authority of the principal organ, that is members in a general meeting or the board of directors. The act of officers is binding on the company under three situations under section 148 of the Act:

- (a) the act is authorised expressly or impliedly by the company through members in general meeting, board of directors or managing director
- (b) the act is ratified by the company through members in general meeting, board of directors or managing director

⁹⁹⁹ [1978] GLR 477.

- (c) the doctrine of estoppel where the company represented the officer or agent as having authority to act and a person has relied on that representation. This may be through express representation by members in general meeting, board of directors or managing director, or by the duties customarily undertaken by the officer. It may also be where the members in general meeting, board of director or managing director acquiesce in the act of the officer or agent.

The case of *Panorama Development (Guildford) Ltd v. Fidelis Furnishing Fabrics Ltd* (supra) indicated the ostensible authority of a Company Secretary under the third situation above and implied authority under the first situation. Holding the company liable for such act also comes under section 150 of Act 992 where it provides that:

“(1) A person having dealings with a company or with any other person who derives title under the company is entitled to assume that, (b) a person described in the particulars filed with the Registrar pursuant to sections 13 ... as a ... Company Secretary of the company, has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a ... Company Secretary of a company carrying on business of the type carried on by the company or customarily exercised or performed by an officer or agent of the typed concerned”.

A Company Secretary can, therefore, bind the company as an officer of the company when the act is authorised, ratified or the company is estopped from denying the authority of the Company Secretary to so act. A person dealing with the Company Secretary is entitled to rely on the presumption of regularity and is protected in the event the Company Secretary has no authority to so act and the act is not ratified. The scope of protection under the presumption of regularity is subject to the limitation imposed under section 150 of the Act.

14.6 Removal of a Company Secretary

Section 211(5) of Act 992 provides that *“(5) Unless the constitution of a company otherwise provides, the Company Secretary shall be appointed by the directors for the term, at the remuneration and on the conditions that the directors consider fit, and may be removed by them [directors], subject to the right of the Company Secretary to claim damages from the company if removed in breach of contract.”* The default position is directors appoint the Company Secretary and determine the terms and conditions of appointment including remuneration and period of appointment. The terms and conditions are provided in a contract signed between the company and the Company Secretary. The contract may be a contract of employment (that is contractor of services) or a contract for services (in which the Secretary is an independent contractor and not an employee). As the appointing authority, the directors have the power to remove the Company Secretary. The removal must be a decision of

the board of directors. If the removal is in breach of the contract between the Company Secretary and the company, the Company Secretary is entitled to claim damages for breach of contract.

The default position may be amended by the constitution of the company. The constitution can provide for an appointing authority different from the board of directors and can also take away the power of directors to remove a Company Secretary or limit the power. Unless so expressly provided in the constitution of the company, the default position is applicable. That the power to remove a Company Secretary is vested in the directors.

Even though not expressly stated in the Act, a Company Secretary can also terminate his position by resignation with due notice to the company in accordance with the terms of the contract between the company and the Company Secretary. That is the Company Secretary can terminate the contract under which he, she or it is appointed a Company Secretary. Resignation or termination in breach of the contract will entitle the company to also claim damages for breach of contract. A Company Secretary that resigned from the position cannot be compelled to continue to render services to the company as equity leans against servitude and the court will not grant an order that the court cannot supervise.¹⁰⁰⁰ The death of a Company Secretary will also terminate the appointment of the individual as a Company Secretary. Where a corporate entity is appointed, the dissolution of the corporate entity will terminate the appointment of the corporate entity as a Company Secretary. Since the Companies Act, 2019 has provided for the qualification of a Company Secretary, the courts can by order terminate the appointment of an unqualified person as a Company Secretary, and in any other instance make an order terminating the appointment of a person as a Company Secretary on stated grounds including breach of the contract of appointment.

¹⁰⁰⁰ *Lumley v Wagner* (1852) 1 De G.M. & M. 604.

15.0 AUDITORS

15.1 Introduction

An auditor is a person duly qualified who is charged with the duty to review and verify the accuracy of financial records of a company, ensure compliance with accounting and tax regulations as well as accepted accounting principles. Every company incorporated under the Companies Act, 2019 (Act 992) is required to have an auditor. The requirement of an auditor under Act 992 refers to external auditors who are to serve as a control unit over the financial matters of a company with reporting responsibility to the shareholders or members of a company. An auditor under the Act, therefore, does not refer to an internal officer of the company, who is an employee of the company.¹⁰⁰¹ There is, therefore, a distinction between an external auditor and an internal auditor of a company. Reference under Act 992 is to the external auditor and not an internal auditor. The external auditor is an independent outsider charged to give an independent opinion or report on the financial state of the company to the shareholders or members.

15.2 Audit reporting requirement

The reporting requirement of an auditor is provided for under section 137 of Act 992. Section 137 of Act 992 provides that:

“(1) The report by the auditors referred to in paragraph (c) of subsection (1) of section 128, shall

(a) consist of a report, addressed to the members of the company, by an auditor or auditors duly qualified and appointed as auditors of the company in accordance with sections 138 and 139 on

(i) the accounting records of the company, and

(ii) financial statements of the company as listed in subsection (5) of section 127 and the consolidated financial statements to be sent to the members and debenture holders of the company in accordance with sections 128 and 131; and

(b) contain statements as to the matters mentioned in the Seventh Schedule.

(2) Where, in the case of the accounts, any of the particulars required to be shown under sections 132 and 133 are not shown, the report, in addition to stating that the accounts do not give the information required by this Act, shall contain a statement giving the required particulars so far as the auditors are reasonably able to do so.

¹⁰⁰¹ Section 142(1) of Act 992 makes it explicitly clear that an auditor is not an officer or agent of the company.

- (3) *The audit of the financial statements shall, in the case of a public or private company be carried out in compliance with international standards on auditing adopted by the Institute of Chartered Accountants, Ghana and it shall be sufficient if the report of the auditor complies with those standards and accords with terminology approved by the Institute of Chartered Accountants, Ghana.***
- (4) *The report shall be open for inspection by a member or debenture holder of the company at the registered office of the company during usual business hours and shall be read at an annual general meeting of the company held within three months after the report is sent to members and debenture holders in accordance with section 128."***

Auditors are constituent in the corporate governance system to serve as a check in relation to the financial statements of the company by providing an independent report on the financial performance of the company to members or shareholders of the company. Section 128 of the Act requires directors to submit financial statements including directors' and auditor's reports to members of the company. The auditor is required to submit a report as provided in section 137 of the Act. One distinctive feature of a company is the separation of ownership and management. Due to that separation, auditors are required to serve as checks to provide an independent opinion on the financial state of affairs of the company as recorded by management to the owners (shareholders or members) to assure them of the financial position of the company as reflected in the financial statements prepared and submitted by the directors together with the director's report. The auditing and reporting requirements of an auditor under the Act are therefore a risk reduction measure. Auditors are therefore watchdogs for shareholders and not stooges of the directors. Auditors are, therefore, not officers of a company.

15.3 Appointment of an auditor

An auditor is required for the purposes of incorporation of a company. Thus, one must be appointed and particulars provided on the application for incorporation prior to submission of the application to the Registrar for incorporation of the company under section 13 of the Act. The first auditor of a company is thus appointed by promoters or subscribers and particulars provided on the application for incorporation.¹⁰⁰² Subsequent appointment is done by members of a company by ordinary resolution. Section 139(3) Act 992 provides that ***"(3) Despite a contrary provision in the constitution of a company, an auditor shall be appointed by ordinary resolution of the company and not otherwise."*** Other than the first auditors appointed by subscribers or promoters of a company and named in the application, auditors are appointed by the ordinary resolution passed by the members. Where members fail to appoint auditors, directors may appoint an auditor to fill a casual vacancy or the Registrar may appoint an auditor where there is no auditor. Section 139(4) of Act 992 provides:

¹⁰⁰² Section 13(2)(k) of Act 992.

- “(4) For the purposes of subsection (3),***
(a) the directors may appoint the first auditors of a company and may fill a casual vacancy in the office of auditor; or
(b) if a company does not have an auditor for a continuous period of three months, the Registrar may appoint an auditor for that company.”

The first auditors of a company must be named in the application submitted for the registration of the company in accordance with section 13 of the Act. This means the first auditor must be appointed by the subscriber or the promoter who completes and submits the application for the incorporation of the company. The application is to indicate particulars of the auditor including the name of the auditors, postal and electronic email address of the auditor, residential address if the auditor is an individual and the letter of consent of the auditor.¹⁰⁰³ As there are no directors prior to incorporation, the first directors cannot technically appoint the first auditor of the company. Directors' power to appoint an auditor must therefore be limited to the appointment of an auditor to fill a casual vacancy. Any interpretation to extend that power to first directors will lead to absurd results for two reasons. First, it will invalidate appointment made by other persons except for the proposed directors. Second, since there are no directors of a company prior to incorporation, no one will be able to appoint an auditor.

Under section 139(4) of Act 992, the Registrar also has the power to appoint an auditor for a company. Such power can only be exercised where members failed to appoint an auditor and the directors did not appoint one in the case of casual vacancy. More importantly, the appointment by the Registrar can only be done where the company fails to have an auditor for a continuous period of three months.

As noted earlier, an auditor refers to a person so qualified to be appointed an auditor. A person cannot be appointed as an auditor unless such person is duly qualified as provided under the Act. Section 139(1) of Act 992 provides that:

- “(1) A person shall not be appointed as an auditor of a company unless, that person***
(a) has, before the appointment, consented in writing to be appointed,
and
(b) is duly qualified in accordance with section 138.”

There are two requirements for the appointment of an auditor. First, the person to be appointed must give his prior written consent to be appointed. Second, the person must be duly qualified in accordance with the provisions of section 138 of the Act. The written consent must be given before the appointment. Therefore, it must predate the appointment of the auditor. In practice, the auditor

¹⁰⁰³ Section 13(2)(k) of Act 992.

is given notice of intention to appoint him as an auditor and requested to provide a written consent. The appointment is done after the written consent is received from the auditor.

An individual or firm can be appointed as an auditor. Section 139(2) of Act 992 provides that *“(2) A partnership firm may be appointed, in the name of the firm, as an auditor of a company, but, whether or not that firm is a body corporate, the appointment shall be deemed to be an appointment of the partners of the firm who, at the time of the appointment, are duly qualified.”* The appointment of the firm as an auditor is deemed to be the appointment of partners of the firm at the time of the appointment as a partner. The advantage of appointing a firm as an auditor, therefore, is that the company is deemed to have appointed all the qualified partners of the firm at the time of appointment as auditors of the company.

The appointed auditor holds office until there is a vacancy in the office in accordance with section 139(5) of the Act. According to section 139(5) of Act 992, an appointed auditor continues to hold office as an auditor until one of the following occurs:

- (a) the auditor ceases to be qualified for appointment;
- (b) the auditor resigns from office by notice in writing to the company;
- (c) an ordinary resolution is duly passed at an annual general meeting in accordance with section 141 of Act 992 removing the auditor from office or appointing some other person in place of the auditor as from the conclusion of the annual general meeting; or
- (d) the tenure of the auditor ends.

There are four ways by which vacancy in the office of an auditor may occur under the Act as stated above. An appointed auditor holds office until a vacancy occurs as provided above. In addition to the four ways provided, a vacancy may also occur where the auditor dies in the event of the appointment of an individual as an auditor. A company can appoint more than one auditor. When a company appoints more than one auditor and there is a casual vacancy in the office of the auditor, the continuing or surviving auditor will continue to act as an auditor of the company.¹⁰⁰⁴

As indicated above, the particulars of the first auditors of a company are stated in the application submitted for incorporation of the company in accordance with section 13 of the Act. A change in the auditor of the company must be notified to the Registrar in the prescribed form not later than fourteen days of the date of the change.¹⁰⁰⁵ Where a firm is appointed as the auditor, the name of the firm and the business address must be given to the Registrar.¹⁰⁰⁶ A change in the partnership agreement or the partners of the firm does not amount to a change of auditor for the purpose of

¹⁰⁰⁴ Section 139(4) of Act 992.

¹⁰⁰⁵ Section 139(6) of Act 992.

¹⁰⁰⁶ Section 139(7) of Act 992.

notice to the Registrar.¹⁰⁰⁷ The company is liable to pay an administrative penalty to the Registrar where it described as its auditors a person who has not been duly appointed as an auditor or breaches section 139 of the Act.

Subsection (8) of section 139 of the Act seeks to make it mandatory for an auditor that is appointed to communicate with a retiring auditor and request for information from the retiring auditor. The subsection provides *“(8) Before accepting the appointment as an auditor of a company, the auditor shall communicate with the retiring auditor and request the retiring auditor to make any representations and supply information about the company.”* It is, therefore, required of incoming auditors to communicate and request for information from retiring auditors. The incoming auditor thus has the right to communicate with the retiring auditor. Such right is statutorily conferred. The directors or members of the company cannot, therefore, prohibit the incoming auditor from communicating and requesting information from the retiring auditor. Such communication may reasonably include the reason for the retirement as auditor of the company and relevant information on the company. However, even though the subsection makes it mandatory, it is suggested that an auditor cannot be held to be in breach of the subsection if the auditor has nothing to discuss with the retiring auditor and does not require any information from the retiring auditor. Once the incoming director reached out to communicate with the retiring auditor or requested for information, the retiring auditor is under obligation to communicate and provide the requested information to the incoming auditor. Subsection (9) of the section provides *“(9) The retiring auditor shall respond to the request and supply the requisite information.”*

A new requirement under the Act which is to ensure that auditors remain independent of the company is the requirement provided in subsection (11) of section 139 of the Act. The subsection provides that *“(11) An auditor shall hold office for a term not more than six years and eligible for appointment after a cooling-off period of not less than six years.”* The assumption is that where an auditor stays with a company for a long period, the independence of the auditor may be compromised. The Act seeks to assure the independence of the auditor through two ways, providing for a maximum term within which a person can be appointed as an auditor and a cooling-off period after the expiration of the term for the person to be eligible for reappointment. The section imposes a mandatory term of six years on auditors of a company. A person cannot therefore act or be appointed as an auditor of a company for more than six years. Upon expiration of the mandatory term of six years, the auditor is not eligible for re-appointment as auditor of the company until the expiration of a cooling-off period of six years from the date on which the auditor ceases to be an auditor of the company.

¹⁰⁰⁷ Ibid.

15.4 Qualification of an auditor

As discussed above, there are two requirements for the appointment of an auditor. First, the person to be appointed must give his prior written consent to be appointed. Second, the person must be duly qualified in accordance with the provisions of section 138 of the Act. Section 138 of Act 992 sets out the qualification requirement of an auditor of a company. Section 138 of Act 992 provides:

- “(1) A person is qualified for appointment as an auditor of a private or public company, if that person is,*
- (a) qualified and licensed in accordance with the Chartered Accountants Act, 1963 (Act 170); and*
 - (b) not disqualified under subsection (2).”*

The section provides for two criteria a person must satisfy to be appointed as auditor of a company. First, the person must have been qualified and licensed as an auditor and secondly, the qualified and licensed auditor must not be disqualified under the Act.

A person may therefore be qualified and licensed as an auditor in accordance with the Chartered Accountant Act, 1963 (Act 170), but that person may have been disqualified to act as an auditor of a company under the Companies Act, 2019 (Act 992). It is therefore not all qualified and licensed persons under Act 170 that are qualified for appointment as an auditor under Act 992. The disqualification criteria are provided in subsection (2) of the section. Section 138(2) of Act 992 provides that:

- “(2) A person is disqualified for appointment as an auditor, if that persons is:*
- (a) an officer of the company or of an associated company;*
 - (b) a partner of, or in the employment of, an officer of the company or of an associated company;*
 - (c) an infant;*
 - (d) found by a court of competent jurisdiction to be a person of unsound mind;*
 - (e) a body corporate, except that a member of incorporated partnership may be appointed in the manner provided by subsection (2) of section 139;*
 - (f) one in respect of whom an order has been made under section 177 so long as the order remains in force unless leave to act as an auditor of the company concerned has been granted by the Court in accordance with that section;*
 - (g) an undischarged bankrupt, unless that person has been granted leave to act as an auditor of the company concerned by the Court by which the adjudication as bankrupt was made; or*

(h) for the time being disqualified from acting as an auditor of a company by order of the Registrar under subsection (4)."

Subsection (4) of section 138 empowers the Registrar, by legislative instrument, to disqualify any person otherwise qualified from acting as auditor of any company and may at any time remove such disqualification. A person aggrieved by the disqualification of the Registrar has the right to appeal to the Court against the disqualification.¹⁰⁰⁸

Officers of a company and associated companies are disqualified from being an auditor of the company. In addition, partners of such officers or persons in the employment of such officers are disqualified from being appointed as auditors of a company. A partner or person in the employment of an officer of a company or associated company who is a Company Secretary is however not disqualified. Section 138(3) of Act 992 provides that ***"(3) Paragraph (b) of subsection (2) does not disqualify a person from being appointed as an auditor by reason only of the fact that, that person is a partner or in the employment of a person acting as Company Secretary of the company or of an associated company."*** A partner or person in the employment of a Company Secretary can, therefore, be appointed as an auditor once the person is qualified and licensed under Act 170.

Infants are also disqualified from being auditors of a company. An infant is defined as ***"a natural person under the age of eighteen years or any other age that is declared by an enactment to be of full age for legal purposes"***¹⁰⁰⁹. A person found by a court of competent jurisdiction to be of unsound mind is also disqualified. Artificial persons are disqualified from being appointed as an auditor except for a partnership incorporated under the Incorporated Private Partnership Act, 1962 (Act 152). The disqualification criteria of directors under section 177 of Act 992 also apply to disqualify persons from being appointed an auditor of a company.

The object of section 177 in relation to section 138 of the Act is to restrain fraudulent persons from acting as auditors of a company. A number of persons may be restrained under section 177 and therefore comes under the disqualification criteria under section 138(1)(f) of the Act. Under subsection (1) of Section 177, any person under subsection (6) may bring an application or the court on its own may disqualify any person coming under the section from being a director of a company. The grounds upon which the person may be liable for the disqualification are:

- (i) a person convicted of an offence of fraud or dishonesty;
- (ii) a person convicted of an offence relating to promotion, formation or management of a body corporate;
- (iii) a person convicted of an offence involving in insider dealing;
- (iv) a person convicted of any criminal offence which is not a misdemeanour;

¹⁰⁰⁸ Section 138(5) of Act 992.

¹⁰⁰⁹ First Schedule of Act 992.

- (v) a person declared bankrupt;
- (vi) a person who is responsible for a criminal offence relating to a body corporate whether the person is convicted or not;
- (vii) a person excluded from being a member of a recognised professional body as a result of disciplinary enquiry before a competent authority; and
- (viii) a person under investigation by a criminal investigating body or Registrar.

Under the subsection, it does not matter whether any of the above occurred within the Republic or elsewhere.¹⁰¹⁰ Under the subsection, the person does not need to be convicted of the offences indicated but a charge leveled against the person may entitle a court to grant an order disqualifying the person. In addition, the court may on its own motion make an order disqualifying a person from being a director for a stated period.¹⁰¹¹

Except with conviction under section 177(1)(a) of Act 992, the order pursuant to which the person is disqualified must be an order made by the High Court either by the court *suo motu* or upon application by the persons indicated in subsection (6) of Section 177 of the Act. For disqualification order pursuant to section 177(1)(a) of the Act, the order may be made by the court in the country where the person is convicted. The persons that can bring an action under subsection (6) of section 177 of the Act are members or officers of the company, a person who can demonstrate an interest in the case, the Registrar or Official Trustee, trustee in bankruptcy of the person concerned, or the liquidator of the body corporate.

Subsection (2) of Section 177 of the Act provides for automatic disqualification for persons convicted within the last five years of an offence involving fraud or dishonesty, or relating to promotion, formation or running of a company; or a person who is a director or senior executive of a company who within the last five is wholly or partially responsible for the insolvency of the company; or a person who within the last five years has been disqualified from being a Company Secretary, receiver, manager or liquidator. The disqualification under subsection (2) of Section 177 of the Act is not based on an order by the court on its own or on application by any person. The disqualification automatically applies once a person has been found within the last five years to have suffered any of the disabilities under the subsection.

A person declared bankrupt is also disqualified as an auditor. A person disqualified by the Registrar under a legislative instrument is also disqualified from being appointed an auditor.

¹⁰¹⁰ Republic v. High Court, Accra, Ex parte Ploetner [1984-86] 2 GLR 107.

¹⁰¹¹ In re West Coast Dyeing Industry Ltd: Adams and Another v. Tandoh [1984 – 86] 2 GLR 561.

Where a person not qualified as an auditor is appointed as auditor of a company, the Act provides that person commits an offence and is liable on conviction to a fine.¹⁰¹² Section 138(6) of Act 992 provides that *“(6) A person not qualified for appointment as an auditor who acts as an auditor, commits an offence and is liable on summary conviction to a fine of not less than three hundred and twenty-five penalty units and not more than seven hundred and fifty penalty units and the company by whom that person is appointed and an officer of that company that is in default are liable each to pay to the Registrar an administrative penalty of seven hundred and fifty penalty units.”* The company for whom the unqualified auditor is appointed and officers of the company who are in default are liable to pay an administrative penalty of seven hundred and fifty penalty units to the Registrar.¹⁰¹³ In effect, the unqualified auditor, the company and officers of the company are all liable to pay a fine where a person not qualified as an auditor is appointed as an auditor for a company.

15.5 Remuneration of an auditor

An auditor is appointed ordinarily by the shareholders or members of a company. The appointed auditor is not an officer of the company¹⁰¹⁴ but reports to the shareholders or members of the company even though the contract of appointment is created between the company and the auditor. Even though the auditor is appointed by the shareholders or members, the appointment is deemed to be done by the company as shareholders or members, acting as the principal organ of the company, binds the company to the appointment.¹⁰¹⁵ In view of the dichotomy between the appointing authority and the contracting authority, there must be clear rules on the setting of the remunerations payable to the auditor. The remuneration payable to the auditor is provided for under section 140 of Act 992. Section 140 of Act 992 provides:

“(1) The remuneration of an auditor of a company shall be fixed where the auditor is appointed

- (a) by the directors for the period expiring at the conclusion of the next annual general meeting of the company;*
- (b) by the Registrar; or*
- (c) at a meeting of the company, by ordinary resolution of the company or in a manner that the company by ordinary resolution may determine.*

(2) For purposes of full disclosure, the^[140]

- (a) company shall clearly state in the financial statements which are accessible and reported to shareholders of the company the*

¹⁰¹² Section 138(6) of Act 992.

¹⁰¹³ Ibid.

¹⁰¹⁴ Section 142(1) of Act 992.

¹⁰¹⁵ Section 147 of Act 992.

remuneration offered to an auditor of the company for any service rendered; and

(b) remuneration payable to an auditor of the company shall be subject to confirmation by members of the company.

(3) For the purposes of this section, "remuneration" includes the sums of money payable by a company in respect of the expenses of an auditor.

(4) Where a company contravenes a provision of this section, the company and an officer of the company that is in default are liable each to pay to the Registrar an administrative penalty of two hundred and fifty penalty units."

The section provides for the manner in which the remuneration payable to an auditor is determined. The determination of remuneration is, however, dependent on who appointed the auditor. The remuneration of an auditor appointed by directors to fill a casual vacancy is determined by the directors up to the time of concluding the next annual general meeting of the company. The remuneration of an auditor appointed by the Registrar is fixed by the Registrar. Generally, the remuneration of auditors is fixed at a general meeting of a company by ordinary resolution of the company. The remuneration of auditors, except the auditors appointed by the directors or Registrar, is fixed by the members of the company by ordinary resolution. The members may by an ordinary resolution not necessarily fix the remuneration but may provide for how the remuneration should be fixed. The Act provides that the section is applicable to any amount payable to auditors in respect of expenses.¹⁰¹⁶ Therefore, reimbursement of expenses incurred by auditors must be determined in the same manner as the remuneration of the auditors. Irrespective of who fixes the remuneration of an auditor, the company is responsible for the payment of the remuneration and expense of auditors of the company. Therefore, where the auditor has not been paid the amount due for undertaking the statutory duties imposed on the auditor, the right person the auditor must sue is the company, and not the shareholders or members of the company.

The Act imposes disclosure requirements on remuneration payable to auditors for any services rendered to the company. Section 140(2) of Act 992 provides:

"(2) For purposes of full disclosure, the

(a) company shall clearly state in the financial statements which are accessible and reported to shareholders of the company the remuneration offered to an auditor of the company for any service rendered; and

(b) remuneration payable to an auditor of the company shall be subject to confirmation by members of the company."

¹⁰¹⁶ Section 140(3) of Act 992.

The requirement is for the company to fully disclose all remuneration paid to auditors for all services rendered by the auditor. For remunerations that are not determined in accordance with subsection (1) of section 140, the payment of such remuneration is subject to confirmation by members of the company.

Where a company pays remuneration and expenses to auditors in breach of subsection (1) of section 140 or fails to disclose in accordance with subsection (2) of the section, the company and officers of the company in default are each liable to pay to the Registrar an administrative penalty of two hundred and fifty penalty units.¹⁰¹⁷

15.6 Functions of an auditor

The Act provides a number of functions that auditors are required to undertake. Principal among the functions of auditors are the duties of auditing and reporting on the financial records and financial statements of the company to shareholders or members of the company.¹⁰¹⁸ The auditor is required to provide a report to the shareholders or members of the company after auditing the accounting records and financial statements of the company. Section 137 of Act 992 provides that:

“(1) The report by the auditors referred to in paragraph (c) of subsection (1) of section 128, shall

(a) consist of a report, addressed to the members of the company, by an auditor duly qualified and appointed as auditors of the company in accordance with sections 138 and 139 on

(i) the accounting records of the company, and

(ii) financial statements of the company as listed in subsection (5) of section 127 and the consolidated financial statements to be sent to the members and debenture holders of the company in accordance with sections 128 and 131; and

(b) contain statements as to the matters mentioned in the Seventh Schedule.

(2) Where, in the case of the accounts, any of the particulars required to be shown under sections 132 and 133 are not shown, the report, in addition to stating that the accounts do not give the information required by this Act, shall contain a statement giving the required particulars so far as the auditors are reasonably able to do so.

(3) The audit of the financial statements shall, in the case of a public or private company be carried out in compliance with international standards on auditing

¹⁰¹⁷ Section 140(3) of Act 992.

¹⁰¹⁸ Section 137 of Act 992.

adopted by the Institute of Chartered Accountants, Ghana and it shall be sufficient if the report of the auditor complies with those standards and accords with terminology approved by the Institute of Chartered Accountants, Ghana.

- (4) The report shall be open for inspection by a member or debenture holder of the company at the registered office of the company during usual business hours and shall be read at an annual general meeting of the company held within three months after the report is sent to members and debenture holders in accordance with section 128."*

It is the responsibility of the auditor to audit the accounting records and financial statements of the company. The end-product of such auditing exercise is to provide the report required under section 137 of the Act to the members and debenture holders of the company. There are specific matters that the report must contain including an indication in the report of the particulars to be shown in accounts kept by the company as provided in the Act. The standard form of reporting is the international standards adopted by the Institute of Chartered Accountants, Ghana. The Institute of Chartered Accountants, Ghana adopted the International Financial Reporting Standards (IFRS) on 1st January, 2007, and requires the accounts of small and medium-scaled enterprises, state-owned enterprises and private organizations to apply the IFRS to the accounts commencing from 2010. The report must also state the opinion of the auditor particularly on matters required under the Seventh Schedule of Act 992. The Seventh Schedule of Act 992 pursuant to section 137 of the Act provides as follows:

"Matters to be Expressly Stated in the Report of the Auditors

- 1. Whether the auditors have obtained the information and explanations which to the best of the knowledge of the auditors and belief, were necessary for the purposes of the audit.*
- 2. Whether, in the opinion of the auditors, proper books of account have been kept by the company, so far as appears from the examination of those books, and proper returns adequate for the purposes of the audit have been received from branches not visited by the auditors.*
- 3. Whether the statement of financial position of the company and, unless it is designated as a consolidated profit and loss account or statement of comprehensive income, profit and loss account or statement of comprehensive income dealt with by the report, are in agreement with the accounting records and returns.*
- 4. Whether in the opinion of the auditors and to the best of their information and according to the explanations given to the auditors, the accounts give the information required by this Act in the manner so required and give a true and fair view,*

- (a) in the case of the statement of financial position, of the state of affair of the company at the end of the financial year, and*
 - (b) in the case of the profit and loss account or statement of comprehensive income, of the profit or loss for the financial year, of the statement of financial position or the profit and loss account or statement of comprehensive income subject to the non-disclosure of any matters to be indicated in the report, which by virtue of Part Four of the Sixth Schedule to this Act, are not required to be disclosed.*
5. *In the case of a holding company submitting group accounts, whether, in the opinion of the auditors, the group account have been properly prepared in accordance with this Act so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries dealt with so far as it concerns the interests of the company or so as to give a true and fair view of the those affairs or of the profit or loss subject to the non-disclosure of any matters to be indicated in the report, which by virtue of Part Four of the Sixth Schedule to this Act are not required to be disclosed.*
6. *Whether the auditors were independent of the company under audit pursuant to section 143 of this Act."*

In sum, the main function of the auditor is to audit the accounting records and financial statement of the company and report to shareholders or members, and debenture holders. It is critical in the discharge of such functions that the auditors prepare a report satisfying the above requirement especially as it relates to the form and content of the report. In discharging the function, the Act imposes a fiduciary duty on the auditor which states the standard required of the performance of the function.

15.7 Fiduciary duties of an auditor

An auditor is appointed for a company. The auditor is an auditor of the company. However, the appointed auditor of a company in the performance statutory duties under the Act is not an officer or agent of the company but is a fiduciary to the shareholders or members of the company as a whole. As a fiduciary, the auditor must act in such a manner as faithful, diligent, careful, and ordinarily skilful auditors would act in the circumstances.¹⁰¹⁹ The fiduciary relationship created between the auditor and the shareholders or members is statutorily imposed under section 142 of Act 992 and no derogation is permitted in any way. Section 142 of Act 992 provides that:

¹⁰¹⁹ Section 142(1) of Act 992.

- “(1) An auditor of a company while acting in the performance of functions under this Act, is not an officer or agent of the company but:***
(a) stands in a fiduciary relationship to the members of the company as a whole, and
(b) shall act in a manner that a faithful, diligent, careful and ordinarily skilful auditor would act in the circumstances.”

Per the section, the auditor, even though appointed an auditor of the company and will be paid by the company, owes no duty to the company but to the members of the company as a whole. As indicated above, the auditors as prescribed under the Companies Act refers to external auditors who are independent outsiders charged with the responsibility of providing an independent report on the accounting records and financial statements of the company to the members or shareholders of the company. Directors, as part of their management function, are required to ensure the preparation of the financial statements of the company that shows the financial status of the company.¹⁰²⁰ Auditors are required to independently audit the financial statements and report to shareholders or members the findings of the audit to inform shareholders or members on the financial status of the company.¹⁰²¹ In order to efficiently undertake the statutory function imposed on auditors, the law imposed a fiduciary duty between the auditor and the shareholders or members of the company. The allegiance of the auditor is to the shareholders or members, not to the company or the directors of the company. In view of this, the Act makes it explicitly clear that the auditor is not an officer or agent of the company even though the auditors are remunerated by the company. The statutorily imposed fiduciary duties on the auditors are mandatory and cannot be derogated from in any manner. As such, the fiduciary duty cannot be excused by a provision in the constitution or resolution of the company, or terms of a contract between the company and the auditor. Section 142 of Act 992 provides that:

- “(2) A provision, whether contained in the constitution of a company, or in a contract, or in a resolution of a company, shall not relieve an auditor from***
(a) the duty to act in accordance with subsection (1); or
(b) a liability incurred as a result of a breach of that duty.”

Under the Act, the fiduciary duty is owed to the shareholders or members of the company as a whole and not to individual shareholders. The duty is limited to shareholders, not the general public or prospective shareholders. However, a person may be able to sue an auditor for negligence under tort where a duty of care is established even though there is no contractual relationship and the person is not a shareholder or member of the company.¹⁰²²

¹⁰²⁰ Section 127 of Act 992.

¹⁰²¹ Section 137 of Act 992.

¹⁰²² A nexus may be created where negligent misrepresentation is alleged in the absence of a contractual relationship under tort where a duty of care is established between the injured person and the auditor. See the case of *Candler v.*

*Caparo Industries plc v. Dickman and others*¹⁰²³ - the respondents were shareholders of Fidelity plc, a public company, whose accounts for the year ended 31 March 1984 showed profits far short of the predicted figure which resulted in a dramatic drop in the quoted share price. After receipt of the audited accounts for the year ended 31 March, 1984 the respondents purchased more shares in Fidelity plc and later that year made a successful take-over bid for the company. Following the take-over, the respondents brought an action against the auditors of the company, Touche Ross & Co, alleging that the accounts of Fidelity plc were inaccurate and misleading in that they showed a pre-tax profit of some £1,432m for the year ended 31 March 1984 when in fact there had been a loss of over £400,000, that the auditors had been negligent in auditing the accounts, that the respondents had purchased further shares and made their take-over bid in reliance on the audited accounts, and that the auditors owed them a duty of care either as potential bidders for Fidelity plc because they ought to have foreseen that the 1984 results made Fidelity plc vulnerable to a take-over bid or as an existing shareholder of Fidelity plc interested in buying more shares. On the trial of a preliminary issue of whether the auditors owed a duty of care to the respondents, the judge held that the auditors did not. The respondents appealed to the Court of Appeal, which allowed their appeal in part on the ground that the auditors owed the respondents a duty of care as shareholders but not as potential investors. The auditors appealed to the House of Lords and the respondents cross-appealed against the Court of Appeal's decision that they could not claim as potential investors. Held – (1) The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed.

(2) Where a statement put into more or less general circulation might foreseeably be relied on by strangers for any one of a variety of different purposes which the maker of the statement had no specific reason to anticipate there was no relationship of proximity between the maker of the statement and any person relying on it unless it was shown that the maker knew that his statement would be communicated to the person relying on it, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or a transaction of a particular kind and that that person would be very likely to rely on it for the purpose of deciding whether to enter into that transaction.

(3) The auditor of a public company's accounts owed no duty of care to a member of the public at large who relied on the accounts to buy shares in the company because the court would not deduce a relationship of proximity between the auditor and a member of the public when to do so would

Crane, Christmas & Co [1951] 2 K.B. 164 as compared to the expansion of duty of care in the case of *Hedley Byrne v. Heller & Partners* [1964] A.C. 465.

¹⁰²³ [1990] 1 All ER 568; [1990] UKHL 2.

give rise to unlimited liability on the part of the auditor. Furthermore, an auditor owed no duty of care to an individual shareholder in the company who wished to buy more shares in the company, since an individual shareholder was in no better position than a member of the public at large and the auditor's statutory duty to prepare accounts was owed to the body of shareholders as a whole, the purpose for which accounts were prepared and audited being to enable the shareholders as a body to exercise informed control of the company and not to enable individual shareholders to buy shares with a view to profit. It followed that the auditors did not owe a duty of care to the respondents either as shareholders or as potential investors in the company. The appeal would therefore be allowed and the cross-appeal dismissed. Lord Bridge of Harwick stated @ pgs. 576 to 581 that:

*"The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ, to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (see *Ultramares Corp v Touche* (1931) 255 NY 170 at 179), it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the 'limit or control mechanism ... imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence' (see the *Candlewood case* [1985] 2 All ER 935 at 945, [1986] AC 1 at 25) rested on the necessity to prove, in this category of the tort of negligence, as an essential*

ingredient of the 'proximity' between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (eg in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter on that transaction or on a transaction of that kind.

I find this expectation fully supported by the dissenting judgment of Denning LJ in Candler v Crane Christmas & Co [1951] 1 All ER 426 at 433–436, [1951] 2 KB 164 at 179–184 in the following passages:

'Let me now be constructive and suggest the circumstances in which I say that a duty to use care in making a statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business ... Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent ... The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him? ... Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of £2,000 which the plaintiff made in reliance on the accounts, because [the accountants] knew that the accounts were required for his guidance in making that investment but it does not extend to the subsequent £200 which he invested after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at

*the time, is implicit in the decided cases ... It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him, in the words of Cardozo, C.J., in *Ultramares Corpn. v. Touche* ((1931) 255 NY 170 at 179), to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is, perhaps, worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see s. 40 and s. 43 of the Companies Act, 1948. That is an instance of liability for reports made for the guidance of a specific class of persons—investors in a specific class of transactions—applying for shares. That enactment does not help one way or the other to show what result the common law would have reached in the absence of such provisions, but it does show what result it ought to reach. My conclusion is that a duty to use care in statement is recognised by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies.'*

*It seems to me that this masterly analysis, if I may say so with respect, requires little, if any, amplification or modification in the light of later authority and is particularly apt to point the way to the right conclusion in the present appeal. Some of the speeches in the *Hedley Byrne* case derive a duty of care in relation to negligent statements from a voluntary assumption of responsibility on the part of the maker of the statements. In his speech in *Smith v Eric S Bush* [1989] 2 All ER 514 at 534, [1989] 2 WLR 790 at 813 Lord Griffiths emphatically rejected the view that this was the true ground of liability and concluded:*

'The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.'

I do not think that in the context of the present appeal anything turns on the difference between these two approaches.

*These considerations amply justify the conclusion that auditors of a public company's accounts owe no duty of care to members of the public at large who rely on the accounts in deciding to buy shares in the company. If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company. A claim that such a duty was owed by auditors to a bank lending to a company was emphatically and convincingly rejected by Millett J in *Al Saudi Banque v Clark Pixley (a firm)* [1989] 3 All ER 361, [1990] 2 WLR 344. The only support for an unlimited duty of care owed by auditors for the accuracy of their accounts to all who may foreseeably rely on them is to be found in some jurisdictions in the United States of America, where there are striking differences in the law in different states. In this jurisdiction I have no doubt that the creation of such an unlimited duty would be a legislative step which it would be for Parliament, not the courts, to take....*

The position of auditors in relation to the shareholders of a public limited liability company arising from the relevant provisions of the Companies Act 1985 is accurately summarised in the judgment of Bingham LJ in the Court of Appeal ([1989] 1 All ER 798 at 804, [1989] QB 653 at 680–681):

'The members, or shareholders, of the company are its owners. But they are too numerous, and in most cases too unskilled, to undertake the day-to-day management of that which they own. So responsibility for day-to-day management of the company is delegated to directors. The shareholders, despite their overall powers of control, are in most companies for most of the time investors and little more. But it would, of course, be unsatisfactory and open to abuse if the shareholders received no report on the financial stewardship of their investment save from those to whom the stewardship had been entrusted. So provision is made for the company in general meeting to appoint an auditor (Companies Act 1985, s 384) whose duty is to investigate and form an opinion on the adequacy of the company's accounting records and returns and the correspondence between the company's accounting records and returns and its accounts (s 237). The auditor has then to report to the company's members (among other things) whether in his opinion the company's accounts give a true and fair view of the company's financial position (s 236). In carrying out his investigation and in forming his opinion the auditor necessarily works very closely with the directors and officers of the company. He receives his remuneration from the company.

He naturally, and rightly, regards the company as his client. But he is employed by the company to exercise his professional skill and judgment for the purpose of giving the shareholders an independent report on the reliability of the company's accounts and thus on their investment. Vaughan Williams J said in Re Kingston Cotton Mill Co [1896] 1 Ch 6 at 11: "No doubt he is acting antagonistically to the directors in the sense that he is appointed by the shareholders to be a check upon them." The auditor's report must be read before the company in general meeting and must be open to inspection by any member of the company (s 241). It is attached to and forms part of the company's accounts (ss 238(3) and 239). A copy of the company's accounts (including the auditor's report) must be sent to every member (s 240). Any member of the company, even if not entitled to have a copy of the accounts sent to him, is entitled to be furnished with a copy of the company's last accounts on demand and without charge (s 246).'

No doubt these provisions establish a relationship between the auditors and the shareholders of a company on which the shareholder is entitled to rely for the protection of his interest. But the crucial question concerns the extent of the shareholder's interest which the auditor has a duty to protect. The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders, e.g. by the negligent failure of the auditor to discover and expose a misappropriation of funds by a director of the company, will be recouped by a claim against the auditor in the name of the company, not by individual shareholders.

I find it difficult to visualise a situation arising in the real world in which the individual shareholder could claim to have sustained a loss in respect of his existing shareholding referable to the negligence of the auditor which could not be recouped by the company. But on this part of the case your Lordships were much pressed with the argument that such a loss might occur by a negligent undervaluation of the company's assets in the auditor's report relied on by the individual shareholder in deciding to sell his shares at an undervalue. The argument then runs thus. The shareholder, *qua* shareholder, is entitled to rely on the auditor's report as the basis of his investment decision to sell his existing shareholding. If he sells at an

undervalue he is entitled to recover the loss from the auditor. There can be no distinction in law between the shareholder's investment decision to sell the shares he has or to buy additional shares. It follows, therefore, that the scope of the duty of care owed to him by the auditor extends to cover any loss sustained consequent on the purchase of additional shares in reliance on the auditor's negligent report.

I believe this argument to be fallacious. Assuming without deciding that a claim by a shareholder to recover a loss suffered by selling his shares at an undervalue attributable to an undervaluation of the company's assets in the auditor's report could be sustained at all, it would not be by reason of any reliance by the shareholder on the auditor's report in deciding to sell: the loss would be referable to the depreciatory effect of the report on the market value of the shares before ever the decision of the shareholder to sell was taken. A claim to recoup a loss alleged to flow from the purchase of overvalued shares, on the other hand, can only be sustained on the basis of the purchaser's reliance on the report. The specious equation of 'investment decisions' to sell or to buy as giving rise to parallel claims thus appears to me to be untenable. Moreover, the loss in the case of the sale would be of a loss of part of the value of the shareholder's existing holding, which, assuming a duty of care owed to individual shareholders, it might sensibly lie within the scope of the auditor's duty to protect. A loss, on the other hand, resulting from the purchase of additional shares would result from a wholly independent transaction having no connection with the existing shareholding.

I believe it is this last distinction which is of critical importance and which demonstrates the unsoundness of the conclusion reached by the majority of the Court of Appeal. It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:

'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.'

(See Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 48 per Brennan J.)

Assuming for the purpose of the argument that the relationship between the auditor of a company and individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty.

I would allow the appeal and dismiss the cross-appeal."

Lloyd Chayham & Co Ltd v. Littlejohn & Co¹⁰²⁴ - Trec Rentals Ltd (Trec) carried on the business of letting trailers on hire. Trehaven Trust Ltd (Trehaven) owned 39% of Trec's shares and held a debenture over the assets of the company which could be converted into shares in Trec so as to give it 78% of the shares of the company. In 1980 and 1981 Trec suffered a severe drop in its rental income and Trehaven was obliged to provide it with financial support. Trehaven sought a purchaser for its interest in Trec and eventually it entered into an agreement with the plaintiffs whereby the plaintiffs were to obtain 50% of the shares in Trec without making payment but they agreed to inject into Trec up to £150,000 as and when it was needed. Before entering into the agreement, the plaintiffs were shown a copy of Trec's audited accounts which had been prepared by the defendants, Trec's auditors, and the plaintiffs had made it clear that they would not enter into the agreement unless they had an opportunity to study the audited accounts of Trec for the previous year. Soon after the agreement was entered into Trec was wound up. The plaintiffs commenced an action against the defendants for damages in negligence alleging that the defendants had been negligent in auditing the accounts of the company on which the plaintiffs had relied in entering into the agreement. In particular, the plaintiffs alleged that the way in which the cost of replacing the tyres of the trailers was provided for in the accounts was inadequate in that they only took the substantial portion of the cost into consideration when it crystallised whereas it should have been taken into consideration when the loss accrued and there was no express statement in the accounts that a substantial sum would have to be paid for the replacement of the tyres. It was held that the action of the plaintiffs be dismissed. Even though this was undoubtedly a case where the defendants owed the plaintiffs a duty of care as the defendants knew that the accounts were going to be relied on by the plaintiffs, on the facts, there had been no breach of duty by the defendants in providing for the cost of replacing the tyres in the way that they did as they could responsibly have taken the view that the accounts as prepared would give a true and fair view of the company's affairs. Woolf J stated @ pgs. 302 to 303 and 310 as follows:

"Before dealing further with the facts it is convenient if I deal with the matters which the plaintiffs have to establish in order to succeed. In different circumstances, this was dealt with in my judgment in JEB Fasteners Ltd v Mark Bloom & Co [1981] 3 All ER 289 and so far as causation is concerned by the Court of Appeal in the same case ([1983] 1 All ER 583), where Sir Sebag Shaw criticised my approach to causation as being over-refined. Bearing that criticism in mind, it seems to me that in this case, in order to succeed, there being no issue of contributory negligence, it is necessary for the plaintiffs to establish:

- (a) That the defendants owed them a duty of care. This involves establishing that the defendants ought to have realised that the accounts which they audited would be relied on in the circumstances in which they were allegedly relied on by the plaintiffs (the duty of care issue).*

¹⁰²⁴ [1987] BCLC 303.

- (b) *That the defendants were negligent in the auditing of the accounts: that is, did the defendants fall below the standard laid down in respect of doctors by McNair J in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582? An approach which was recently endorsed by the House of Lords in Maynard v West Midlands Health Authority [1985] 1 All ER 635, [1984] 1 WLR 634 and Sidaway v Bethlem Hospital Governors [1985] 1 All ER 643, [1985] AC 871. To comply with the standard the defendants must act in accordance with a practice accepted as proper by a body of responsible and skilled medical opinion (the negligence issue).*
- (c) *If the defendants were negligent, did the plaintiffs suffer loss in consequence? On the facts of this case this can be restated by asking whether the plaintiffs would in fact have entered into the agreement with Trec and Trehaven of 28 September 1981 if the defendants had not been negligent as alleged (the causation issue).*
- (d) *The amount of loss suffered by the plaintiffs in consequence of entering into the agreement (the quantum issue).*

In considering the negligence issue it is desirable to bear in mind s 14 of the Companies Act 1967 as amended which requires the auditor's report to state whether the accounts in their opinion have been properly prepared in accordance with the Companies Act and whether they gave a true and fair view of the company's affairs.

... It is clear beyond peradventure in this case that the defendants knew that their audited accounts were required by the plaintiffs in relation to their proposed agreement in respect of Trec. In these circumstances, subject to reserving his position if the case should go to appeal, counsel for the defendants (Mr Baker QC) accepts that the defendants owed to the plaintiffs a duty of care in auditing the accounts of Trec. On my view of the law this is undoubtedly the position."

*State v. Andoh and others*¹⁰²⁵ - this was a criminal proceeding in which the State sought to prosecute the accused persons including a professional accountant employed as an auditor by a company, Nadeco Ltd. He was charged with four counts of falsification of accounts contrary to Act 29, section 140 in that he omitted to make full and true entries of the bank balances in the balance sheet thus defrauding the Commissioner of Income Tax. Act 29 relate the offence to an "officer" of a company. At his trial, counsel raised a preliminary point that though the four counts against auditor referred to him as an "auditor of Nadeco" and section 2(3) of Act 29 defined an "officer" to include an auditor and section 140 of the same Act spoke of an "officer," section 136 of Act 179 provided that an auditor shall not be regarded as an agent or officer of a company. Counsel submitted, therefore, that section

¹⁰²⁵ [1967] GLR 355.

2(3) of Act 29 was inconsistent with section 136 of Act 179 and as Act 179 was subsequent to Act 29, section 136 of Act 179 must be deemed to have impliedly repealed section 2(3) of Act 29. In holding that Act 179 does not repeal section 2(3) of Act, Edusei J explained @ pg. 358 the exclusion of auditor as an officer of a company under section 136 of Act 179 as follows:

“Section 136 of the Companies Code, 1963 (Act 179), in my opinion, does not desire to fetter the way and manner the auditor does his auditing; the section gives him absolute freedom and he is in the category of an independent contractor, so to speak; he is in a fiduciary relationship to the directors and the shareholders of the company, and he must not be subservient to any member of the company whose accounts he is auditing so that he can discharge his duties with honesty and efficiency. I do not see how this section 136 of the Companies Code (Act 179), can be considered as being inconsistent with section 2(3) of the Criminal Code (Act 29), the subject-matter of which is distinct from that of section 136 of Act 179.”

The standard required of the auditor in the performance of the functions of the auditor is the standard of a faithful, diligent, careful and ordinarily skilful auditor in the circumstances in which the auditor is acting. The auditor is therefore not required to have any special skill or knowledge, but the ordinary skill required of auditor in the circumstances in which the auditor discharging the duties owed to the members finds himself. The auditor is to act with reasonable skill and diligence. What is reasonable is dependent on the circumstance of each case. The following cases discuss the reasonable standard of care to be exercised by the auditor in the discharge of the duties of the auditor.

*In re London And General Bank (No2)*¹⁰²⁶ - an auditor presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realizing them. However, the report to the shareholders merely stated that the value of the assets was dependent on realisation, resulting in the shareholders being deceived as to the condition of the company, and a dividend was declared out of capital and not out of income. In an action against the auditor and the directors, it was held that directors and auditors must pay the dividend so declared. On appeal by the auditor, it was held that the auditor had been guilty of misfeasance under section 10 of the Companies (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid. That although it is not the duty of the auditors of a company, appointed under the Companies Act, 1879, to consider whether its business is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs, and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company and must take reasonable care that what they certify as to the company's financial position is true. And except in very special cases, it is their duty to place before the shareholders the

¹⁰²⁶ [1895] 2 Ch. 673.

necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it. Lindley L.J. stated @ pgs. 682 to 685 that:

"In connection with these articles, and in order to save repetition, it should be stated that by the articles of this bank it is the duty of the directors, and not of the auditors, to recommend to the shareholders the amounts to be appropriated for dividends (clause 98), and it is the duty of the directors to have proper accounts kept, so as to shew the true state and condition of the company (clause 103). Lastly, it is for the shareholders, but only on the recommendation of the directors, to declare a dividend (clause 115). It is impossible to read s. 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance-sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Stirling J. in Leeds Estate Building and Investment Co. v. Shepherd 36 Ch. D. 802. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does

not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest - i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe businessmen select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance sheet. He did not content himself with making his balance-sheet from the books without troubling himself about the truth of what they shewed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognised as correct by businessmen. The balance sheet and certificate of February, 1892 (i.e., for the year 1891), was accompanied by a report to the directors of the bank. Taking the balance sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and if this report had been laid before the shareholders Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance. A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its consequent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to insure publicity, he made a confidential

report to the shareholders and invited their attention to it and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared it, he would perhaps have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle; and in order not to be misunderstood I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril and runs the very serious risk of being held judicially to have failed to discharge his duty."

*In re Kingston Cotton Mill Co (No. 2)*¹⁰²⁷ – Lindley LJ stated as follows:

"This is an appeal from an order made by Vaughan Williams J. under s. 10 of the Companies (Winding-up) Act, 1890, on Mr. Pickering and Mr. Peasegood, the auditors of the company, ordering them to pay to the liquidator certain sums of money, being the amounts of dividends improperly declared and paid out of the assets of the company on the faith of certain balance-sheets prepared and signed by the auditors. The facts are not in dispute. They will be found correctly stated in the report of the case. The appeal is based on two grounds, namely--(1.) that the auditors have not failed to discharge their duty to the company, and are under no liability to make good the money misapplied; ...

I come now to the real question in this controversy, and that is, whether the appellants have been guilty of any breach of duty to the company. To decide this question it is necessary to consider--

- *what their duty was;*
- *how they performed it, and in what respects (if any) they failed to perform it.*

The duty of an auditor generally was very carefully considered by this Court in In re London and General Bank, and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance sheet shewing the true financial position of the company at the time to which the balance sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill.

It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable

¹⁰²⁷ [1896] Ch 279.

than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error.

The company's articles of association contain special regulations relating to auditors: see arts. 129-140; but they do not impose upon the auditors any more onerous duties than those I have already mentioned. Auditors are, however, in my opinion bound to see what exceptional duties, if any, are cast upon them by the articles of the company whose accounts they are called upon to audit. Ignorance of the articles and of exceptional duties imposed by them would not afford any legal justification for not observing them. Some reliance was placed in this case on arts. 123 and 124. Those, however, relate to the duties of the directors, and not of the auditors. Art. 124 empowers the auditors to direct what accounts shall be kept and how they shall be kept; but there is nothing in this article which makes an auditor responsible for not ordering an account to be kept which he did not think necessary. His duty in this respect is governed by the general principles which have been already stated. If on those principles it can be truly said that an auditor ought to have required a particular account to be kept, then art. 124 prevents him from effectually urging as a defence that he had no authority to require it. But beyond that, art. 124 cannot be invoked against the auditor.

I pass now to consider the complaint made against the auditors in this particular case. The complaint is that they failed to detect certain frauds. There is no charge of dishonesty on the part of the auditors. They did not certify or pass anything which they did not honestly believe to be true. It is said, however, that they were culpably careless. The circumstances are as follows: For several years frauds were committed by the manager, who, in order to bolster up the company and to make it appear flourishing when it was the reverse, deliberately exaggerated both the quantities and values of the cotton and yarn in the company's mills. He did this at the ends of the years 1890, 1891, 1892, and 1893. There was no book or account (except the stock journal to which I will refer presently) shewing the quantity or value of the cotton or yarn in the mill at any one time. It would not be easy to keep such a book. Nor is it wanted for ordinary purposes. There is considerable waste (20 or 25 per cent. on the average) in the manufacture of yarn from cotton, and the market prices of both cotton and yarn are subject to great fluctuations. The balance-sheets of each year contained on the asset side entries of the values of the stock-in-trade at the end of the year, and those entries were stated to be "As per manager's certificate." There were also in the balance-sheets entries on the opposite side of the values of the stock-in-trade at the beginning of the year. The quantities did not appear in either

case. The auditors took the entry of the stock-in-trade at the beginning of the year from the last preceding balance sheet, and they took the values of the stock-in-trade at the end of the year from the stock journal. This book contained a series of accounts under various heads purporting to shew the quantities and values of the company's stock-in-trade at the end of each year, and a summary of all the accounts shewing the total value of such stock-in-trade. The summary was signed by the manager, and the value as shewn by it was adopted by the auditors and was inserted as an asset in the balance sheet, but "As per manager's certificate." The summary always corresponded with the accounts summarized, and the auditors ascertained that this was the case. But they did not examine further into the accuracy of the accounts summarized. The auditors did not profess to guarantee the correctness of this item. They assumed no responsibility for it. They took the item from the manager, and the entry in the balance-sheet shewed that they did so. I confess I cannot see that their omission to check his returns was a breach of their duty to the company. It is no part of an auditor's duty to take stock. No one contends that it is. He must rely on other people for details of the stock-in-trade on hand. In the case of a cotton mill he must rely on some skilled person for the materials necessary to enable him to enter the stock-in-trade at its proper value in the balance sheet. In this case the auditors relied on the manager. He was a man of high character and of unquestioned competence. He was trusted by everyone who knew him. The learned judge has held that the directors are not to be blamed for trusting him. The auditors had no suspicion that he was not to be trusted to give accurate information as to the stock-in-trade in hand, and they trusted him accordingly in that matter. But it is said they ought not to have done so, and for this reason. The stock journal shewed the quantities--that is, the weight in pounds--of the cotton and yarn at the end of each year. Other books shewed the quantities of cotton bought during the year and the quantities of yarn sold during the year. If these books had been compared by the auditors they would have found that the quantity of cotton and yarn in hand at the end of the year ought to be much less than the quantity shewn in the stock journal, and so much less that the value of the cotton and yam entered in the stock journal could not be right, or at all events was so abnormally large as to excite suspicion and demand further inquiry. This is the view taken by the learned judge. But, although it is no doubt true that such a process might have been gone through, and that, if gone through, the fraud would have been discovered, can it be truly said that the auditors were wanting in reasonable care in not thinking it necessary to test the managing director's return? I cannot bring myself to think they were, nor do I think that any jury of businessmen would take a different view. It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to

any one before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential. I cannot think there was. The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier who has to account for the cash which he receives, and whose own account of his receipts and payments could not reasonably be taken by an auditor without further inquiry. The auditor's duty is not so onerous as the learned judge has held it to be. The order appealed from must be discharged with costs."

*In re Thomas Gerrard & Son Ltd*¹⁰²⁸ - the managing director of a company falsified the company's books by three methods. He caused the half-yearly stock valuation to be inflated by the inclusion of non-existent stock; he caused the price payable on purchase of stock made at the end of each half-yearly period to be included in the outgoings of the succeeding period by altering invoices in a manner immediately apparent to anyone looking at the invoices; and he caused the price payable for sales made after the end of the relevant period to be included in the preceding period. The company's auditors obtained the information about the various matters on which they were required to report under section 162 of the Companies Act, 1948, principally from the managing director, whom they believed to be of the highest integrity, and they accepted his explanation of the alterations. The auditors certified the accounts, tax was paid on the inflated profits, and the directors recommended and the members confirmed payment of dividend during the financial years ending in March, 1957 to 1962. The frauds were then discovered and the company went into liquidation. The audit was required by the directors to be completed on a day soon after the date of each period of account, but the auditors started their audit before the end of the period and no complaint was made in evidence that they were given insufficient time. In an action taken by the liquidator against the auditors claiming that they were guilty of or liable for negligence or breach of duty in respect of the audit of the accounts, the auditors contended that they were not in breach of duty in that, inter alia, they were not given sufficient time in which to make their audit. It was held that an auditor must use reasonable skill and care in carrying out his statutory duty as an officer of the company under section 162 of the Companies Act, 1948, to make a report to the members containing the required statements; that on the discovery of the altered invoices it was the duty of the auditors to make an exhaustive inquiry and to inform the board of directors; and that, reserving the position under methods (1) and (3) had they stood alone, in all the circumstances the auditors in failing to make such inquiries were in breach of their duty. Pennycuik J. stated @ pgs. 471 to 477 as follows:

"By section 159 a company must appoint auditors. Section 162 is critical upon the present issue. It provides as follows:

¹⁰²⁸ [1968] Ch 455.

"(1) The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet, every profit and loss account and all group accounts laid before the company in general meeting during their tenure of office, and the report shall contain statements as to the matters mentioned in Schedule 9 to this Act. (2) The auditors' report shall be read before the company in general meeting and shall be open to inspection by any member. (3) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the officers of the company such information and explanation as he thinks necessary for the performance of the duties of the auditors. ..."

I need not read subsection (4).

Schedule 9, which is referred to in subsection (1) of section 162, is headed "Matters to be expressly stated in Auditors' Report," and it says:

"1. Whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of their audit. 2. Whether, in their opinion, proper books of account have been kept by the company, so far as appears from their examination of those books, and proper returns adequate for the purposes of their audit have been received from branches not visited by them. 3. (1) Whether the company's balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account dealt with by the report are in agreement with the books of account and returns. (2) Whether, in their opinion and to the best of their information and according to the explanations given them, the said accounts give the information required by this Act in the manner so required and give a true and fair view - (a) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year- and (b) in the case of the profit and loss account, of the profit or loss for its financial year; or, as the case may be, give a true and fair view thereof subject to the non-disclosure of any matters ... not required to be disclosed. ..."

The scheme of the Act, then, is that the directors must prepare the accounts; the auditors must make a report to the members upon the accounts; the report must contain statements upon certain specified matters. It is, I think, clear that the auditor, when he "thinks" for the purpose of subsection (3) what is necessary for the performance of his duties, when he forms the "belief" mentioned in paragraph 1 of Schedule 9, when he forms the "opinion" mentioned in paragraph 2 of Schedule 9, and again when he forms the "opinion" mentioned in paragraph 3 (2) of Schedule 9, must exercise reasonable care and skill. Equally, if he performs these mental

operations without exercising reasonable care and skill and then proceeds to give an unqualified statement, in other words a clean certificate, he is in breach of his statutory duty as an officer of the company.

Once the pleadings had been brought into order, Mr. Instone, who appeared for Kevans, did not, as I understood him, contend to the contrary. It has always been the law that an auditor must exercise reasonable care and skill and it could hardly be suggested that the effect of the present statutory provisions is to diminish this obligation.

*I was referred to such judicial decisions on the duties of auditors as are to be found in the books. The most important for the present purpose is the decision of the Court of Appeal in *In re Kingston Cotton Mill Co. (No. 2)*. (1896) 2 Ch. 279. The headnote reads as follows:*

"Held (affirming the judgment of Vaughan Williams J.), that where an officer of a company has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible in an action, such breach of duty is a 'misfeasance' for which he may be summarily proceeded against under the Companies (Winding-up) Act, 1890, s. 10, and it is not necessary that an action should be brought.

For some years before a company was wound up, balance-sheets signed by the auditors were published by the directors to the shareholders in which the value of the company's stock-in-trade at the end of each year was grossly overstated. The auditors relied on certificates, wilfully false, given by J., one of the directors who was also manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books and added to the stock-in-trade at the beginning of the year the amounts purchased during the year, and deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so:-

Held (reversing the decision of Vaughan Williams J.), that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid.

An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care and skill."

This decision has been so much relied upon in the present case that I ought to read two passages from the judgment of Lindley W.J.:

*"I come now to the real question in this controversy, and that is, whether the appellants have been guilty of any breach of duty to the company. To decide this question it is necessary to consider (1) what their duty was; (2) how they performed it, and in what respects (if any) they failed to perform it. The duty of an auditor generally was very carefully considered by this court in *In re London and General Bank*,³ and I cannot usefully add anything to what will be found there. (2) It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance-sheet showing the true financial position of the company at the time to which the balance-sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill. It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error."*

Then comes this passage:

"The auditors did not profess to guarantee the correctness of this item. They assumed no responsibility for it. They took the item from the manager, and the entry in the balance sheet showed that they did so. I confess I cannot see that their omission to check his returns was a breach of their duty to the company. It is no part of an auditor's duty to take stock. No one contends that it is. He must rely on other people for details of the stock-in-trade on hand. In the case of a cotton mill he must rely on some skilled person for the materials necessary to enable him to enter the stock-in-trade at its proper value in the balance sheet. In this case the auditors relied on the manager. He was a man of high character and of unquestioned competence. He was trusted by everyone who knew him.

The learned judge has held that the directors are not to be blamed for trusting him. The auditors had no suspicion that he was not to be trusted to give accurate information as to the stock-in-trade in hand, and they trusted him accordingly in that matter. But it is said they ought not to have done so, ... the question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential. I cannot think there was."

I need only quote further the well-known sentence in the judgment of Lopes L.J.: "He (that is, the auditor) is a watch-dog, but not a bloodhound."

*This case appears, at any rate at first sight, to be conclusive in favour of Kevans as regards the falsification of the stock taken in isolation. Mr. Walton, for the liquidator, pointed out that before 1900 there was no statutory provision corresponding to section 162 of the Companies Act, 1948. That is so, but I am not clear that the quality of the auditor's duty has changed in any relevant respect since 1896. Basically that duty has always been to audit the company's accounts with reasonable care and skill. The real ground on which *In re Kingston Cotton Mill Co. (No. 2)* is, I think, capable of being distinguished is that the standards of reasonable care and skill are, upon the expert evidence, more exacting today than those which prevailed in 1896. I see considerable force in this contention. It must, I think, be open, even in this court, to make a finding that in all the particular circumstances the auditors have been in breach of their duty in relation to stock. On the other hand, if this breach of duty stood alone and the facts were more or less the same as those in *In re Kingston Cotton Mill Co. (No. 2)*, this court would, I think, be very chary indeed of reaching a conclusion different from that reached by the Court of Appeal in *In re Kingston Cotton Mill Co. (No. 2)*.*

I return now to the three methods of falsification and will seek to apply the law as I understand it to those three methods.

(1) I think it better not to make a finding on what would be the position under head (1) if it stood alone.

(2) I find it impossible to acquit Kevans of negligence as regards purchases of stock before the end of each current period of account and the attribution of the price to the succeeding period of account. I will assume in their favour that Mr. Nightingale was entitled to rely on the assurances of Mr. Heyes and Mr. Croston until he first came upon the altered invoices, but once these were discovered he was clearly put upon inquiry and I do not think he was then entitled to rest content with the assurances of Mr. Croston and Mr. Heyes, however implicitly he may have trusted Mr. Croston. I find the conclusion inescapable alike on the expert evidence and as a

*matter of business common sense that at this stage he ought to have taken steps on the lines indicated by Mr. Macnamara, that is to say, he should have examined the suppliers' statements and where necessary have communicated with the suppliers. Having ascertained the precise facts so far as it was possible for him to do so, he should then have informed the board. It may be that the board would then have taken some action. But whatever the board did he should in each subsequent audit have made such checks and such inquiries as would have ensured that any mis-attribution in the cut-off procedure was detected. He did not take any of these steps. I am bound to conclude that he failed in his duty. It is important in this connection to remember that this is not a case of some isolated failure in detection. The fraud was repeated half-yearly on a large scale for many years. The words which I have quoted from the judgment of Lindley L.J. in *In re Kingston Cotton Mill Co. (No. 2)* are, I think, precisely in point:*

"What in any particular case is a reasonable amount of care and skill depends on the circumstances of the case, that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than can be so considered if suspicion was or ought to have been aroused."

Here suspicion ought emphatically to have been aroused and the auditors ought to have taken the steps which I have indicated.

(3) *The position with regard to sales of stock after the end of each current period of account and the attribution of the price to the current period of account is different in an important respect, namely, that here no alteration of documents is involved. What happened, as I have said, is that Mr. Croston destroyed the copy invoices and gave a plausible though untrue explanation for their absence. Again I think it is better not to make any finding on what would be the position under this head if it stood alone.*

It is conceded by Mr. Instone that if breach of duty is found under any one of the three heads, the measure of compensation is the same as if breach of duty had been found under either two or all three heads. This concession is clearly right. The three heads are closely interrelated, and once put on their guard under any one head the auditors ought to have taken such steps as would have ensured that a fraud under either of the other heads equally would not remain undetected. It is for this reason that I have thought it better not to make separate findings under heads (1) and (3). These are matters of some general importance and findings under either of them in isolation would be unnecessary and might be misleading.

As I have said, Mr. Philp, while accepting in full the evidence of Mr. Macnamara as to the duties of auditors, gave it as his opinion that in the circumstances of this case Kevans were not guilty of breach of duty. The ground for this view was largely, if

not wholly, as I understood him, that the directors did not give Kevans proper time in which to make their audit and that Kevans did the best they could in the time at their disposal. I do not think that this view could be supported on the facts, It is true that Kevans' audit was required by the directors to be completed on a date quite soon after the close of each period of account. On the other hand, they started their audit before the end of the period of account and neither Mr. Nightingale nor Mr. Swarsbrick made any complaint in evidence that they were not given sufficient time to make their audit. However that might be, I do not think Mr. Philp's view is good in law. The auditors of the company owe a statutory duty to make to the members a report containing certain statements. If the directors do not allow auditors time to conduct such investigations as are necessary in order to make these statements, the auditors must, it seems to me, either refuse to make a report at all or make an appropriately qualified report. They cannot be justified in making a report containing a statement the truth of which they have not had an opportunity of ascertaining."

15.8 Powers of auditors

In order for the auditor to be able to perform the function of auditing the financial statement of a company and reporting to members or shareholders, the Act provides for the following powers and rights of an auditor of a company.

(a) Right to access all books, accounts and vouchers

Section 142(3) of Act 992 provides *"(3) An auditor shall have a right of access at all times to the accounting records and financial statements and vouchers of the company and is entitled to require from the officers of the company information and explanation that the auditor thinks necessary for the performance of the functions of the auditor."* The auditor, therefore, has the right of access, at all times to the books, accounts and vouchers of the company. This is not a right to be exercised at specific periods but can be exercised at all times. An auditor can therefore request for specific financial information from the company at any time. *In re Kingston Cotton Mill (No. 2)* (supra) and *In re London And General Bank (No. 2)* (supra) illustrate the duty on the auditor to examine the books of account and vouchers of a company and prepare a report.

(b) Right to request for information and explanation from officers

Related to the auditor's right to access financial statements and vouchers, the auditor also has the right to request for information and explanation from officers of the company that are necessary for the performance of the functions of the auditor. The auditor can, therefore, conduct interviews with

officers of the company on acts and omissions relating to the financial statements and other activities of the company that the auditor determines are necessary for the performance of the functions of the auditor. The auditor has the right to request for explanation on information provided that in the view of the auditor are not clear or there are inconsistencies. *In re Thomas Gerrard & Son Ltd* (supra) illustrates the breach of duty where the auditor fails to make enquiry and request for explanation on matters that are not clear in the information provided.

(c) Right to attend general meeting

Section 142(4) of Act 992 provides that:

- “(4) The auditor of a company is entitled to*
(a) attend a general meeting of the company,
(b) receive the notices of, and other communications relating to, a general meeting, and
(c) be heard at a general meeting on any part of the business of the meeting which concerns the auditor.”

The auditor of a company is entitled to attend the annual general meeting of the company and any extraordinary general meeting convened by the company.¹⁰²⁹ In order to be able to exercise this right, the auditor is entitled to receive all notices of and other communications relating to any general meeting of the company.¹⁰³⁰ At the general meeting, the auditor is entitled to be heard on any part of the business of the meeting which concerns the performance of the duty of an auditor. The auditor, therefore, does not have a right to contribute to every discussion at the general meeting. The right to be heard at the general meeting is restricted to a matter relating to the functions of the auditor.

(d) Right to apply to the Court for direction

Section 142(5) of Act 992 provides that *“(5) The auditor of a company may apply to the Court for directions in relation to a matter arising in connection with the performance of functions under this Act.”* The subsection gives the auditor of a company the discretion to apply to the Court for directions in relation to any matter arising in connection with the performance of his functions under the Act. This power may be exercised where due to circumstances arising, the auditor is not able to perform the function required or is prevented from doing so by any officer of the company. An example will include where the auditor request for information and the officer in possession of the information refused or failed to give the auditor the information. Subsection (6) of section 142 of the Act provides that on any such application, the Court may give such directions as the Court thinks

¹⁰²⁹ This position is also stated in paragraph 7(a) of the Eighth Schedule of Act 992.

¹⁰³⁰ Paragraph 1(f) of the Eighth Schedule of Act 992.

just. The cost associated with such application is borne by the company unless the Court otherwise directs.¹⁰³¹

(e) Right to communicate with retiring auditor

Section 139(8) of Act 992 provides that *“(8) Before accepting the appointment as an auditor of a company, the auditor shall communicate with the retiring auditor and request the retiring auditor to make any representations and supply information about the company.”* The auditor is given the right to communicate with the retiring auditor prior to accepting the appointment to be the auditor of the company. This gives the incoming auditor the opportunity to assess the performance of the functions that will be required of the auditor once appointed. The right is limited to instances where the incoming auditor is appointed where the office of the auditor is vacated by retirement. Where the auditor ceased to be an auditor as a result of removal by the members, disqualification or expiration of the terms of appointment, there is no obligation on the incoming auditor to communicate with such auditor. Even though the subsection used the word “shall”, thereby making it mandatory for the incoming auditor to so communicate with the retiring auditor, it is suggested that the subsection will not be breached if the incoming auditor assessed that no information or clarification is required from the retiring auditor, thereby not communicating with the auditor. The retiring auditor is required to respond to the request made by the incoming auditor. Subsection (9) of section 139 provides that *“(9) The retiring auditor shall respond to the request and supply the requisite information.”*

15.9 Avoidance of conflict of interest by an auditor

An auditor of a company is required not to put himself in a conflict of interest position when performing the duties imposed on him under the Act. Section 143 of Act 992 provides that:

“(1) An auditor of a company shall ensure that in carrying out the duties of an auditor under this Part, the personal judgement of the auditor is not impaired by reason of any relationship with or interest in the company or any of the subsidiaries of the company.

(2) Without limiting subsection (1), a company¹⁰³², person or firm that carries out duties of an auditor shall not engage in any relationship with a client that will result in a conflict of interest between the person or firm and that client including a relationship with a client that will

(a) place the person or firm in the position of auditing work of that person or firm;

¹⁰³¹ Section 142(6) of Act 992.

¹⁰³² The reference to ‘company’ under this section is a mistake as section 138(2)(e) disqualifies all body corporate from being an auditor except a firm incorporated under the Incorporated Private Partnership Act, 1962 (Act 152).

- (b) result in that person or firm acting as management or an employee of the client; or*
- (c) place that person or firm in a position of being an advocate for the client.*
- (3) Subsection (2) applies to the appointment of an auditor who is appointed to perform the services of a receiver."*

The repealed Companies Act, 1963 permits an auditor of a company to provide additional services to the company under the terms of a contract with the company in relation to the detection of defalcations, advice on accounting, costing, taxation, raising of finance and other matters.¹⁰³³ The provision by an auditor of such advisory services to the client has the potential of leading to a situation where the auditor will end up auditing financial statements of a company that is based in some respect on the advice given by the auditor. This is a potential conflict of interest situation. In order to avoid such situations, the new Companies Act, 2019, whilst not totally prohibiting an auditor from providing services to the company, prohibits that auditor from putting himself in a situation of conflict of interest. The memorandum to the Companies Bill (which was passed into Act 992) provides that:

"Clause 143 presents a new position. It prohibits the conflict of interest scenario where an audit firm and its partner and employees engage in relationships that would create a mutual and conflicting interest between the firm and audit client."

Section 143 of the Act first requires the auditor in carrying out the duties of an auditor not to permit his personal judgment to be impaired as a result of the relationship with or interest in the company or any subsidiary of the company. Without limiting the generality of the preceding prescription, the Act prohibits a person or firm that carries out duties of an auditor for a client from having a relationship with the client that will result in a conflict of interest between that person or firm and the client. Specifically, the Act prohibits relationship with the client that will result in the person or firm being in a position to audit the work of the person or firm; result in the person or firm acting as management or employee of the client; or place the person or firm in a position of being an advocate for this client. The prohibition is applicable to an auditor who is appointed to perform the services of a receiver of a company.¹⁰³⁴

15.10 Removal of an auditor

There are a number of ways that an auditor of a company will cease to be an auditor of the company under Act 992. One of the ways by which an auditor ceases to be an auditor is removal under section 141 of the Act. In addition to removal in accordance with section 141 of the Act, an auditor may also

¹⁰³³ Section 136(7) of repealed Companies Act, 1963 (Act 179).

¹⁰³⁴ Section 143(3) of Act 992.

cease to be an auditor of a company if the auditor ceases to qualify for appointment, resigns by notice in writing to the company, the term of appointment expires or through the death of the auditor.¹⁰³⁵ For an auditor to cease to be an auditor through removal, the removal must strictly be in accordance with section 141 of the Act. First, the removal can only be done in accordance with a resolution passed by the company which must satisfy stated conditions and passed at an annual general meeting. Section 141 of Act 992 provides as follows:

“(1) A resolution to remove an auditor or to appoint any other person in the place of that auditor is not effective unless,

(a) a written notice has been given to the company of the intention to pass the resolution, not less than thirty-five days before the general meeting at which the resolution is to be moved and on receipt of the resolution, the company has forthwith sent a copy of the resolution to the auditor concerned;

(b) the resolution is passed at a general meeting of the company;

(c) the company has given the members notice of the resolution, at the same time and in the same manner as the company gives notice of meetings or, if that is not practicable, has given the members notice of the resolution in the same manner as notice of meetings are required to be given not less than twenty-one days before the meeting.

(2) For the purposes of subsection (1),

(a) if, after notice of the intention to move the resolution is given to the company, an annual general meeting is called for a date thirty-five days or less after the notice has been given to the company, the notice is properly given; and

(b) in the case of a resolution to remove an auditor appointed by the directors in accordance with subsection (4) of section 139 or to appoint any other person in place of an auditor so appointed, subsection (1) shall have effect with substitution of fourteen days for thirty-five days in paragraph (a) of subsection (1) and seven days for twenty-one days in paragraph (c) of subsection (1).

(3) The auditor concerned is entitled

(a) to be heard on the resolution at the meeting; and

(b) to send the company a written statement, and the company shall send copies of the statement with every notice of the annual general meeting or, if the statement is received too late, shall forthwith circulate to each person entitled under subparagraph (f) of paragraph 1 of the Eighth Schedule the notice of the meeting in the same manner as notices of meetings are required to be given.

¹⁰³⁵ Section 139(5) of Act 992.

- (4) The company is not required to send or circulate the statement under paragraph (b) of subsection (3),*
- (a) if the statement is received by the company less than seven days before the meeting; or*
- (b) if the Court, on an application made by the company or any other person who claims to be aggrieved, so orders on being satisfied that the statement is unreasonably long or that the rights conferred by this section are being abused to secure needless publicity for defamatory matter; the Court may order the costs of the applicant to be paid in whole or in part by the auditor although the auditor is not a party to the application.*
- (5) Without limiting the right of the auditor to be heard orally on the resolution, the auditor may, unless the Court makes an order under subsection (4), also require that the written statement by the auditor be read to the meeting.*
- (6) If the resolution is passed, the resolution shall not take effect until the conclusion of the annual general meeting."*

The removal of an auditor is done the same way as the removal of directors. However, an auditor can be removed only at an annual general meeting and not at an extraordinary general meeting. The auditor cannot, therefore, also be removed without an annual general meeting notwithstanding the unanimous desire of the members to remove the auditor.

An auditor cannot be removed at an annual general meeting where no notice of intention to remove the auditor is given by a member to the company prior to the meeting. Subsection (1) of section 141 of the Act requires the notice of intention to remove an auditor is given by a member to the company thirty-five days to the day of the general meeting. However, for the removal of auditors appointed by directors or appointed as a replacement for such auditors, paragraph (b) of subsection (2) requires the notice of intention to remove the auditor to be given at least fourteen days to the annual general meeting. However, under subsection (1), if after the notice of intention to remove an auditor is given to the company when no annual general meeting has been called, but the company called an annual general meeting for a period less than thirty-five days from the day the notice was given, the resolution to remove the director can be moved at the meeting even though thirty-five days have not lapsed.

The company must in addition to giving notice for an annual general meeting, give to the members the notice of the intention to remove an auditor. If possible, the two notices must be given together and in the same manner. However, if it is not practicable, then the notice of intention to remove an auditor must be given in the same manner as notice of the annual general meeting and at least twenty-one days prior to the general meeting. Thus, if the notice of general meeting is personally

delivered to the members, the notice of intention to remove a director must be given in the same manner. For an auditor appointed by directors, the notice of intention to remove that auditor can be given seven days to the annual general meeting.¹⁰³⁶

Paragraph (a) of subsection (1) of section 141 requires the notice of intention to remove an auditor be given to the affected auditor. The notice may either be given prior or at the same time as the notice of intention to remove an auditor is given to the members. Failure to give the notice to the concerned auditor will render the removal at the annual general meeting ineffective.

The Act permits the auditor to respond to the notice of intention to remove the auditor in two ways. The auditor may provide a written response to the notice and submit the written response to the company for circulation by the company to the members prior to the meeting. In addition, the auditor has the right to be heard at the meeting which right includes reading the written response at the meeting prior to the determination of the matter.

The written statement of the auditor in response to the notice of intention to remove the auditor must be circulated together with the notice of the general meeting, but if received too late, probably after the notice of general meeting is given, must subsequently be circulated to persons entitled to a notice of the general meeting in the same manner as the notice of the general meeting.

However, under subsection (4) of section 141 of the Act, the company need not send or circulate the written statement of the auditor in the following instances:

- (a) if it is received by the company less than 7 days before the meeting; or
- (b) if the Court, on an application being made by the company or any other person who claims to be aggrieved, so orders upon being satisfied that the statement is unreasonably long or that the rights conferred by this section are being abused to secure needless publicity for defamatory matter; the Court may order the costs of the applicant to be paid in whole or in part by the auditor notwithstanding that the auditor is not a party to the application.

A written statement by an auditor in response to a notice of intention to remove the auditor does not need to be circulated in two instances only, when received less than seven days to the meeting and where a court order that it should not be circulated.¹⁰³⁷ The application to the court may be made by the company or any person who claims to be aggrieved by the circulation.¹⁰³⁸ The court will give that order if satisfied that the statement is unreasonably long or the auditor is abusing the right conferred on the auditor in order to circulate defamatory matters.¹⁰³⁹ In addition to the right to hear the auditor

¹⁰³⁶ Section 141(2)(b) of Act 992.

¹⁰³⁷ Section 141(4)(b) of Act 992.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ *Ibid.*

orally on such resolution, the auditor may, unless the Court has made an order, also request that the written statement be read at the meeting.¹⁰⁴⁰

Where the resolution to remove the auditor is passed it shall not take effect until the conclusion of the annual general meeting.¹⁰⁴¹ This will be the case even if the meeting is adjourned to be concluded on another day. The removal of an auditor, therefore, only takes effect upon conclusion of the annual general meeting for which the resolution was moved to remove the auditor. It is therefore advisable that the resolution to remove an auditor is considered as the last item on the agenda.

¹⁰⁴⁰ Section 141(5) of Act 992.

¹⁰⁴¹ Section 141(6) of Act 992.

16.0 RAISING CAPITAL FOR COMPANIES

16.1 Introduction

Just as the process of childbirth and raising a baby, who is a natural person, require resources, companies also require resources to carry on the business or pursue the objects for which they are incorporated. In terms of giving birth to a natural person, the resources are provided either by the parents or family of the baby and in some cases the state or related donor agencies. The resources of companies are also provided by the persons who set up the company, members or shareholders, and in some instances by third parties. The resources provided to the company are referred to generally as the capital of the company. At the time of incorporation, the Act requires under section 13(2) of the Companies Act, 2019 (Act 992) that a company with shares provides the details of the amount proposed as stated capital of the company, and state the number of authorised shares of each class.¹⁰⁴² In addition, section 13(3) of Act 992 requires the subscriber to indicate by his or her name, the number of shares agreed to be taken and the cash price payable for the shares, with a mandatory requirement for each subscriber to take at least one share.¹⁰⁴³ Clearly, the requirement is that some contribution must be made by the shareholder towards the capital of the company.

16.2 Minimum capital requirement

Under section 28 of the repealed Companies Act, 1963 (Act 179), a company limited by shares was required to have a minimum capital prior to commencement of business. For a private company registered with shares, the minimum capital required was GHS500 (of which GHS100 had to be in cash) and for public companies registered with shares, the minimum capital was GHS2,500 (of which GHS500 had to be in cash). Even though this requirement is not restated under the new Companies Act, 2019 (Act 992), companies with shares pursuant to section 13(2)(n) of the Act are still required to provide details of their stated capital on the application for incorporation of the company. It is suggested that without indication of the stated capital, the Registrar of companies will not register a company on the grounds that the application is incomplete. Stating the stated capital is also important for the general purpose of the stated capital for companies with shares under the capital maintenance rule.

Notwithstanding that the Companies Act, 2019 (Act 992) did not provide for the minimum capital requirement, other legislations provide for minimum capital requirements for companies engaged in specific businesses or based on the involvement of foreigners. Examples include the following:

¹⁰⁴² Even though this requirement is limited to company with shares, section 13(2)(o) of the Act requires members to state the amount they guarantee to contribute in the event of winding up in relation to a company limited by guarantee.

¹⁰⁴³ Section 33(4) of Act 992.

- Under the Ghana Investment Promotion Centre Act, 2013 (Act 865), an enterprise with foreign participation is required to register with the Centre prior to commencement of business. In registration, the enterprise is to comply with the following minimum capital requirement – for a joint venture company, with Ghanaian having not less than 10%, the foreigner is to contribute a minimum capital of US\$200,000; for a wholly foreign owned company, the minimum capital to be contributed by the foreigner is US\$500,000; and for a trading company with foreign ownership, the minimum capital to be contributed by the foreigner is US\$1,000,000.¹⁰⁴⁴
- Under the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930), the Bank of Ghana is given the power to prescribe minimum paid-up capital of banks and specialised deposit-taking institutions. For companies that seek to engage in banking business, the Bank of Ghana has set the minimum capital at GHS400,000,000 (in effect as of January 2021).
- Under the Insurance Act, 2006 (Act 724), a company limited by shares that is a direct insurer shall have a minimum capital of cedi equivalent of US\$1,000,000; and a reinsurer, a cedi equivalent of US\$2,000,000 (both amounts as of January 2021).
- Securities and Exchange Commission has pursuant to section 209 of the Securities Industry Act, 2016 (Act 929) set minimum capital requirements for market operators as follows: Broker-Dealer – GHC1,500,000; Clearing House – GHC 50,000,000; Credit Rating Agency – GHC1,000,000; Custodian – GHC50,000,000; Fund Manager – GHC2,000,000; Investment Adviser (Corporate) – GHC1,000,000; Investment Adviser (Individual) – GHC200,000; Issuing House – GHC1,000,000; Margin Trader – GHC2,000,000; Market Maker – GHC3,000,000; Nominee – GHC1,000,000; Primary Dealer – GHC400,000,000; Registrar – GHC1,000,000; Securities Depository – GHC50,000,000; Securities Exchange – GHC10,000,000; Trustee – GHC50,000,000; and Underwriter – GHC2,500,000.¹⁰⁴⁵

There are other sector specific legislations stating the minimum capital requirement for companies intending to operate in that sector. In the event a sector specific legislation prescribes a minimum capital requirement, that requirement must be met by the company in its application for incorporation as the sector specific legislation will take precedence over the Companies Act, 2019 pursuant to the effect of section 4 of Act 992.

Even where a minimum capital requirement is not made a legal requirement, both private and public companies (whether limited by shares or guarantee, or unlimited) require funds for pre-incorporation activities and the activities of the company upon incorporation. Money will be required, for example, to incorporate the company, acquire assets to carry on business, purchase an existing business, buy supplies and pay employees.

¹⁰⁴⁴ As of January 2021.

¹⁰⁴⁵ Amounts that are in force as of January 2021.

16.3 Means of raising capital

Business companies (that is companies with shares) raise funds mainly through the issue of shares (equity) or debentures (debt), or both equity and debentures. Shares and debt constitute securities issued by the company to obtain the funds required for the business of the company. Shares constitute equity and debenture constitute debt. Shareholders contribute to the stated capital of a company and, in a loose sense, own a portion or a fraction of the company. Debenture holders lend money to the company and are creditors of the company. In other words, companies with shares raise capital through equity or debenture or both equity and debenture. It should be added that a person who is a shareholder can also be a debenture holder by lending money to the company under a written agreement. There is a third source of raising capital where the company as a going concern, ploughs back profit from its operation into the business. That is, the transfer of money from reserve to stated capital in accordance with section 68 of Act 992. In other words, rather than distribute profit to the shareholders, the profit is retained and added to the stated capital account. This is however applicable to existing companies whose account at the end of a financial year show the company has made profit. This third option is, therefore, not available to a newly incorporated company seeking resources for its operation.

Raising of capital through shares can only be done by companies limited by shares and unlimited companies (both private and public companies) since such companies are required under section 7(3) of Act 992 to be registered with shares. These are business companies as the Act does not prohibit these companies from carrying on business for the purpose of making profit. A company limited by guarantee is prohibited from engaging in business for the purposes of making profit other than for the purpose of furtherance of its objects.¹⁰⁴⁶ Companies limited by guarantee are unable to raise capital through the issue of shares since such companies are prohibited from being registered with shares, and are not to create or issue shares.¹⁰⁴⁷ Companies limited by guarantee can therefore raise capital through debentures, that is borrowing money.¹⁰⁴⁸ In addition to raising capital through debentures, companies limited by guarantee may also raise capital through membership contributions either as subscriptions or donations.

The focus on the discussion of raising capital through the issue of shares relates only to business companies whilst raising capital through the issue of debentures applies to both business companies and companies limited by guarantee. There are varied options available for raising capital through any of the above means. In other words, in issuing shares or debentures, the company may do so in varied ways including the following:

¹⁰⁴⁶ Section 8(1) of Act 992 provides that “(1) A company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profits other than marking profits for the furtherance of its object.”

¹⁰⁴⁷ Section 7(8) of Act 992.

¹⁰⁴⁸ Section 83(1) of Act 992.

(a) Public offer of shares – a company may raise its capital through a public offer of shares. Public offering of shares refers generally to selling of shares to the public to raise capital for a company. Public offer of shares can only be done by a public company with shares and is usually done through a stock exchange. Section 7 of Act 992 prohibits private companies from making an invitation to the public to acquire the shares of the company. Public invitation done by a public company must be in accordance with section 295 of Act 992, which defines what amounts to “invitation to the public”, and the Stock Exchange (Ghana Stock Exchange) Listing Regulations (Securities Legislation), 1990 (LI 1509). A company raises capital through public offers of share or public invitation to acquire the shares. This is done through advertisements or through other means of disseminating information to members of the public directly or indirectly. Members of the public may acquire the shares of the company either by accepting the offer from the company or making an offer to the company to acquire the shares of the company. The first of such public offers made by the company is the initial public offer (IPO). IPOs are done by newly incorporated public companies or private companies converted to public companies which raise capital through the issue of shares for the first time through public offers or public invitations. The advantage of raising capital through public offers is that it provides for a larger pool of persons from which the company can obtain funds and is therefore used where huge capital is required.

A placement with the intention that the intermediary will offer the shares to the public or invite the public to acquire the shares is deemed to be a public offer of shares. Placement generally refers to a situation where a company allots the whole of its shares to an intermediary which may be a bank, brokerage firm or insurance company at an agreed price, on the understanding that the intermediary will sell the shares to purchasers at a higher price. The intermediary keeps the difference. The conditions of the placement may permit the intermediary to either fully pay for all the shares issued by the company, in which case the intermediary bears the risk of holding the shares that it is unable to sell or may permit the intermediary to pay only for shares sold at the price agreed with the company whilst the unsold shares are treated as unissued shares of the company. This is covered under underwriting arrangements either by the intermediary itself or an underwriter is appointed. The underwriting arrangement provides insurance to cover the risk that if the intermediary is unable to sell the shares, the underwriter will purchase the shares.

(b) Private placement of shares – a company can also raise capital not by advertisement or circulation of information to invite interested members of the public to acquire its shares, but by direct offer or invitation to a particular investor to acquire the shares of the company. Rather than selling shares on the open financial market (stock exchange), the shares are sold to selected investors. The use of such a targeted approach is referred to as private placement or a domestic concern arrangement. In such a situation, the company makes an offer to a particular person or invites the particular person to make an offer to acquire its shares. Private placement is used by private companies which are prohibited from inviting the public to acquire its shares. This may be done

by the company itself or through private equity firms who act as matchmakers by bringing investors and companies seeking funding together. Unlike public offering of shares, the advantage of private placement is that the company is able to select who acquires its shares. It, therefore, enables the company to control who becomes a shareholder of the company. This enables investors of similar interests to have shares in the company. This option, therefore, best suits private companies or companies that are family-owned and which seeks to have particular persons as their shareholders.

- (c) Right Issues – a company may also raise capital through right issue, where the company issues new shares to existing shareholders generally in proportion to existing shareholding. Right issues are mandated by the Companies Act, 2019 where it requires the directors to first offer new and unissued shares of the company to existing shareholders prior to offering such shares to outsiders.¹⁰⁴⁹ Approval of the shareholders is required where the directors seek to offer the shares to others without first offering the shares to existing shareholders.¹⁰⁵⁰ In right issue, the shares of the company are offered to the existing shareholders. The advantage to the existing shareholders is that by acquiring the shares, they maintain the proportion of their shareholdings. In the event the shareholders or some do not acquire the shares offered, their shareholding will be diluted where the shares are acquired by outsiders or by just some of the existing shareholders. The advantage of right issue to the company is that it may be faster to conclude the issuance as the existing shareholders are conversant with the operation and financial position of the company hence no prolonged due diligence is required.

Right issue may be done as a renounceable right issue, where the shareholder may either acquire the shares issued or trade the right to acquire the shares by assigning it to another person at a price. A shareholder offered a renounceable right can thus trade the right to acquire the shares to another person. The right issue may also be a non-renounceable right issue where the shareholder is not permitted to renounce the right and assign it to another person. Non-renounceable right issue is usually resorted to where the company is constrained in relation to time and therefore offers the shareholder the opportunity to acquire the shares within a limited time or the company proceeds with offering the shares to another person. The shareholder is not permitted to look for another person to take up the right to acquire the shares.

As indicated, the Companies Act, 2019 mandates right issue when the company seeks to issue new or unissued shares to raise capital.¹⁰⁵¹ The only exception is the shareholders by ordinary resolution waive the right or permit the directors to offer shares to third parties without first

¹⁰⁴⁹ Section 189(1)(a)(i) of Act 992.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *Ibid.*

offering to the existing shareholders.¹⁰⁵² The mandatory right issue is not applicable in relation to issue of treasury shares. In right issue, the shareholders must make payment for the new shares acquired. The payment made is added to the stated capital of the company, thereby increasing the stated capital of the company.¹⁰⁵³

The company may also invite the existing shareholders to buy the shares of the company under an open offer arrangement. An open offer allows shareholders of the company to buy shares of the company at lower prices than acquiring the shares on the market. Unlike right offers, the shareholders are not limited to the proportion of shares they have in the company. Open offers are usually not transferable by the shareholder.

(d) Capitalisation Issue – another means by which the company raises capital is by capitalizing the profits made by the company. That is, the company ploughs back the profit made into the business without distributing such profits to the shareholders as dividend. In place of distribution of the dividend by paying cash to the shareholders, the company issues shares to the shareholders. Capitalisation issue is dealt with under section 77 of Act 992. Shareholders invest in companies for returns including payment of dividend. Dividend is declared and paid out of profit or retained earnings. In the event the company needs additional capital, rather than sell shares to outsiders or existing shareholders, the company chooses to keep the money payable to shareholders as dividend and rather issue shares equivalent to the dividend that it would have paid to each shareholder. The issue of the shares to shareholders in place of the dividend payable is referred to as capitalisation issue. It is also sometimes referred to as non-cash dividend. The shareholders receive dividend not in cash but by getting additional shares.

A company may retain profit by transferring funds from reserve to stated capital without issuing any shares to the shareholders. That will not amount to capitalisation issue. For capitalisation issue, additional shares are given to the shareholders, and rather than demand payment for the shares from shareholders, the dividend payable to the shareholders in cash is retained by the company. This may be seen as a sort of set-off arrangement. Company issues shares to shareholders that shareholders must pay for. The company also declares and owes shareholders dividend. The amounts due from shareholder to the company and from company to the shareholder is set-off against each other. The set-off arrangement is tied to ensuring the amount payable in respect to shares is equivalent to the dividend due to the shareholder. For that reason, the company must first determine that the company has made profit and that part of the profit is to be distributed as dividend. Secondly, the company must determine how much each shareholder is to get. The company then issues shares for an amount equivalent to the dividend payable to the shareholder. The shareholder gets additional shares in place of the cash dividend.

¹⁰⁵² Ibid.

¹⁰⁵³ Section 68(1) of Act 992.

The additional shares issued to the shareholder is not for free as payment has been made by the shareholders through the retention of the dividends that the shareholders would have otherwise received. A company thus raises capital by issuing shares to shareholders in return for keeping the dividends payable to the shareholders. There are a number of approvals required from the shareholders for capitalisation issue to occur under section 77 of Act 992. This is discussed fully under capitalisation issue.

- (e) Conversion issue – as indicated above, a company raises capital generally through debt or equity. A company can also raise money by issuing shares in lieu of repaying existing debt. This is termed conversion issue as the company has converted the debt into equity. The company is permitted to issue convertible debentures under section 88 of the Companies Act, 2019. The convertible debenture entitles either the company or the debenture holder (that is the lender) to convert the debt into equity whereby the company issues shares to the debenture holder. The debenture holders or lender thus becomes a shareholder of the company. The company ceases to be under obligation to repay the debt. The amount that the company would have expended on the debt repayment is thus kept by the company as capital of the company.

In conversion issue, the company issues shares to a lender of the company. The lender does not pay money to the company for acquiring the shares. The lender has already lent money to the company. The company as a debtor is liable to repay the money owed to the lender. Rather than repay the money, the company issues shares to the lender to offset the payment of the debt. The money the company would have paid as repayment of the debt is kept by the company which is added to the capital of the company.

The right of conversion of the debt to equity may be given to the company, lender, both the company and the lender, or tied to an occurrence of an event. Once the person entitled to exercise the right based on the conditions stated in the debenture (that is the written loan agreement), invokes the right, the company will issue the shares of an amount equivalent to the debt.

All the above are varied options available to a company to raise capital through the issue of shares but are by no means exhaustive. As indicated, a company may also raise capital through debt termed debentures and debenture stock. That is debt or loan capital. In raising capital through debt, the company can also adopt doing so through a public offering. That is, a public company may make an invitation to the public to deposit money with the company.¹⁰⁵⁴ This is usually done as issuing of stock, corporate bonds or notes. A company can also raise capital through debt under a private placement where the company engages with a selected lender to borrow money. In addition, a company can borrow additional money by right issue where existing lenders are given the option to

¹⁰⁵⁴ Section 7(5) of Act 992 permits a public company to make invitation to the public to deposit money for fixed periods or payable at call whether bearing or not bearing interest.

make additional facilities available to the company. The right is usually given in the loan agreement where the company is under obligation to first request for additional loan from an existing lender prior to seeking loans from another lender.

16.4 Factors that affect decision on means to raise capital

A company may use any of the above options to raise capital subject to the limitations imposed by law and business considerations. Whether a company raises capital through the issue of shares or borrowing, and when adopting any of the options for issuing shares or debentures will depend on a number of factors including:

- (a) Time – the urgency with which a company requires the capital may dictate the option used by the company to raise the capital. The options available to a company within a given circumstance has different gestation periods for the company to secure the capital. Relatively, it may take a shorter period for a company to conclude the issue of shares to existing shareholders and receive the payment for the shares than it will take to conclude with outsiders since, for existing shareholders, detailed due diligence on the company may not be necessary. Similarly, it may be relatively shorter to secure a loan from the bankers of the company than to issue shares to third parties. Private placement may be quicker to undertake than seeking to raise capital through public invitation which requires stringent compliance with legal requirements including preparation of prospectus. A company that urgently requires capital, for example, to purchase urgently required equipment or pay off a debt to avoid petition for insolvency proceedings, will therefore recourse to the relatively quickest option for obtaining the capital required.
- (b) Cost – each of the options available come at a financial cost to the company. The company will have to compare the relative cost of each option and generally will opt for the option that is relatively cheaper among the available options. In raising funds through debt, the company will have to consider the applicable interest rates and fees payable. In issuing shares, the company would have to determine the terms under which the investor intends to acquire the shares including returns expected in the form of dividend. However, since dividends are only payable when declared, it is relatively cheaper for the company to raise capital through the issue of shares than through debt. Debt unlike shares imposes repayment obligations on the company of the principal and interest, whilst no such obligation will be assumed when the company obtains capital from issuing shares. Also, the transaction cost of each option may affect the selection of the option adopted by the company. Seeking to undertake an initial public offering requires the engagement of experts for the preparations of the prospectus which has cost implications which cost is relatively higher than the option of private placement. The company must therefore compare the cost of each available option in determining which option to adopt.

- (c) Amount required – the amount of capital required by a company will also affect the option selected by the company to raise the capital. The huge capital requirement may be out of reach of individual investors. This may be sought from institutional investors or the public through public offerings. Generally, the perception in relation to resorting to public offering in Ghana is to raise relatively huge capital for a company. The conversion of a private company to a public company with its attendance listing on the stock exchange and undertaking initial public offering is arguably seen as the next stage of growth for a private company doing well. A private company may therefore not consider a public offering when it requires a relatively small amount for purchase of equipment. Similarly, the amount required may inform whether the company seeks short term loan as overdraft rather than seeks to issue additional shares. It must be noted that there is no general threshold for choosing to raise capital through the issue of shares or borrowing from financial institutions.
- (d) Legal requirements to be satisfied – the law dictates available options to a company. A private company is prohibited from raising capital through public offerings. As such, that option is not available for consideration by a private company. A public company can also only engage in public offerings after satisfying stated legal requirements including preparation of a prospectus. Therefore, unless that is done, the option of public offering is not available to the public company. A company limited by guarantee is not registered with shares and thus cannot raise capital through the issue of shares. In addition, sector specific legal requirements may impose restriction on how capital is raised by a company. For example, an acquisition of significant shareholders in a company that engages in banking business requires approval of the Bank of Ghana which must also be factored into the determination to raise capital through the issue of shares by such a company.¹⁰⁵⁵ Legal requirements prescribed for the use of each option will affect decisions on the option to adopt. Where a company will not be able to satisfy legal requirements for a particular option, that option will be out of consideration by the company.
- (e) General preference of directors and shareholders – a decision on what option to use to raise capital for a company is taken by the directors of a company, subject in many instances to the approval of shareholders. Even though not apparent in decision making, the choice made by decision-makers is also heavily dependent on personal preferences. Some individuals are very risk averse compared to others who are very risk tolerant. A risk averse person generally will shy away from borrowing huge amounts. Directors having the option to raise capital through either equity or debt will opt for equity if such a director is personally risk averse if both options are equally in the best interest of a company. Shareholders who seek to maintain control of a company will prefer the use of right issue as a means of raising additional capital than approving direct offer of shares to non-shareholders. The choice of an option is therefore dependent, in some

¹⁰⁵⁵ Section 49 of Banks & Specialized Deposit-Taking Institutions Act, 2016 (Act 930).

part, on the attitude of the directors and shareholders making the decision on which option to use among all the available options.

- (f) Restrictions imposed by agreements binding on the company – the options available to a company may be restricted by agreements entered into by the company either with existing shareholders or lenders. In a shareholders' agreement, the company may give the right of first refusal to existing shareholders over new issue of shares.¹⁰⁵⁶ A company in a loan agreement may be obligated to first seek an additional loan from the existing lender and only engage with others when the existing lender declines such a request for an additional facility. The company may also have restrictions in its registered constitution on options that it may use to raise capital. Any such restriction, either in an agreement binding on the company or the registered constitution of the company, will restrict the options available to the company to raise additional capital for its operations.
- (g) Economic and financial market conditions – financial market refers generally to any marketplace where securities are traded which include primary markets and secondary markets. Securities refer to share and debt instruments through which companies raise capital. Primary markets refer to mediums through which company first issue share and debt instruments whilst secondary markets refer to medium through which owners of such instruments may trade such instruments. The economic conditions existing in a country have a direct bearing on the financial market. The conditions affect investor behaviour which will affect the choice of offerings the company uses to attract capital. There are instances where market conditions favour equity investment whilst other conditions may favour debt instruments. Arguably, where interest on government instruments particularly treasury bills, investment in corporate instruments may decline and government instrument may be considered more favourable and less risky, such market conditions affect the options available to a company to raise capital.
- (h) Investor preferences – closely related to the above is investor preference. Selling corporate securities to raise capital depends on demands of investors. Just like any marketplace, the rule of supply and demand are at play. Where investors preference favours a particular option – investment through equity or debt – that directly informs the option the company may select to raise capital. Where investors' preference is for equity investment, seeking to raise capital through debt instrument will not yield much result. Investors' preference may also be fixed term instrument with fixed returns over more flexible and variable return instruments. For example, pension funds may prefer investments in fixed term instruments. Where there are huge funds available in such instances where pension funds managers are looking for investment opportunities, it follows that companies may tailor the options to raise capital for the company

¹⁰⁵⁶ This is also a statutory requirement under section 189(1)(a)(i) of Act 992.

by using options that provide for such fixed term returns. In such instances, debt instruments may be preferable to equity instruments.

- (i) Gearing ratio – gearing ratio refers to the debt to equity ratio of a company. That is the ratio of funding from ‘owners’ to borrowing from lenders. The project undertaken by a company may require a particular debt to equity ratio which may be dictated by law or by agreement. Particularly in project finance arrangement relating to concessions or public private partnership arrangements between private investors and government entities, the project agreement may require some capital outlay from the project sponsors in the form of a stated percentage of equity investment as total project cost. In that respect, the choice of options for raising capital by the project company must take into account the debt to equity ratio agreed under the project agreement. Such debt to equity ratio may be anything from 70%-90%:30%-10% debt to equity ratio. Where so stated, it restricts the amount that must be sourced as loans as against what must be obtained from shareholders as payment for the issued shares. Even where not dictated by project agreement, the lenders may require a percentage of equity contribution as a condition for lending. This is to ensure that the ‘owners’ also assume some risk in the undertaking as a means of comfort to lenders that ‘owners’ have some degree of belief in the success of the venture by putting their monies at risk. Generally, equity holders are assumed to take more risk than lenders or creditors.

The above factors are just examples of some of the factors that may inform the choice of options a company may choose to raise capital and are not exhaustive. In addition, the factors are not considered in isolation but all the options are considered together in determining which option must be used by the company.

16.5 General limitations on raising capital through shares

As noted above, legal requirements are one of the factors that must be considered in determining which option a company can use to raise capital. The law in some instances prohibits a particular type of company from using a particular option for raising capital. The limitation on the option may be placed by the Companies Act, 2019 or any other enactment of general application or sector specific legislation. A few general limitations are discussed below.

- (a) Restriction on public offerings – the Companies Act, 2019 under section 7(5)(c) and (d) prohibits a private company from making an invitation to the public to acquire any shares or debentures of the company or making an invitation to the public to deposit money for a fixed period or payable at calls whether bearing or not bearing interest. The option of raising capital through public offerings is, therefore, not available to a private company. The option is only available to a public company. A private company must, therefore, raise all funds from its promoters,

members and selected investors or lenders. The options of right issue, capitalisation issue, conversion issue and private placement are all available. However, public offerings are not available.

- (b) Restriction on having shares – a company limited by guarantee cannot raise capital through the issue of shares. The Companies Act, 2019, under section 7(8) provides that “(8) *A company limited by guarantee shall not for the purposes of incorporation be registered with shares and shall not create or issue shares*”. The option of raising capital through the issue of shares is not available to a company limited by guarantee. A company limited by guarantee may raise capital through membership contributions, subscription fees and donation, as well as through borrowing if permitted under the constitution of the company.
- (c) Requirement for public offerings – even though a public company may raise capital through public offerings, there are stringent legal requirements that are put in place primarily to protect the public that must be complied with prior to the public offerings. Under the Companies Act, 2019, these requirements include having a statement in lieu of prospectus and a prospectus complying with sections 303 to 319 of the Act which must be filed not only with the Registrar but the Securities & Exchange Commission. In addition, where the securities of the company are to be traded on the stock exchange, the company must comply with the listing rules and regulations of the stock exchange. These legal requirements in many instances may limit the option of public offerings to companies.
- (d) Thin capitalisation – one limitation on raising capital for a company is the requirement of thin capitalisation rules which applies when it comes to computation of tax liability of the company. As discussed under gearing ratio, there may be a requirement under an agreement that some of the cost of the project be funded by contribution from ‘owners’ in terms of equity contribution and the other part from debts from lenders. Thin capitalisation refers to a situation where a company is financed with a high level of debt compared to equity. Under the tax law, where a company has a debt to equity ratio of more than 3:1, and a foreign company and its associates hold more than fifty percent of the interest, the interest paid on debt above the ratio and foreign exchange losses is disallowed as deductible expenses in the computation of profit for the purposes of imposing tax on the profit.¹⁰⁵⁷ The tax authority treats thin capitalisation as a tax avoidance scheme hence the rule to disallow interest on debts above the ratio of 3:1 of debt to equity. Whilst there is no prohibition to have a debt-to-equity ratio above the 3:1 ratio, it will increase the tax liability of the company as the interests paid on debt above three times the equity will not be treated as a deductible expense. This will increase the profit that is taxable, leading to higher tax liability. This may restrict the amount sourced as capital of a company through debt.

¹⁰⁵⁷ Section 33(1) of the Income Tax Act, 2015 (Act 896) as amended.

The next chapters on shares and debentures discuss the detailed rules and principles applicable to raising capital through the issued shares and debts.

17.0 SHARES

17.1 Nature of shares

Companies with shares may raise capital through the issue of shares either through subscription or sale of its shares to interested persons who provide considerations in cash or kind to the company. In finance terms, this is equity financing, where the company issues its shares to raise finance and in return gives 'ownership' interest to those providing the financing.¹⁰⁵⁸ The considerations provided in return for the issued shares become the capital of the company¹⁰⁵⁹ and the shares issued by the company become the assets of the shareholders. In view of these positions, a company cannot raise capital through the transfer of shares from one shareholder to another or through transmission of shares by operation of law, unless the shareholder has not fully paid the company for the shares prior to transfer or transmission of the shares. If the shareholder has fully paid for the shares, any monies paid at the time of transfer are monies of the transferor and not the company.

17.1.1 Shares as asset of the holder

Act 992 provides in section 42(1) that *"The shares of a member in a company are movable property."* Shares are, therefore, a special type of movable assets which are an intangible type of assets. However, as assets of the shareholders, the shares do not confer any interest on the shareholder in the assets of the company.¹⁰⁶⁰ This is due to the separate legal personality principle.¹⁰⁶¹ The assets of the company belong to the company, and not the shareholders.¹⁰⁶² As the shares do not entitle the shareholders to take or deal with the assets of the company, the question to ask is what do the shares entitle the shareholder to for the shareholder to be interested in acquiring the shares of the company?

In *Whitaker v. Nanka-Bruce and another*¹⁰⁶³, Justice Brobbey stated @ 787 that:

"Two of these grounds clearly justified the order striking out the plaintiff's case. The first related to the concept of "shares." The writ of summons stated that "the successors of the shareholders of the said Independent Press Ltd vested their shares in the late Violet Afua Maanum Whittaker..." Paragraph 11 of the statement of claim averred that the shareholders vested all the shares of the company in her." Counsel for the respondent contended that since the plaintiff's case was based on the transfer of "shares" and shares did not include assets like the disputed house,

¹⁰⁵⁸ This is contrasted to debt financing where the company raised capital from borrowing from creditors or lenders and assumed the obligation to repay the money.

¹⁰⁵⁹ Section 68 of Act 992.

¹⁰⁶⁰ *Macura v. Northern Assurance Co. Ltd* [1925] SC 619.

¹⁰⁶¹ *Salomon v. Salomon & Co. Ltd* [1895-9] All ER 33; [1897] AC 22.

¹⁰⁶² *Short v Treasury Commissioners* [1948] SCV 177; [1948] KB 116.

¹⁰⁶³ [1994-95] GBR 784.

the plaintiff's action was incompetent. That argument may sound technical but I think there is some merit in it. In their book "Company Law" 2nd ed, at p 103, Yorston and Brown described a share as:

"...the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders, inter se. A shareholder has, however, no property in the assets of the company, nor, by virtue of his shareholding are the company's liabilities his liabilities."

That the shares of a member do not include assets like realties such as the disputed house is further confirmed by the Companies Code 1963 (Act 179), s 39(1) of which provides that:

"The shares of any member shall be personal estate and shall not be in the nature of real estate or immovable property."

To the extent that the plaintiff equated shares with realty, such as the disputed house, the plaintiff's action was misconceived and was therefore rightly struck out."

17.1.2 Shares entitle the holders to distribution

The shares issued by the company confer on the shareholder rights and liabilities as stated in Act 992, the constitution of the company and the terms of issue of the shares. Subsection (2) of section 42 of the Act provides that *"The number of shares in a company and the rights and liabilities attaching to the shares are dependent on the terms of issue."* The shareholder must therefore look to the constitution of the company, terms pursuant to which the shares are issued and the Act to know what rights and liabilities are attached to the shares. The rights and liabilities are generally stated in Act 992, the constitution of the company and the agreement pursuant to which the shares are issued by the company. Generally, the shares confer on the shareholder the right to share in the distribution of income and capital of the company. The First Schedule of Act 992 which provides for the definition of the terms used in the Act provides that *"'shares' means the interests of members of a body corporate who are entitled to share in the capital or income of the body corporate."* The shares, therefore, confer on the shareholder the right to distribution whether of income and/or capital of the company. As the name "share" indicates, the holder is entitled to share something, that something refers to the income and capital of the company. This is reflected in the *Whitaker case* (supra).

Distribution of income is applicable where the company as a going concern makes profit and declares part of the profit, subject to the distribution test, as dividend to be distributed among the shareholders. That is distribution of dividend which is regulated under section 72 of Act 992. The dividend may also be paid in terms of issuing additional shares to shareholders rather than payment

of cash to the shareholders.¹⁰⁶⁴ That is capitalisation issue dealt with under section 77 of the Act. Other than distribution of dividend, whether in cash or through additional shares, a shareholder is entitled to distribution of capital and assets of the company. Distribution of capital or assets of a company envisages two situations. First, a going concern company with excess asset or capital may return the excess assets or capital to the shareholders. Second, where upon winding up of the company, there are surplus assets after satisfying all the liabilities of the company, the liquidator is to distribute to the shareholders the net assets. The return of excess assets to shareholders of a company that is a going concern requires strict compliance with sections 69, 78 to 82 of Act 992.

A shareholder is thus entitled to four types of distribution made up of two each in relation to income and capital. For income, the distribution is in relation to cash dividends payable upon declaration of dividends or non-cash dividends in the nature of capitalisation issues. Distribution of capital relates to return of surplus assets or capital of a company to shareholders either as a going concern or upon winding up of the company. The general definition of the shares under the First Schedule of Act 992 covers all four scenarios. Thus, shares entitle a shareholder to distribution of the capital and/or income of the company.

17.1.3 Shares entitle the holder to rights and liabilities

Shares also entitle shareholders to additional rights as are stated under the Companies Act, 2019, the constitution of the company and the terms of issue of those shares. This position is stated in the *Whitaker case* (supra). In addition, shares also confer liabilities on the shareholders. The rights conferred on shareholders are discussed under the chapter on membership which includes the right to attend general meetings, speak and vote at a general meeting, have the name of the shareholder entered in the register of members, among others. The liabilities include liability to observe the constitution, liability to pay for the shares acquired, liability to contribute to the assets of the company in the event of winding up.

17.1.4 Shares as chose in action rather than chose in possession

Since shares do not entitle the shareholders to enforce the rights by taking possession of the assets of the company, the enforcement of the rights conferred on the shareholder is only by a court action. Shares are, therefore, chose in action rather than chose in possession. Chose in action refers to rights that can only be enforced through a court action, whilst chose in possession are rights that can be reduced to possession by the right holder.¹⁰⁶⁵ A shareholder can only enforce the rights conferred

¹⁰⁶⁴This refers to capitalisation issues and non-cash dividends dealt with under section 77 of Act 992.

¹⁰⁶⁵ This position is supported by the rights conferred on shareholders to bring an action to enforce rights for breach of the constitution of the company under section 29 of Act 992; right to bring action against directors under section 200 of Act 992; right to bring action for injunction or declaration in the event of illegal or irregular activities; and right to bring

on the shareholder by a court action. Such rights cannot be reduced to possession of the assets of the company without such court action. That is, the shares are a bundle of rights enforceable through court action and not reduced to physical possession by the shareholder.

Channel J stated a classic definition of a chose in action in *Torkington v. Magee*¹⁰⁶⁶ @ 430 as follows:

“Chose in action’ is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession.” I am unable to understand what personal right of property anyone has in a mere name so as to sell or purchase it. Claim (b) is equally an untidy and vacuous claim. A letter written by one man to another concerning their mutual transaction and copied to three institutions is to be set aside by a court of law on the application of a stranger to the transaction. I confess I do not appreciate what possible purpose such a court order can be reasonably expected to accomplish nor do I think claim (c) should be dignified by any comment and I will ignore it completely.”

17.1.5 Shares as securities or financial instruments

As a means of raising capital by companies, shares are a type of securities. Securities refer to financial instruments or assets that are tradeable on the financial market. There are different types of securities. The Companies Act, 2019 provides in the First Schedule that *““securities” include:*

- (a) shares and debentures;*
- (b) securities of the Government or any other country or territory;*
- (c) rights or interests, whether described as units or otherwise under a unit trust;*
and
- (d) rights, whether actual or contingent in respect of money lent to or deposited with, a person that is not a body corporate licensed, under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) or any other enactment to carry on banking business.”*

The Central Securities Depository Act, 2007 (Act 733), in section 60 also provides that securities include:

- (a) Debentures, shares, bonds or notes issued or proposed to be issued by a corporate body and any right, warrant or option in respect of them;

an action for remedy against oppression under section 219 of Act 992. See: *Okudjeto and others v. Irani Brothers and others* [1974] 1 GLR (HC); and *Okudjeto and others v. Irani Brothers and others* (no. 2) [1974] 1 GLR 389 (HC); *Sanyo Electric Co. Ltd v. Quarcoopome* [2001-200] 2 GLR 198 (CA).

¹⁰⁶⁶ [1902] 2 K.B. 427.

- (b) Bonds, treasury bills or other loan instruments of the Government of Ghana or any other country;
- (c) Rights or interest, whether described as units or otherwise under a collective investment scheme;
- (d) Other rights or instruments as the Minister responsible for Finance may, by notice in the Gazette, prescribe.

Section 216 of the Securities Industry Act, 2016 (Act 929) which provides a broader definition of securities, defines securities to include shares or debentures within the meaning of the Companies Act. The section provides: *“‘securities’ include*

- (a) shares and debentures within the meaning of the Companies Act, 2019 (Act 992);*
- (b) loan instruments of a company;*
- (c) bonds or other loan instrument of the Government or the Government of any other country;*
- (d) bonds or other loan instruments of a corporation established under an enactment;*
- (e) rights or interest whether described as units or otherwise under any unit trust;*
- (f) warehouse receipts;*
- (g) a right or option in respect of any shares, debentures, bonds or notes;*
- (h) commodities futures, contracts, options or other derivative;*
- (i) derivatives as defined under this Act; and*
- (j) any other instrument as the Minister may by notice in the Gazette prescribed upon recommendation of the Commission.”*

17.1.6 Shares as transferable or tradable instruments

As financial instruments or assets that are tradable, shares can be transferred from a shareholder to another person. Section 98 provides *“(1) Except as expressly provided in the registered constitution of a company, shares are transferable without restriction by a written transfer in common form.”*

Shares of different classes and types

As a financial instrument or assets used by the company to raise capital, the Act permits the company to issue different types or classes of shares. Section 44 provides *“Subject to the registered constitution of a company, different classes of shares may be issued in a company at the times and for consideration that the company shall determine ...”*. Section 49 also provides that *“(1) The registered constitution of a company may provide for different classes of shares by attaching to certain of the shares preferred, deferred or any other special rights or restrictions, whether as regards dividends, voting, repayment or otherwise.”* A company may therefore have different classes and

types of shares depending on its needs and the interest of potential investors who are likely to acquire the shares of the company. The classes of shares must be prescribed in the constitution of the company.

17.1.7 Shares must be paid for by the holder

Shares as a means of raising capital by the company require that the shareholders who acquire shares from the company must pay for the shares. Act 992 makes only one exception to this requirement. The only exception is in the instance of capitalisation issue.¹⁰⁶⁷ Section 45(1) of Act 992 provides that *“(1) Except on a capitalisation issue pursuant to subsection (1) of section 77, shares shall not be issued otherwise than for valuable consideration paid or payable to the company...”* Payment must always be made by the shareholder for shares acquired from the company. Shares of the company cannot, therefore, be issued for free.

17.1.8 Shares have no par value

The price paid per shares is dependent on the value placed on the shares by the directors of the company in the offer to issue the shares or arrived at upon negotiation between the company and the prospective shareholder. There is no set down amount in the constitution of the company as value for the shares. Section 43 of Act 992 provides that *“The shares created or issued under this Act are shares of no par value.”* Unlike in other jurisdictions where the constitution or incorporation document sets the price of the shares at the time of incorporation, there is no such requirement under Ghanaian law. Even where a subscriber writes beside his or her name in the constitution the number of shares taken and the price paid for the shares, the price per shares as indicated will not be applicable as the price for unissued shares of the company. Shares in Ghana do not, therefore, have a fixed price attached to those shares in the constitution of the company. The price is what is put on the shares at the time of offering those shares to potential shareholders or negotiated between the potential shareholders and the company. The price will vary from one transaction to another.

In jurisdictions where the constitution sets out the price per share, the shares may be sold at a discount when the shares are sold at a lower price than the set price or sold at a premium when sold at a higher price. That concept is not applicable in Ghana. The price per share is therefore dependent on the offer made by the company or prospective shareholder, negotiations based on the bargaining position of either party and agreement reached by the parties.

In summary, shares have the following characteristics:

- (1) Shares are instruments used by companies to raise capital to undertake the business for which the company has been formed.

¹⁰⁶⁷ Section 45 of Act 992.

- (2) Shares are movable assets of the shareholders acquired by the shareholders from the company for which the shareholder provides consideration either in cash or in-kind. Shares are however intangible movable assets.
- (3) The shares do not confer ownership or title on the holder over the assets of the company. The assets of the company belong to the company.
- (4) The shares confer on the holder interests, rights and liabilities. The basic interest is to share in the income and assets of the company whenever there is a distribution. In addition, there are rights and liabilities conferred on the holder as provided in the constitution of the company and the Companies Act, as well as terms of issue of the shares.
- (5) The rights and interests conferred on the shareholders are only enforceable through a court action. Shares are therefore chose in action rather than chose in possession.
- (6) Shares are a type of security, as the shares are financial instruments or assets that can be traded. The shares are transferable from one shareholder to another person.
- (7) Shares acquired from the company must be paid for by the shareholder. The price is determined by directors but not stated in the constitution. Shares do not have par value in Ghana.
- (8) There may be different classes of shares issued by the company to attract investors to acquire the shares of the company.

17.2 Payment for Shares

Shares are instruments used by a company to raise capital for its activities. As such for the company to have the capital through the issue of shares, shares must be paid for by those to whom the company issues the shares. In other words, persons acquiring shares from the company must pay for the shares. Section 44 of Act 992 makes this requirement clear when it gives the company the ability to issue different classes of shares *“for consideration that the company shall determine and shall be paid for at the times that are agreed between the member and the company.”* The company must, therefore, receive consideration for the issue of its shares.

In view of the above, a company, as a general, rule cannot issue shares for “free”. That is, where no consideration is provided for the shares issued by the company to the shareholder. Section 45 of Act 992 provides that *“(1) Except on a capitalisation issue pursuant to subsection (1) of section 77, shares shall not be issued otherwise than for valuable consideration paid or payable to the company and unless otherwise agreed, shares shall be paid for in cash.”* The subsection mandates that shares must always be issued for valuable consideration. That valuable consideration must be paid or payable to the company. Implied in the subsection is that shares do not necessarily need to be paid for in cash but can also be for non-cash consideration agreed between the company and the person taking the shares. Shares can, therefore, be paid for either in cash or services provided or property transferred to the company. The preference under section 45(1) of the Act is that payment must be

made in cash. In the event payment is to be made in-kind, additional requirements in section 45(2) of the Act must be complied with. In addition, the consideration must be paid or payable to the company. Payment to shareholders or directors personally will not discharge the obligation to pay for the shares issued by the company.

General principles applicable to consideration provides that consideration can also be a forbearance or benefit foregone by a person.¹⁰⁶⁸ However, it is debatable as to whether payment for shares can be by foregoing some benefit the person is entitled to if foregoing such benefit does not confer any corresponding benefit on the company. This is in the light of the prescription in the subsection that the valuable consideration must be “paid or payable to the company”. This means the company must be receiving the consideration either executory or executed consideration.¹⁰⁶⁹ If the company receives nothing, but the person alleges he foregoes a right he is entitled to which confers no benefit on the company, it is suggested that is unlikely to be a consideration under the subsection. This position is also supported by the further requirements that payment for shares other than in cash must comply with in order to be recognised as consideration under the Companies Act, 2019. Preference for consideration under the Act is cash consideration. Payment other than in cash must comply with additional filing requirement which requires a value to be placed on the in-kind consideration which value can be challenged in the future. However, a forbearance that confers a benefit on the company may qualify as valuable consideration under section 45 of the Act.

Section 45(1) of Act 992 on payment for shares seeks to suggest that there is one exception to the requirement that consideration must always be provided for shares. The exception under the section is capitalisation issues. That in respect to capitalisation issues, no consideration is provided by the person taking the shares. This may be misleading as consideration is provided by foregoing the dividend which is kept by the company. Capitalisation issue refers to a situation where the dividends declared and payable to shareholders is paid for by giving the shareholders additional shares rather than payment of the dividends in cash. In this situation, the company retained the cash which it may have used to pay dividends to the shareholders and give the shareholders additional shares in proportion to the shareholding of the shareholders. This is a simple set-off arrangement. In view of that, the shareholders are actually paying for the shares by the cash dividends that the shareholders could have received. However, capitalisation issues may be deemed excluded from the requirement that valuable consideration must be provided for shares issued by the company in the sense that the subsection requires the *“valuable consideration [to be] paid or payable to the company”* and in capitalisation issues, the shareholder will not pay or be paying anything to the company, since the cash is already with the company and not moving from the shareholder to the company.

¹⁰⁶⁸ Currie v Misa LR 10 Ex 153; LR 1 App Cas 554.

¹⁰⁶⁹ A past consideration which qualifies as a good consideration under the general contract law principles on consideration may suffice.

17.3 Time for payment

Under section 44 of Act 992, payment is to be made “*at the times that are agreed between the member and the company*”. Generally, the company may require payment at the time of the issue of the shares, or requires payment at an agreed future date or upon the occurrence of a specific event, or payment at call, that is anytime the company calls for the payment. A person can, therefore, acquire shares without having paid for the shares. The person will be a shareholder notwithstanding payment has not been made for the shares. The company has three options when payment is due and the shareholder fails to pay for the shares. The company may either sue the shareholder for the payment and if it obtains judgment but the shareholder as judgment debtor still fails to pay, the company may enter into execution including attaching the shares. Secondly, the company may commence forfeiture proceedings if permitted by the constitution of the company.¹⁰⁷⁰ The company may exercise a lien over the shares for the unpaid liability if provided in the constitution of the company.¹⁰⁷¹

In *Adehyeman Gardens Limited v. Assibey*,¹⁰⁷² where it was alleged that a subscriber to the Regulations of the company ceased to be a shareholder, the Supreme Court held a shareholder remains a shareholder notwithstanding non-payment for the shares. That until the shares are validly forfeited after a valid call is made, a shareholder remains a shareholder even if the shareholder has not paid for the shares and no share certificate has been issued by the company to the shareholder. The shareholder, however, remains liable to pay for the shares. Sophia A.B. Akuffo, JSC, as she then was, stated:

“As a subscriber, therefore, the Respondent’s shareholding, as well as the consideration payable by him therefore, is contractual. He does not need to be issued with a certificate for his membership to take legal effect. Consequently, there is, no doubt whatsoever that, since the Respondent is a subscriber to the Regulations of the company (as evidenced by Exhibit 1), he, pursuant to section 30(1), became a

¹⁰⁷⁰ Section 61(3) of Act 992.

¹⁰⁷¹ Section 105 of Act 992 provides:

“(1) Subject to the Central Securities Depository Act, 2007 (Act 733), a company may, where the constitution of the company so provides, have a lien on any of the issued shares on which there is an unpaid liability for the moneys, whether presently payable or not, called or payable at a fixed time in respect of those shares.

(2) The lien shall be an effective charge on the shares and the dividends payable on the shares enforceable in the manner provided by the constitution of the company.

(3) Despite a provision in the constitution of the company, the lien of the company shall not extend to shares on which there does not exist an unpaid liability, or to the sums of money due from the shareholder except in respect of the unpaid liability on the shares.”

¹⁰⁷² [2003-2004] 2 SCGLR 1016. See generally *R v. High Court, Accra*; ex parte Brenya 2001 – 2002 1GLR 483 (SC) for discussions on allotment and transfer of shares; See also *Sanyo Electric Company Limited v. Quarcoopome* [2001-2002] 2 GLR 198 (CA). *R v. High Court, Accra*; ex parte Appiah [1999-200] 1 GLR 420 (SC) deals with death of a shareholder and vesting of his shares.

member of the Company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5). By the terms of the Code, until all of his shares are forfeited for non-payment of a validly made call (or until the occurrence of any of the other said eventualities), a subscriber remains a fully-fledged member and shareholder of the company, even if he has not paid a pesewa for his shares. The Code does not prescribe any mode for forfeiture of shares and rather leaves this to be spelt out in the Regulations of the company... There is nothing on the record to show that there was any agreement made at any time between the 1st Appellant and the Respondent whereby the Respondent became liable to pay for his shares on any fixed date. As a result, it is only by a formal call that any amount may become due on any of his shares. However, the record is totally devoid of any evidence, whether in the form of minutes of a director's meeting, or in the form of a signed resolution, that the Company went through, or even made any pretence of going through, the processes prescribed by its Regulations, before purporting to forfeit the Respondent's shares... Consequently, even though the Respondent had not paid for his shares nor been issued with any share certificate, in law, he has never ceased to be a member of the company and he remains a shareholder thereof. The Court of Appeal was, therefore, right in granting the Respondent the reliefs that it did and did not commit any errors whatsoever."

As indicated, payment for the shares may be tied to the occurrence of a stated condition. The Act permits the company to indicate that the payment for the shares should be tied to the winding up of the company. That is, the company may reserve some unpaid amount on the shares and indicate such amount is payable only upon the winding up of the company. That is the reserve liability dealt with under section 57 of the Act which can only be done pursuant to approval from the shareholders by a special resolution. Section 57 of Act 992 provides:

- "57(1) A company limited by shares may, by special resolution determine that a portion of the unpaid liability on its shares which has not already been called up shall not be capable of being called up except in the event, and for the purpose, of the company being wound up.*
- (2) Where a resolution is passed, that portion shall not be capable of being called up except in the event and for the purpose stated in that subsection."*

In other words, a company is permitted to indefinitely defer payment for its shares until or premise the payment on the winding up of a company. Even though section 44(1) of the Act provides payment can be made at any time agreed between the shareholder and the company, where the

payment is tied to winding up of the company, the approval by special resolution of the shareholders is required.

17.4 Requirement for non-cash payment for shares

Section 45 of Act 992 imposes additional requirements where the valuable consideration paid or payable to the company is a non-cash payment. That is where the payment for the shares is made by either the provision of services or transfer of assets to the company. In other words, a company may issue shares as payment for services rendered by a person to the company or as payment for goods or assets transferred to the company. In order to ensure that the company obtains adequate valuable consideration for the shares issued, the section imposes additional requirement not required where the payment is made in cash. Subsection (2) of section 45 of Act 992 provides:

“(2) Where a company agrees to accept payment for shares or otherwise than wholly in cash, the company shall within twenty-eight days after the allotment of the shares, deliver to the Registrar for registration a contract in writing duly stamped evidencing the terms of the agreement and the true value of the consideration or, if the agreement have not been reduced to writing, particulars in the prescribed form of the agreement duly stamped, as if it were a written agreement.”

For an issue of shares by the company for non-cash consideration or partly cash consideration, there must be a contract which states the true value of the non-cash consideration.¹⁰⁷³ Subsection (2) of section 45 of Act 992 requires that the contract must be stamped and submitted to the Registrar within twenty-eight days of the allotment of the shares. Allotment here means the shares have been issued pursuant to an agreement and the name of the shareholders have been entered in the register of members.¹⁰⁷⁴ In instances where there is no contract or there is one but the contract has terms that the parties intend to keep confidential, the subsection permits the company to provide the particulars in the prescribed form which is duly stamped to the Registrar for the registration. The particulars that are required on the prescribed form include:

- (a) the name of the company;
- (b) the name, address and occupation of the person providing non-cash consideration for the shares;
- (c) the number and the of shares issued to the person; and
- (d) the monetary value of the non-cash consideration provided.

The purpose of this requirement is to inform the public of the amount placed on the services provided or goods or assets transferred to the company for the shares. The Act provides that the value of such non-cash consideration as stated in the agreement or the submitted particulars is

¹⁰⁷³ Section 45(2) of Act 992.

¹⁰⁷⁴ *Conte v. Kpeglo & Others* [1964] GLR 311 at 314 (SC).

sufficient evidence of the true value of the consideration but permits the liquidator or creditor to challenge that value in court in the event of official liquidation of the company under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015). Section 45(4) of Act 992 provides that:

“(4) The statement in the agreement of the value of the non-cash consideration is sufficient evidence of the true value of the consideration, but when a company limited by shares is in the course of being wound up under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015), the liquidator or a creditor may apply to the Court and if the Court is satisfied that the true value of the consideration was less than stated, it may direct that the shares shall be treated as unpaid to the amount of money that it shall direct.”

The statement is deemed to be the true value of the non-cash consideration. The value can only be challenged in an official liquidation, and not in voluntary liquidation, which is regulated under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015) and not the Companies Act, 2019. In the event of such challenge, where the court is satisfied that the value stated in the registered agreement or the particulars provided in the prescribed form is less than the true value of the non-cash consideration, the court will direct that the shares are treated as unpaid as to an amount the court may direct. In sum, the shareholder will be treated as not having fully paid for the shares and will be required to pay the additional amount declared unpaid on the shares.

This additional requirement is applicable only to instances of payment for shares in other means than payment in cash. However, the Act provides that it is not applicable to capitalisation issues. Section 45 of Act 992 provides *“(3) The particulars referred to in subsection (2) shall not be required on a capitalisation issue of shares pursuant to subsection (1) of section 77.”* It is not applicable to instances of cash payment. It is also not applicable to non-cash payment for shares in an unlimited company.

Section 47 of Act 992 imposes a penalty for failure of the company to comply with the registration requirement for non-cash payment for shares issued by the company. Section 47 provides *“Where a company defaults in delivering a document required under section 45 ..., the company and every officer of the company who is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the default continues.”*

Cash payment

Section 48 of Act 992 provides for what amount to payment in cash for shares. It is not in all instances that cash moves from the person acquiring shares to the company that amounts to payment by cash for the purposes of section 45. Section 48 of the Act provides that:

- “(1) For the purposes of this Act, shares have not been paid for in cash except to the extent that the company has actually received cash for the shares at the time of, or subsequent to the agreement to issue the shares.*
- (2) Where shares are issued to a person who has sold or agreed to sell property or rendered or agreed to render property services to the company or to person nominated by that person, the amount of money of a payment made for the property or services shall be deducted from the amount of a cash payment made for the shares and only the balance shall be treated as having been paid in cash for the shares despite an exchange of cheques or any other securities for money.”*

The section makes a prescription to avoid circumventing the requirements applicable to non-cash payment for shares. That even in instances where cash, cheques or other securities for money have changed hands, the law may treat those instances as non-cash payment. The first of such instances relates to payment in cash made prior to the issue of shares. Where payments were made in cash prior to the agreement to issue shares, and the payments were used to offset the money due under the agreement, the law treats it as non-cash consideration. Subsection (1) of section 48 provides that only cash actually received by the company *“at the time of or subsequent to the agreement to issue the shares”* qualifies as payment in cash. Secondly, notwithstanding that a person renders services or agrees to render services, or transfer property or agree to transfer property to the company for payment, once that person also acquires shares from the company and pays cash, the court will treat the transaction as non-cash payment for the shares. The cash payment will only apply where the amount paid by the person is more than the amount paid by the company for the services or property, and only to the extent of such the difference. As stated earlier, the section seeks to prevent the circumvention of the requirements attached to non-cash payment for shares by treating schemes adopted to avoid such requirements as a non-cash payment even though on the surface, there is an exchange of cash.

17.5 Return of issue of shares

In order to have an up to date information on shares issued by the company, the Act mandates that the company must deliver to the Registrar for registration within twenty-eight days after issue of shares a document or form known as return of issue of shares with stated particulars prescribed under section 46 of the Act. Section 46 of Act 992 provides:

- “46. Where a company issues shares, other than a re-issue of treasury shares as defined in subsection (3) of section 61, the company shall, within twenty-eight days after the issue, deliver to the Registrar for registration a return in the prescribed form showing, as at the date of the return,*
- (a) the amount of the stated capital, attributable to each of the items specified in subsection (1) of section 68;*

- (b) the number of the authorised shares of each class;*
- (c) the total number of the issued shares of each class and the amount of money paid on the shares, distinguishing between the amount paid in cash and the amount paid otherwise than in cash and, in the case of a company limited by shares, the amount of money remaining payable on the shares, distinguishing between the amount presently due for payment and the amount not yet due for payment; and*
- (d) the total number of the treasury shares of each class."*

The return of issue of shares is thus a document or form that must be submitted by the company anytime the company issues shares other than the re-issue of treasury shares. The form must provide the particulars listed and must be delivered to the Registrar for registration not later than twenty-eight days after the issue of shares. Section 47 of Act 992 imposes a penalty of twenty-five penalty units for each day during which the company is in default on the company and every office of the company.

17.6 Type & classes of shares

Act 992 provides for two types of shares and permits companies to issue different classes of the type of shares. Shares are a mechanism through which companies raises capital. In order to attract investors with different interests, the company may issue different types and classes of shares that are tailored to attract different investors. Investors with fixed term investment policy require shares that the investors are not bound to hold beyond the term agreed. Investors that required a fixed return on the investment must have shares that provide for a fixed term return. The different interest of the different investors must be reflected in the different types and classes of shares that a company may issue. Also, the founding shareholders may seek protective rights over the shares of such shareholders which may not be attached to shares issued to other subsequent investors after incorporation.

Act 992 provides for two types of shares.¹⁰⁷⁵ Preference shares and equity shares.¹⁰⁷⁶ Equity shares are also referred to as ordinary or common shares. There is sub-categorization of the types of shares and among the types of shares, a company may issue different classes of shares. Section 49 of Act 992 provides:

"49. (1) The registered constitution of a company may provide for different classes of shares by attaching to certain of the shares preferred, deferred or any other special rights or restrictions, whether as regards dividend, voting, repayment or otherwise.

¹⁰⁷⁵ Section 51 of Act 992.

¹⁰⁷⁶ Ibid.

(2) Shares are not of the same class unless they rank at the same rate for all purposes."

Equity shares have characteristics that differentiate them from preference shares. In addition, there may be different classes of equity or preference shares once different rights and obligations are attached to a class which is not applicable to another class. Once rights and obligations are attached to a type or class of shares different from another type or class of shares, they are not of the same class. It is for that reason that subsection (2) of section 49 makes it clear that shares are not of the same class unless they have the same rights and obligations attached to the shares. Explanation of the different types of shares follows.

17.6.1 Preference Shares

Section 51 of Act 992 provides for two types of shares – preference shares and equity shares. Section 51 provides as follows:

"51(1) In this Act, "preference share" means a share, which does not entitle the holder of the share to a right to participate beyond a specified amount of money in distribution whether by way of dividend, or redemption, in winding up, or otherwise; and any other share shall be referred to as an "equity share".

(2) A share that is not a preference share shall be referred to as an "equity share".

(3) The meaning of "preference share" under subsection (1) shall apply to whatever name a company may designate in its constitution."

The company does not need to designate the shares as preference shares for it to qualify as preference shares under Act 992. Once the nature of the shares falls within the description of preference shares as provided in the Act, the shares are preference shares. The designation is not therefore important, one must look at the substantive description or features attached to the shares for a determination as to whether the shares are preference shares or not.

There are two broad types of preference shares – preference as to distribution and preference as to redemption. In other words, from the description, preference shares are shares that have two characteristics, they have preferential rights either to the amount payable as dividend or return of capital or assets (that is distributions) or to the period of holding the shares (that is redemption). The preferential right as to distribution relates to the fact that the preference shareholder must be paid first, in relation to whatever distribution that the preference is applicable, up to a stated maximum. It is only after the preference shareholders are paid up to the stated maximum that equity shareholders will be paid. In relation to preference as to redemption, the preference shareholder and the company has agreed at the time of issue of the shares on the conditions of redemption of the shares in the future by the company to the shareholder.

In relation to preference as to distribution, in addition to the preference of being paid first, preference shareholders are to be paid a cap or fixed amount in terms of the applicable distribution beyond which they are not entitled to participate in further distribution.

Section 51(1) of Act 992 provides for preference shares as to dividend, winding up and redemption. The subsection does not close the categorization when it added "or otherwise". So, there can be other categories of preference shares.

Preference shares as to dividend refer to shares that entitle the holder to a specific amount per share as dividend, when dividend is declared and payable, beyond which the shareholder is not entitled. In a constitution of a company, where it is provided that a category of shares has a right to be paid dividend of, for example, GHS12.00 per share, those shares are preference shares. In the event the company declared dividends, the holders of those shares will be entitled to be paid first. In addition to being paid first, they will be paid up to the stated dividend per share based on the number of shares held. In comparison, the amount paid to equity shareholders or other preference shares (that is preference shares not related to dividend) varies depending on the amount declared as dividend. This means other shareholders (other than preference shareholders as to dividend) will receive an amount higher or lower than GHS12.00 per share depending on the total amount declared as dividend. A preference shareholder has a fixed amount that is paid to the preference shareholder as dividend and the preference shareholder is not entitled to any amount beyond the stated amount. Section 54(d) of Act 992 which deals with canons of construction of class rights provides that:

"54 In construing the provisions of the constitution of a company in respect of rights attached to shares, the following canons of construction shall be observed: (d) if a class of shares is expressed to have a right to preference dividend, then unless the contrary intention appears, that class does not have a further right to participate in dividends;

The advantage to a preference shareholder as to dividend is that such shareholder is paid first. Secondly, the shareholder knows in advance how much dividend they are entitled to when dividend is declared. Thirdly, they may be paid their stated dividend even though there is not enough dividend to pay other categories of shareholders. The disadvantage is whilst the other shareholders may in some years receive what may be termed as 'bumper dividend' when the company performs well financially and declares a huge amount as dividend to be distributed among shareholders, a preference shareholder is not entitled to receive more than the stated dividend per share.

Preference shares as to winding up also operate similarly as preference shares as to dividend. The main distinction is the type of distribution the shareholder of preference shares as to winding up is entitled to. The holder of preference shares as to winding up is entitled to be paid first and up to a stated amount out the net assets of a company in the event of winding up. When a company is put

in liquidation, the liquidator undertakes winding up by gathering the assets of the company, realizing the assets and satisfying the liabilities of the company. The assets left after the satisfaction of all the liabilities of the company are the net assets. The net assets are distributed among the shareholders. Holders of preference shares as to winding up are entitled to be paid first out of the net assets and are entitled to be paid a specific amount per share. What remains after the payment to such preference shareholder is shared among other shareholders. Section 54 dealing with rules of construction of class rights provides that: *“54 In construing the provisions of the constitution of a company in respect of rights attached to shares, the following canons of construction shall be observed: (e) if a class of shares is express to have preferential rights to payment out of the assets of the company in the event of winding up, unless the contrary intention appears, that class does not have a further right to participate in the distribution of assets in the winding up”*. The preference shareholder is not entitled to receive amounts above the stated amount.

So, other shareholders may receive less than the preference shareholder as to winding up, or may receive nothing, or receive far higher amounts per share than the preference shareholder as to winding up depending on the value of the remaining net assets. The advantages and disadvantages are the same as preference shareholder as to dividend albeit it relates to entitlements in winding up.

The third categorization under section 51(1) of the Act relates to redemption. A share that is entitled to be redeemed is a preference share as to redemption. That is redeemable preference shares. Redemption of shares refers to the right attached to the shares at the time of issue that the company is liable to acquire back the shares at a stated time in the future or upon the occurrence of a stated event or request of the company or shareholder or both. At the time the shares are issued, there is an agreement that the company will acquire the shares back in the future. Generally, a holder of redeemable preference shares has the right to request the company to acquire back the shares at an agreed time or upon the occurrence of an event, at a price already agreed or the manner of determination is agreed at the time of issue of the share. The company may also have this right conferred on it to request for redemption.

As noted, there could be preference shares relating to other forms of distributions since section 51(1) of Act 992 did not close the categorization. In addition, other rights can be attached to preference shares. The rights discussed are only applicable to preference shares and once attached to some preference shares and not all, create different classes of preference shares. Further, once the rights are attached to a class of shares, that type of shares are preference shares even if not referred to as such. The rights are discussed below.

17.6.1.1 Right of cumulation of dividend

Right of cumulation of dividend refers to rights attached to preference shares as to dividend whereby when dividend is not paid at the end of the financial year, the dividend will accumulate arrears which are payable in subsequent years that dividend is declared together with dividend of that year prior to any payment of dividend to any other shareholder. Once the right of accumulation is attached to preference shares, the shares are cumulative preference shares. Thus, cumulative preference shares are preference shares as to dividend whose dividend accumulates when dividend is not paid for a particular year. That is, the company will owe the shareholder the dividend. The cumulative arrears become payable when the company has money and declares dividend to pay to shareholders. The cumulative preference shareholder is entitled to have all his arrears paid in addition to dividend for the previous year prior to making payment to any other shareholder. According to section 54(b) of Act 992, all preference shares as to dividend are cumulative preference shares unless otherwise stated. Section 54(b) of Act 992 provides that *"54. In construing the provisions of the constitution of a company in respect of the rights attached to shares, ... (b) unless the contrary intention appears, a fixed preference dividend payable on a class of shares shall be cumulative, in order words, a dividend is not payable on any shares ranking subsequent to that class of shares until all the arrears of the fixed dividend have been paid"*. The default position under the Companies Act, 2019 is that all preference shares as to dividend are cumulative preference shares.

In other words, preference shares as to dividend accumulate arrears which arrears must be paid first prior to payment made to any other shareholder. It is debatable as to when the arrears accumulate. That is whether the company must first declare dividend or the arrears automatically accumulate each year whether or not the company declares dividend provided no payment has been made to the cumulative preference shareholder. It may be argued that the dividend accumulates only when declared but not paid. The proponents of this position rely on sections 54(a) and 72 of Act 992. Section 54(a) of Act 992 provides that *"(a) unless the contrary intention appears, a dividend is not payable on any shares unless the company resolves to declare dividend."* Further section 72 provides that *"(1) Except in a winding up, a company shall not pay a dividend to the shareholders of the company ... unless, the company has complied with the distribution test."* The distribution test requires the company to have profit after tax for the financial year and determines that after the payment of dividend, the company is able to satisfy its liability when due. In view of the above provisions, it may be argued that arrears of cumulative preference shares accumulate only when dividend is actually declared by the company but not paid. That is declaration of dividend is a condition for accumulation of dividend.

The position in the sections, which is declaration of dividend is a condition to payment of dividend, is supported by case law.

In *Bond v. Barrow Haematite Steel Co*¹⁰⁷⁷, the plaintiffs brought an action for payment of dividend on fixed preference shares even though no declaration of dividend was made in accordance with the articles of the company. It was held that no dividend is payable on the shares of a company, even on fixed preference shares, unless and until the company has decided to pay one. Farwell J. stated @ pg. 362 that:

“It is argued that the provisions as to the declaration of a dividend do not apply to shares on which a fixed preferential dividend is payable. In my opinion this is not so. The necessity for the declaration of a dividend as a condition precedent to an action to recover is stated in general terms in Lindley on Companies, 5th ed. p. 437, and, where the reserve fund article applies, it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company, but the preference shareholders came in on these terms, and this argument does not carry much weight in an action such as this, where bona fides is conceded. The opposite conclusion might enable the preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance. Granted that it is a hardship to go without dividends for a time, this hardship presses more heavily on the ordinary shareholders who have to wait until the preference shareholders have received all arrears before they can get anything.”

The decision is usually known as the “declaration of dividend” rule. Whilst it is accepted that declaration of dividend is a condition for payment of dividend, based on the above sections and case law, that position, it is suggested should not be extended to cover accumulation of dividend. Accumulation is clearly different from payment. Accumulated dividend on cumulative preference shares is not payable until the company declares dividend in accordance with the Companies Act, 2019 or the constitution of the company. That will be in line with section 54(a) of the Act and the *Bond v. Barrow Haematite Steel Co* case (supra).

However, the position that dividend on cumulative preference shares must only be accumulated when dividend is declared will not only lead to an absurd interpretation of section 54(b) which provides for accumulation but also a practical absurdity. The interpretation is not supported by the *Bond v. Barrow Haematite Steel Co* case (supra) as the action was for payment when no declaration was made. Such position will make nonsense of the applicable dividend cumulative right of the preference shareholder as to dividend. First, both sections 54(a) and 72(1) of the Act relates to payment of dividend and not declaration. Accumulation of arrears only happens when payment cannot be made. Secondly, from a practical position, if the above interpretation is to hold, no arrears

¹⁰⁷⁷ [1902] 1 Ch 353.

will ever be accumulated as the company is unlikely to declare dividends that it cannot pay with the understanding that the company accumulates arrears of a particular class of shareholders. The other shareholders, if in the majority, can always avoid such accumulation of dividend arrears of preference shareholders as to dividend since the majority is unlikely to vote to declare dividend which is not paid but accumulated to the minority cumulative preference shareholders to the disadvantage of the majority. Thirdly, there will be no difference between cumulative preference shareholders and any other shareholder when the dividend is not declared. In other words, once dividend is declared, all shareholders are entitled to the dividend. This is seen from the very essence of the definition of shares which entitles the holder to share in the income of the company. If the company fails to pay the declared dividend, the company in essence owes all the shareholders the dividend. It will amount to debt which the shareholders are entitled to sue to recover from the company. There is therefore no distinction between a cumulative preference shareholder who has not been paid the declared dividend and any other shareholder as both can bring an action to recover the dividend from the company.

In addition, section 76 provides that dividends must be paid within sixty days after the company has resolved to pay dividends or the dividends become payable. So, once dividend is declared, it must be paid within sixty days and not left to accumulate, as in practice, no second resolution is passed to effect payment after resolution of declaration. The right interpretation, therefore, is that the arrears of cumulative preference shareholders accumulate any year that the company fails to pay the fixed stated dividend of such shareholders. No declaration is required for the dividend of cumulative preference shareholders to accumulate. Declaration is not a condition for accumulation. Their right to payment of the arrears of dividends for a particular year or years only arises when dividend is declared.

Further, holders of cumulative preference shares are investors who intend to have fixed payment on investment for every year. The investors intend to have a guaranteed fixed return and therefore do not intend to take risk relating to non-payment when the company does not make profit. As such, the instrument of cumulative preference shares is to operate as a hybrid feature of shares and loan combined. The company is to pay the fixed amount annually and where it is not in the position to pay for a particular year, it is carried forward until such a time that the company is in the position to pay, that is upon declaration of dividend. It is for that reason that the cumulative dividend will be due and payable when during the winding up of the company even when dividends are not declared.¹⁰⁷⁸

Section 54(c) of Act 992 further provides that even in winding up, such accumulated arrears are payable whether earned or not up to the date of actual payment of the winding up. It will make no sense that whilst the company is in liquidation, the law requires payment of the accumulated

¹⁰⁷⁸ Section 54(c) of Act 992.

dividends whilst when a going concern and is in the position to make payment, such accumulated dividend would not be payable.

Any other class of preference shares that expressly excludes the right of accumulation of arrears is a class of non-cumulative preference shares. In other words, for preference shares as to dividend to be non-cumulative preference, the right of accumulation of dividend arrears must be expressly excluded in the constitution of the company or terms of issue, as the default position is preference shares as to dividend accumulate arrears.¹⁰⁷⁹ Preference shares as to dividend that do not have the right of cumulation of dividend attached are referred to as non-cumulative preference shares. Holders of non-cumulative preference shares will not be entitled to dividend in the year in which the company does not declare dividend.

17.6.1.2 Right of conversion

Preference shares may have right of conversion attached to them which right entitles the preference shareholder to convert the preference shares into equity shares. Where such a right is attached, the preference shares are called convertible preference shares. Convertible preference shares are, therefore, shares that the shareholder has the option to convert the preference shares to equity shares. Even though preference shareholders have preference in terms of stated rights, the cap on the distribution the shareholder is entitled to or the condition that the company can acquire back the shares when redemption is due, or the right to suspend voting rights of preference shareholder¹⁰⁸⁰ may be seen as a disadvantage in some instances for holding preference shares. In view of that, a preference shareholder may opt to have right that entitles the shareholder to convert the preference shares to equity shares and thus be entitled to the same right as the equity shareholder. Where therefore the terms of issue permit the preference shareholder to convert the preference shares into equity shares, such preference shares are convertible preference shares. Preference shares without the attached right of conversion are non-convertible preference shares. All preference shares will be deemed to be non-convertible preference shares unless the constitution of the company expressly confers the right of conversion on the preference shares. Even if not conferred on the class of preference shares at the time of issue, the constitution of the company can be amended subsequently to confer the right of conversion on the preference shares.

17.6.1.3 Right of redemption

Redeemable preference shares are shares that have right of redemption attached to those shares. Redemption right or right of redemption refers to right attached to preference shares at the time of

¹⁰⁷⁹ In *Staples v. Eastern Photographic Materials Co* [1896] Ch. 303, it was held that stating that preference shareholders shall be paid 'out of the net profit of each year' means the dividends are not cumulative.

¹⁰⁸⁰ Section 52 of Act 992 permits suspension of voting rights of preference shares.

the issue of the preference shares that require the company to acquire back the shares at a stated time in the future or upon the occurrence of a stated event, or upon request of the company or shareholder or both. At the time the shares are issued, there is an agreement that the company will acquire the shares back in the future. Generally, a holder of redeemable preference shares has the right to request the company to acquire back the shares at an agreed time or upon the occurrence of an event, at a price already agreed or the manner of determination agreed. The company may also have this right conferred on it where the company can opt to acquire the shares back from the holder. Even though section 58(1)(d) of Act 992 prohibits a company from acquiring its issued shares, section 61 of Act 992 permits the redemption of shares. Preference shares that have no right of redemption are non-redeemable preference shares. Non-redeemable shares are equity shares and preference shares that have no right of redemption. The constitution of the company can be amended at any time to convert all or some of the non-redeemable shares into redeemable shares.¹⁰⁸¹ In the event the company has only redeemable shares or converts all its non-redeemable shares into redeemable shares, the company must consider in mind the requirement that there must be at least one shareholder of the company when the company undertakes the redemption.¹⁰⁸²

The categorization of preference shares into cumulative preference shares (whether as to dividend or winding up), convertible preference shares or redeemable preference shares are not mutually exclusive. A class of shares may have rights attached which made the shares in that class cumulative redeemable convertible shares as to dividend and winding up. Conferment of rights on a class of shares to make the class of shares convertible shares does not prevent conferment of rights to make the same class redeemable and cumulative.

17.6.2 Equity Shares

As indicated earlier, two types of shares are provided for under Act 992. These are preference shares and equity shares. Section 51(1) of Act 992 provides for description of preference shares and indicates *“any other share shall be referred to as an “equity share”.*” A share that is not a preference share is an equity share. Section 51(2) of the Act for the abundance of caution expressly provides *“(2) A share that is not a preference share shall be referred to as an “equity share”.*” Equity shares are also referred to as ordinary shares or common shares.

Equity shares are not defined in the Act in a similar manner as section 51(1) of the Act defines preference shares. However, given section 51(1) and (2) of Act 992 provides equity shares are simply shares that are not preference shares. Implied from the definition of preference shares, equity shares are shares which do not provide for a stated amount beyond which the holder cannot participate in distribution by way of dividend or winding up, and which the holder has no right to redemption.

¹⁰⁸¹ Section 61(1)(a) of Act 992.

¹⁰⁸² Section 41 of Act 992.

Equity shareholders may be regarded as taking more risk than preference shareholders in that they rank below preference shareholders in terms of payment of distributions whether as dividend or winding up, or have no right to request redemption of the shares as much as it is in the interest of the holder to do so. Compensating for the risk is the possibility that equity shareholder may gain higher than preference shareholders as to dividend or winding up when the amount available for distribution as dividend or as net assets in winding up respectively qualifies to be called a 'bumper harvest'. That is, the equity shareholder gains more when the company makes a huge profit which has been declared as dividend and makes nothing when the company makes little or no profit. In view of this, equity shareholders are deemed to be the "real owners" of the company.

It is important to clarify that other than permission to suspend the right of preference shareholders¹⁰⁸³, preference shareholder as to winding up is in the same position as equity shareholder when it comes to distribution of dividend. Redeemable preference shareholder is in the same position as equity shareholder when it comes to distribution of dividend and net assets during winding up. One must therefore have regard to the particular preference shares to determine the distinction between the preference shares and equity shares.

17.7 Classes of Shares

A company may issue different classes of preference shares and equity shares. Shares are not to be deemed to be of the same class unless they have the same interest, rights and obligations.¹⁰⁸⁴ Act 992 in section 49 provides that *"(1) The registered constitution of a company may provide for different classes of shares by attaching to certain of the shares preferred, deferred or any other special rights or restrictions, whether as regards, dividend, voting, repayment or otherwise."* The company is permitted under the subsection to create different types of shares either as preference shares or equity shares and can further create different classes of preference shares or equity shares. The company can attach preferred rights to a class of preference shares or equity share or attached to those shares deferred rights. The preferred or deferred right may relate to the ranking of the shares in terms of entitlement such as payment of dividends, payment for the shares, voting on shareholders' issues, and other rights.

It is advisable that in creating different classes of shares, the focus is not placed on terminologies but the rights and obligations attached to the shares. Terminologies should therefore not be of importance but the substance of the rights, restrictions and obligations attached to the shares. Without expressly providing for different rights and obligations to shares, the shares are deemed to be of the same class. Section 54 provides *"In construing the provisions of the constitution of a company in respect of the rights attached to shares, the following canons of construction shall be*

¹⁰⁸³ Sections 34 and 52 of Act 992.

¹⁰⁸⁴ Section 49(2) of Act 992.

observed: (g) subject this section, the shares rank equally in all respects unless the contrary intention appears."

As noted, having different classes of shares is to attract investors with different interests. In addition, it may be to confer specific rights on a specific class of shareholders to protect the specific interest of such shareholders. Rights may be conferred on shares held by subscribers, who are the "founding" shareholders to protect their interests as different from other class of shareholders. Similarly, rights may be conferred on shares issued to strategic investors who have the technical and financial knowhow that the company requires to undertake its business which may not be available to other classes of shareholders. It is important in creating classes of shares to have reasons that inform the purpose for the creation of such different classes of shares.

17.8 Variation of class right

Since a company may have different classes of shares, the Act permits the company to vary the rights of a class of shareholders by complying with the Act and the constitution of the company. Variation of class right is dealt with under section 50 of Act 992. Subsection (6) of section 50 of the Act provides for what amount to a variation of class right. Section 50(6) of Act 992 provides:

"(6) A resolution of a company the implementation of which would have the effect of
(a) diminishing the proportion of the total votes exercisable at a general meeting of the company by the holder of the existing shares of a class, or
(b) reducing the proportion of the dividends or distributions payable at any time to the holders of the existing shares of a class,
is for the purposes of this Act, a variation of the rights of that class."

Variation of class right, therefore, does not refer to any change in the rights attached to a class of share. Variation of class right occurs only under two instances. First, the implementation of a resolution that diminishes the proportion of the total votes by the holders of the existing shares of a class. Second, the implementation of a resolution that reduces proportion of the dividends or distribution payable at any time to the holder of the existing shares of a class. In both cases, the variation of class rights occurs through a resolution passed by the company. The distinction in the two instances is the effect of the resolution. In one case it diminishes the proportion of the total votes of the affected class of shareholders, and in the other case, it reduces the proportion of dividend or distribution payable to the affected class of shareholders. In the first instance, it is important not to confuse instances of dilution of the voting right of a shareholder through a resolution issuing new shares or subdivision as a variation of class right.

In *Greenhalgh v. Arderne Cinemas Ltd and Another*¹⁰⁸⁵, the plaintiff brought an action challenging a resolution that subdivided issued shares and attached to the subdivided shares, one vote per share, on the ground that it amounts to a variation of his class right without his approval as provided for variation of class right. By the resolution, one share of 10s was subdivided into 5 shares at 2s per share but now have 5 votes rather than one vote. As a result of such subdivision, the plaintiff who was issued shares on similar terms lost his majority voting right to prevent the passage of certain resolutions. It was held that the effect of the resolution is not a variation of class right by reduction of the voting right of the plaintiff's class of shareholder. Lord Greene MR stated at pg. 516 that:

"The resolution passed at an extraordinary general meeting of the company held on 16 April 1941, was to this effect:

'That the 4,705 ordinary shares of 10s. each be subdivided into 23,525 ordinary shares of 2s each, ranking for dividend, voting and winding-up pari passu with the other ordinary shares for the time being issued.'

The effect of what I have referred to is this: Each of those split 2s shares was given one vote per share, and in that respect they rank pari passu with the 10s ordinary shares for voting. Each 10s share had one vote and each 2s share had one vote, and that right was attached unquestionably to the 2s shares. The resolution which is attacked is the resolution of 12 March 1943, which is to this effect:

'That subject to the necessary consent in writing (in accordance with the articles of association of the company) of the holders of the present 10s. shares, the 26,295 issued ordinary shares of 10s. each to be subdivided into 131,475 ordinary shares of 2s each ranking so as to form one class of shares with the existing 23,525 ordinary shares of 2s each, and ranking for dividend, voting and winding-up pari passu with the said existing 2s shares.'

The 10s shares so split into 2s shares were those which throughout the relevant history were held, or the greater part of which were held, by the parties in the company who were opposing Greenhalgh. The 23,525 ordinary shares of 2s each referred to in that resolution were the 2s shares which resulted from the subdivision and issue in pursuance of the original agreement.

Looking at the position of the original 2s ordinary shares, one asks oneself: What are the rights in respect of voting attached to that class within the meaning of art 3 of Table A which are to be unalterable save with the necessary consents of the holders? The only right of voting which is attached in terms of the shares of that class is the right to have one vote per share pari passu with the other ordinary shares of the company for the time being issued. That right has not been taken away. Of course, if it had been attempted to reduce that voting right, eg, by providing or attempting to provide that there should be one vote for every five of such shares,

¹⁰⁸⁵ [1946] 1 All ER 512.

that would have been an interference with the voting rights attached to that class of shares. But nothing of the kind has been done; the right to have one vote per share is left undisturbed. In order, therefore, to make good the argument that what was done was an interference with the voting rights of that class of shares, it had to be argued, in effect, that those shares had attached to them a right within the meaning of art 3 to object to the other ordinary shares being split so as to increase their voting power: in other words, that it was a right attached to these 2s shares that they could object to any increase in the voting power attached to the 10s shares resulting from a subdivision of those shares. If an attempt had been made, without subdividing the 10s shares, to give them five votes per share, it may very well be that the rights attached to the original 2s shares would have been varied, because one of the rights attached to that class of shares was that they should have voting powers pari passu with the other ordinary shares of the company and that right might well have been affected if in the result you had two kinds of ordinary shares, one a 10s share carrying five votes and the other a 2s share carrying one vote. But that is not what was done. The present position under the resolution which is attacked is that the ordinary shares are now all 2s ordinary shares and each of them has one vote per share, and accordingly the voting power of the original 2s shares is in fact entirely pari passu with the other ordinary shares. It only shows that these things are of a technical nature; but I cannot myself see how it can be said that there is attached to the original 2s shares a right to object to the other ordinary shares having more than one vote, provided that is done, as I say, by the method of subdivision, which was the method employed here."

*Re Mackenzie & Co. Ltd*¹⁰⁸⁶ - preference shares were entitled to dividend which was stated as 4 percent of the paid-up capital. In a resolution to reduce the capital, which the articles of the company indicated must be voted on by only ordinary shareholders, the preference shareholder challenged the resolution on the ground that it amounts to a variation of their right and as such two-third approval is required from the preference shareholder. It was held that the resolution does not amount to a variation of rights attached to the preference shares. Ashbury J stated @ pgs. 1021 to 1023 that:

"This is a petition to sanction a reduction of capital from 200,000 pounds to 82,000 pounds odd. The company was incorporated for the purpose of carrying on the business of wine and spirit merchants and shippers, and it has 6,000 four per cent cumulative preference shares of 20 pounds each and 4,000 ordinary shares of the same denomination as its nominal capital. Of these it has issued 5,300 preference shares and 1,578 ordinary shares, and all these issued shares are fully paid. The company is alleged to have lost capital to the amount of 34,390 pounds, and it is

¹⁰⁸⁶ [1916-17] All ER 1018; [1916] 2 Ch 450.

proposed to write off 5 pounds from each of the preference and ordinary shares which have been issued and, having done so, to return 3 pounds per share to each of the shareholders as being capital in excess of the present wants of the company. The petition is supported by the whole of the ordinary shareholders, and more than half the preference shareholders appearing on the petition are in favour of the sanction of the court being given to the reduction scheme, but a substantial amount of preference shareholders oppose the scheme on three grounds. First of all, they say that under the constitution of the company their rights are affected, and that, that being so, the matter cannot proceed without the sanction in writing of the holders of two-thirds of the issued preference shares, which having regard to the number who oppose, cannot be obtained. ...

With regard to the first point, by cl 5 of the memorandum the capital of the company is stated as being "200,000 pounds divided into 10,000 shares of 20 pounds each, whereof 6000 are 4 per cent preference shares and 4000 ordinary shares with the respective rights and privileges specified in the articles of association registered herewith."

Clause 6 of the memorandum provides that:

"Subject to any express provision to the contrary made upon the creation of any class of shares [all the preference shares that I have to deal with were originally created] all or any of the special rights, privileges, and advantages attached to any class may with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction) be altered, modified, dealt with, or affected."

That, I think refers to the rights and privileges referred to in cl 5 of the memorandum as being defined by the articles. Under art 64 it is again provided that

"all or any of the special rights and privileges attached to any class of shares [the rights referred to in cl 5 of the memorandum] may with the sanction in writing of the holders of two-thirds of the issued shares of that class ... be altered or modified,"

and it is necessary to turn to art 62 to discover what are the special rights, privileges, and advantages attached to the preference shareholders as a class. That article provides that the preference shares shall be called four per cent cumulative preference shares and the holders shall be entitled to receive out of the profits of the company available for division among the members dividends at the rate of four per cent per annum on the nominal amount of the capital. Then the words are, "from time to time paid up or credited as paid up" thereon, "such dividend to be cumulative ... and to be a first charge on such profits" in a winding-up. By art 59 of the original articles it is provided that the company may by special resolution reduce its capital in any manner authorised by statute, and by art 79 it is provided

that, except under circumstances which have not arisen, the ordinary shareholders alone shall have the right of voting at the meeting of the company. Therefore the result of the memorandum and articles shortly is this: that, subject to the right of this company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by the statute, these preference shares are to be of the denomination of 20 pounds each, and the special right, privilege, and advantage which is attached to those shares is a cumulative four per cent preference dividend on the amount of capital from time to time paid up or credited as paid up. It is contended that the company has no power to reduce its capital, if any of the preference shares are included in the reduction without the consent of two-thirds of the issued shares of that class. I do not think that that is the right construction to place on these articles. In my judgment the fair and proper construction of these articles is that the special rights, privileges, and advantages of the preference shareholders are those, and those only stated, in art 62, which is confined to the right to a cumulative preferential dividend on the amount of capital from time to time paid up or credited as paid up, and that that is without prejudice to the rights of the company, as provided in its articles, to reduce its capital in any way provided for by the Act, and provided that that reduction obtains the sanction of the court."

In order to undertake variation of class rights, the Act requires that the variation must be in accordance with the constitution of the company¹⁰⁸⁷ and if the constitution of the company does not provide for variation, the constitution of the company must be amended in accordance with the Act to provide for the manner of variation of class right¹⁰⁸⁸. Section 50 Act 992 provides *"(1) Where at any time the shares of a company are divided into different classes, the rights attached to a class shall not be varied unless otherwise expressly provided for in the constitution of a company."* Variation of class right must be in accordance with the constitution of a company.¹⁰⁸⁹ If the constitution of a company does not provide for variation of class rights,¹⁰⁹⁰ the constitution can be amended to insert a clause that provides for variation of class right. Section 50 of the Act provides *"(3) Except as provided in subsection (2), a company may, by a special resolution, amend its constitution by inserting in the constitution provisions regarding the variation of the rights of a class, or by modifying the terms of those provisions."* The requirement for amending the constitution of a company to provide for variation of class rights or modification of variation clauses is permitted.

¹⁰⁸⁷ Section 50(1) of Act 992.

¹⁰⁸⁸ Section 50(3) of Act 992.

¹⁰⁸⁹ Paragraph 7 of Second Schedule of Act 992 provides for variation of class which is in the default constitution of a private company limited by shares. Paragraph 6 of Third Schedule of Act 992 provide for same in the default constitution of a public company limited by shares.

¹⁰⁹⁰ Which means the default paragraphs as stated in footnote above have been deleted from the registered constitution of the company.

The requirement for the amendment of the constitution to provide for variation or to modify an existing variation clause in the constitution of a company is a special resolution of the company. However, the special resolution is not a general special resolution of the shareholders, the special resolution must be a special resolution of each class. Subsection (4) of section 50 of Act 992 provides *“(4) An amendment under this section requires the prior writing consent of the holders of at least three-fourths of the issued shares of the shares of each class or the sanction of a special resolution of the holders of the shares of each class and shall be deemed, to be a variation of the rights of each class.”* Thus, the special resolution shall only be deemed to be passed if approved by a vote of not less than seventy-five percent of each class of shareholders.

There are two instances where the Act prohibits amendment of the constitution of the company to provide for variation of class right. In the first instance, where the registered constitution of a company expressly prohibits variation of class right, the company cannot amend the constitution by special resolution to provide for variation and proceed to undertake variation. In the second instance, where the constitution of the company contains provisions on variation and prohibits amendment of that provision, the company cannot by special resolution modify the variation clause and proceed to undertake variation in accordance with the modified variation clause. The variation must be in accordance with the original variation clause. Variation, in the case the constitution prohibits variation and amendment of the constitution to provide for variation, can only be undertaken with the approval of the High Court under a scheme of arrangement. Undertaken amendment of a variation clause contrary to a clause in the registered constitution of the company that also prohibits modification of such variation clause can also only be done with the approval of the High Court under a scheme of arrangement. Section 50(2) of Act 992 provides that:

“(2) Where the constitution of a company expressly forbids a variation of the rights of a class, or contains provisions regarding that variation and expressly forbids an amendment of the provision, in respect of the variation of rights, the rights shall not be varied and the provision for the variation shall not be amended except with sanction of the Court under a scheme of arrangement in accordance with section 239.”

Once the constitution of a company permits variation of class rights, variation of class rights requires a special resolution of the affected class for the rights to be varied. Section 50(5) of Act 992 provides that *“(5) Despite a provision in the constitution of a company to the contrary, the rights attached to a class of shares shall not be varied except with the written consent of the holders of at least three-fourths of the issued shares of that class, or the sanction of special resolution of the holders of the shares of that class.”* That is at least seventy-five percent of the holders of the affected class must consent to the variation for it to take effect. In both cases - *Greenhalgh v. Arderne Cinemas Ltd and Another* (supra) and *Re Mackenzie & Co. Ltd* (supra) – one of the grounds for the plaintiff's

action is the fact that the resolution was passed without the two-third approval of the affected shareholders.

The repealed Companies Act, 1963 provides that notwithstanding the variation by special resolution, the holders of at least fifteen percent of the issued shares of the affected class whose rights are varied may apply to the court to have the variation cancelled.¹⁰⁹¹ However, such a provision has not been provided in the current Companies Act, 2019 which means holders of at least fifteen percent do not have such right. However, an aggrieved shareholder can still apply for the cancellation of the variation if not done in accordance with the constitution of the company and the Act as the constitution is a contract binding on the shareholders inter se and the shareholders and the company.¹⁰⁹² In addition, Act 992 gives members the right to apply for an injunction to prevent illegal or irregular acts or declaration that such act is void.¹⁰⁹³

17.9 Suspension of voting rights attached to shares

The right to attend, speak and vote on resolutions at a general meeting is a right conferred on shareholders of a company.¹⁰⁹⁴ However, the Act permits suspension of such rights under the constitution of the company. Subsection (2) of section 34 of Act 992 permits a company in its constitution to provide that a shareholder is not entitled to attend and vote at a general meeting unless the shareholder has paid amount due on the shares.

In relation to equity shares, other than the above restriction, no other restriction is provided in the Act in respect of the right to vote of holders of equity shares. In addition, the Act does not permit any restriction in the constitution of the company that takes away the right to vote by poll at a general meeting. Section 53 of Act 992 provides *“(1) Despite a provision to the contrary in the constitution of a company, equity shares carry the right on a poll at a general meeting of the company to one vote only, in respect of each share subject to section 34.”* Holders of equity shares, therefore, have the right in a vote by poll to one vote for each share the holder has in the company notwithstanding a contrary statement in the constitution except where the constitution takes away the right for non-payment of amount due on shares. Preference shares converted to equity shares are equity shares for this purpose.¹⁰⁹⁵

In relation to preference shares, the Act permits suspension of voting rights of holders of preference shares under section 52. In addition to the permission under section 34 of the Act for a company by

¹⁰⁹¹ Section 47(7) of repealed Companies Act, 1963 (Act 179).

¹⁰⁹² Section 29(1) of Act 992.

¹⁰⁹³ Section 218 of Act 992.

¹⁰⁹⁴ Section 34(1) of Act 992.

¹⁰⁹⁵ Section 53(2) of Act 992.

its constitution to restrict a shareholder from attending and voting at a general meeting due to non-payment of amount due on shares, section 52 permits suspension of the right of preference shareholders on conditions stated in the constitution. Subsection (1) of section 52 of Act 992 provides that *“(1) Despite section 34, the right of holders of preference shares to attend and vote at a general meeting of the company may be suspended on conditions.”* The conditions for the suspension must be stated in the constitution of the company. However, notwithstanding the conditions stated in the constitution of a company, the preference shareholders are permitted to vote in circumstances stated under subsection (2) of section 52 of Act 992 which provides:

“(2) Despite a provision to the contrary in the constitution of a company, preference shares carry the right to attend general meetings and on a poll at those meeting to at least one vote per share in the following circumstances, but not otherwise:

- (a) on a resolution during the period that the preference dividend or a part of the preferential dividend remains in arrears and unpaid, the period starting from a date not more than twelve months, or a lesser period that the constitution of a company may provide, after the due date of the dividend;*
- (b) on a resolution which varies the rights attached to those shares;*
- (c) on a resolution to remove an auditor of the company or to appoint another person in place of that auditor; or*
- (d) on a resolution for the winding up of the company or during the winding up of the company.”*

The right of preference shareholders cannot, therefore, be suspended notwithstanding the conditions for suspension stated in the constitution of a company in respect of any of the following resolutions to be passed at a general meeting:

- (a) where a resolution is to be passed at a period that the dividends or any part of the dividends due has not been paid or remain in arrears. The period may be a period not more than twelve months or a lesser period as stated in the constitution from the due date of the dividend. The suspension of the right can be in effect notwithstanding the dividend is in arrears for a period not exceeding twelve months or a lesser period in the constitution of the company. In other words, the suspension of the voting right of the preference shareholder does not take effect the moment the payment of the dividend is due. The constitution can state any time from which the suspension will not be given effect, which must not be more than twelve months after the due date. The due date may be the day immediately after the end of the financial year or the date stated in the constitution of the company;¹⁰⁹⁶
- (b) where the resolution is to vary the rights of the class of such preference shareholders. The right of affected preference shareholders cannot be varied without the approval of such class.

¹⁰⁹⁶ Section 52(5) of Act 992.

In addition, section 50(5) of the Act requires the special resolution of that class for the variation of class right;

- (c) where the resolution is to remove or appoint an auditor of the company. The auditor owes a fiduciary duty to the shareholders of the company as a whole.¹⁰⁹⁷ Therefore, all shareholders are required to vote on any resolution to remove or appoint an auditor of the company including preference shareholders;
- (d) where the resolution is for the winding up of the company; and
- (e) where the company is going through winding up, any resolution to be passed by the company.

Other than the possible restriction on voting under section 34(1) and above under section 52(1) and (2) of the Act, preference shares, like equity shares, carry the right on a poll at a general meeting of the company to one vote for each share.¹⁰⁹⁸ Where a company passes a special resolution to increase the number of shares of a class other than preference share, the special resolution may provide for additional number of votes per preference shares to preserve existing ratio of votes of preference shares to the total votes exercisable at the meeting.¹⁰⁹⁹

17.10 Rules of construction of class right

Act 992 provides for rules of interpretation applicable to class right. In the creation of classes of shares, one must be mindful of the application of these rules as the default applicable rules unless contrary positions are provided in the constitution of a company. These canons of construction of class rights are provided in section 54 of Act 992. The section states:

“54 In construing the provisions of the constitution of a company in respect of rights attached to shares, the following canons of construction shall be observed:

- (a) unless the contrary intention appears, a dividend is not payable on any shares unless the company resolved to declare that dividend;***
- (b) unless the contrary intention appears, fixed preferential dividend payable on a class of shares shall be cumulative; in other words, a dividend is not payable on any shares ranking subsequent to that class of shares until all arrears of the fixed dividend have been paid;***
- (c) unless the contrary intention appears, in winding up, arrears of a cumulative preferential dividend whether or not earned or declared is payable up to the date of actual payment in the winding up;***

¹⁰⁹⁷ Section 142(1)(a) of Act 992.

¹⁰⁹⁸ Section 52(3) of Act 992.

¹⁰⁹⁹ Section 52(4) of Act 992.

- (d) if a class of shares is expressed to have a right to preference dividend, then unless the contrary intention appears, that class does not have a further right to participate in dividends;*
- (e) if a class of shares is expressed to have preferential rights to payment out of the assets of the company in the event of winding up, unless the contrary intention appears, that class does not have a further right to participate in the distribution of assets in the winding up;*
- (f) in determining the rights of the various classes to share in the distribution of the property of the company on a winding up, consideration shall not be given unless the contrary intention appears, to whether or not the property represents accumulated profits or surplus which would have been available for dividend while the company remained a going concern; and*
- (g) subject to this section, the shares rank equally in all respects unless the contrary intention appears."*

Per the rules of interpretation stated in section 54 of Act 992, the following are the default positions under the Act:

- (a) Dividends are not payable unless and until there is a resolution of the company declaring dividend. A contrary position will be applicable, for example, if the constitution of a company provides for an automatic dividend policy which must however be subject to section 72 of the Act.
- (b) All preference shares as to dividend accumulate dividends in arrears. Such arrears are payable prior to payment of dividends on shares ranking subsequent. Where a company creates preference shares as to dividend but does not intend such dividends to accumulate in the event the company is unable to pay dividends in a particular year, the constitution of the company must expressly exclude the right of accumulation.
- (c) Arrears of dividends on cumulative preference shares of a company in winding up is payable whether earned or declared up to the date of actual winding up of the company. Preference shareholders do not lose their right to receive accumulated dividend even where the company is going through winding up. The accumulated dividend is payable to the shareholders.
- (d) A fixed dividend applicable to a class of shares makes the class preference shares as to dividend and such shares are not entitled to dividend above what is fixed.
- (e) A fixed preferential amount payable out of assets of a company in winding up on a class of shares makes the class of shares preference shares as to winding up and such shares are not entitled to payment out of the assets above the fixed amount.
- (f) In the distribution of net assets to shareholder of a company in winding up, there is no requirement to consider whether the assets may have been accumulated surplus or profits

that may have been available for distribution as dividends if the company was a going concern.

- (g) Unless stated above, all shares of a company are of equal rights and obligations. Any distinction in shares must therefore be expressly stated in the constitution of the company.

The default rules are applicable in the interpretation of rights and liabilities attached to a class of shares unless a contrary position is stated in the constitution of the company. It is important in drafting the constitution of a company, where different types or classes of shares are created, to determine whether the subscribers intend to have these rules apply. If the rules are not to be applicable, the constitution of the company must expressly modify these rules.

17.11 Acquisition of Shares

Shares, as indicated earlier, are financial instruments used by the company to raise capital and are tradable in the sense that the shares can be transferred from one person to another. It is therefore important to briefly explain the different means by which a person may acquire shares of a company and become a shareholder of a company. This has been dealt with in large part under chapter 11. However, it is important to revisit the manner of share acquisition. A person can acquire shares in a company through subscription, by purchasing the shares from the company, by transfer of the shares from an existing shareholder and by transmission of shares by operation of law.

17.11.1 Acquiring shares by subscription

A subscriber who signed the application required for registration of a company with shares under section 13 of the Act must write opposite the name of the subscriber the number of shares the subscriber takes and the cash price payable for the shares.¹¹⁰⁰ The Act requires the subscriber to mandatorily take at least one share of the company.¹¹⁰¹ Subscribers indicate their intention of becoming a shareholder prior to the incorporation of the company. The subscriber may have entered into a shareholders' agreement with the proposed company and other shareholders, which must be ratified as a pre-incorporation contract after incorporation to be binding on the company. Alternatively, the subscriber may enter into the subscription agreement upon the incorporation of the company. However, there are three important acts that give recognition to a person as a subscriber. Firstly, the particulars of the subscriber are stated in the application for incorporation required under section 13(2) of the Act. Secondly, the application is signed by the subscriber who must indicate opposite his, her or its name the number of shares taken and the cash payable for the shares.¹¹⁰² Thirdly, where the company intends to submit a registered constitution, the subscriber

¹¹⁰⁰ Section 13(3) of Act 992.

¹¹⁰¹ *Ibid*

¹¹⁰² *Ibid*.

must subscribe to the registered constitution.¹¹⁰³ Subscription is the act of signing the registered constitution by the subscriber in the presence of a witness, who attests to the signing.¹¹⁰⁴

Section 33(1) of Act 992 requires the recognition of the subscriber upon the incorporation of the company as a shareholder and mandates the name of the subscriber to be entered in the register of members. Section 33 of Act 992 further provides “(4) *In the case of a company with shares, each member is a shareholder of the company and shall hold at least one share.*” In addition, the section further provides “(5) *A holder of share is a member of the company.*” Subscribers must pay for the shares taken either by providing cash or non-cash consideration or partly cash and non-cash consideration.¹¹⁰⁵ Payment may not be made immediately but at an agreed time or upon a call made by the company.¹¹⁰⁶ The Act requires subscribers to write opposite the name of the subscribers the number of shares taken and the cash price paid for the shares.¹¹⁰⁷

A subscriber thus acquires shares by signing the application and the registered constitution of the company. Under section 33(1), upon incorporation, the subscriber must be entered in the register of shareholders as a member or shareholder of the company. It has been established that the acquisition of the shares of a company upon incorporation is by subscription and not by the entry of the name in the register of members.

*In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd*¹¹⁰⁸ - Northern Engineering Co. Ltd. was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000 shares. It was established that all the shares were subscribed to and allotted to its four subscribers—each holding 25 per centum of the shares. It was later alleged that there was an increase in the shares to 100,000 and shares were issued to additional eight shareholders. The court stated the position of subscribers per Taylor J @ pgs. 501 and 502 as follows:

“The relevant provisions of the Companies Code regulating membership of a company are section 30(1)-(6) and they read:

“30. (1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code. ...”

It seems to me that having regard to the provisions of section 30 of the Code, entry in the register is at least some prima facie evidence of the fact of membership and the extent of shareholding. The effect of the corresponding English provision of

¹¹⁰³ Section 28 of Act 992.

¹¹⁰⁴ Ibid.

¹¹⁰⁵ Section 45 of Act 992.

¹¹⁰⁶ Section 44 of Act 992.

¹¹⁰⁷ Section 13(4) of Act 992.

¹¹⁰⁸ [1979] GLR 477.

section 30(1) of the Code was considered in Evans's Case (1867) 2 Ch. App. 427 and it was there held that as a general proposition, registration ipso facto makes a subscriber automatically a member of the company and holder of the shares for which he has signed and in my opinion the subscriber continues to be a shareholder and a member even if the company makes default by omitting to perform its statutory obligation of putting the subscriber's name in the register or allotting the shares to him. It seems to me that even if the company refuses deliberately to issue share certificates to subscribers to the regulations, the said subscribers at least in the case of a private company are nevertheless by virtue of section 30(1) of our Code, members and shareholders of the company."

*Adehyeman Gardens Ltd v. Assibey*¹¹⁰⁹ - Adehyeman Gardens Ltd was incorporated with 1,000,000 shares. The regulations of the company showed there were four subscribers including Mr. Peter Osei Assibey who had subscribed to 200,000 shares. It was alleged that Mr. Assibey did not pay for his shares. Correspondences showed he was later referred to as a nominal shareholder as he has not paid for the shares. He was offered 20 percent shares and asked to pay for it at current value. In an action on his status as a shareholder, which was before the Supreme Court, Sophia Akuffo JSC stated @ pgs. 1024 to 1026 as follows:

"For the purposes of this appeal, our starting point must be section 30(1)-(5) of the Companies Code, (1963) (Act 179), which deals with the constitution of membership of a company and provides as follows:

- "30(1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code.*
- (2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company.*
- (3) Every member shall have such rights, duties and liabilities as are by this Code and the Regulations of the company conferred and imposed upon members.*
- (4) In the case of a company with shares each member shall be a shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company.*
- (5) Membership of a company with shares shall continue until a valid transfer of all the shares held by the member is registered by the company, or until all such shares are transmitted by operation of law to another person or forfeited for non-payment of calls under a provision in the Regulations, or until the member dies."*

¹¹⁰⁹ [2003 – 2004] SCGLR 1016.

Accordingly, counsel for the respondent is correct in his submission that under the Code, there are two kinds of members of a company: those who become members at the inception of a company subscribing to its regulations and those who, after the company comes into existence, agree to become members. The membership of a subscriber is by legal prescription and, in the absence of a valid forfeiture, is not predicated on full or partial payment of the consideration for the shares taken. Indeed, even in the case of a non-subscribing member of a company, his membership is not dependent on whether or not he is fully paid-up.

From his submission, counsel for the appellants appears to be under the impression that, legally, the company may classify its members into those whose shares have been paid for and those whose shares have not been paid for. Thus, according to counsel, the respondent is, at best, an allottee of shares, since he has not paid for any of his shares. Such an impression is entirely misguided. Although section 46 of the Code makes it possible for the regulations of a company to make provisions for different classes of shares, such differentiation do not relate to membership, but rather to the rights and liabilities to be enjoyed by members holding such classified shares (see section 46 of the Code and regulation 9 of the regulations). Admittedly also, under sections 31 and 160, a shareholder's right to attend and vote at meetings of a company may be affected by his paid-up status; and under regulation 28 a company has a lien on unpaid shares and dividends in respect thereof. However, such limitations on rights can occur only after a valid call has been made and the shareholder has failed to pay, or other sums presently payable by the shareholder in respect of his shares remain unpaid. Certainly, nowhere in the Code or exhibit 1 [Regulations of the company] is there created any class of members known as "allottee" or "nominal" shareholders; and in view of the clear provisions of section 30, it is doubtful if a company's regulations could legally create such borderline memberships. Consequently, under the law, there is nothing anomalous about a person being considered a shareholder of a company merely because such a person has not yet fully paid for his shares.

Furthermore, contrary to what may be implied from the first ground of appeal, the issue of share certificates is not a pre-condition to membership in a company. Section 53 of the Code requires every company to deliver a share certificate to the registered holder, within two months of the issue of shares or registration of transfer of shares. This is the company's obligation, and, by virtue of section 53(3), the company, and any defaulting officer to the company are liable to penalty in the event of the non-compliance. Therefore, the fact that the respondent has not been issued with a share certificate cannot be a valid ground for challenging his membership of the company. Rather, it is a reflection of the failure by the company and its officers to comply with the dictates of the Code. Moreover, under section 54

*of the Code, the function of a share certificate is to serve as “prima facie evidence of the title to the shares of the person named therein.” This means that other evidence may be adduced by a person claiming to be a shareholder to establish the number of shares he has in the company. Therefore, the mere fact that a person claiming to be a shareholder of a company has not been issued with any share certificates, is not material to that person’s legal status as a member and shareholders. In the case of a subscriber, by the combined effect of sections 21 and 30 of the Code, subscription to the regulations of the company serves an identical evidentiary purpose. In a similar vein, there is also the need to reiterate that registration of the name of a subscriber in the company’s register of members is also not a condition precedent to membership: see *In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179)*, s. 217; *Luguterah v. Northern Engineering Co. Ltd* [1979] GLR 477.*

Section 21 of the Code shows that the regulations of a company is no mean document. It is the registration of the regulations that brings the company into existence as a body corporate: see section 14(d) of the Code. Once registered, the regulations have, inter alia, the effect of a contract under seal between: (i) the company its members; (ii) the company and its officers; (iii) the members and the officers; (iv) the members of the company inter se; and (v) the officers of the company inter se. As a subscriber, therefore, the respondent’s status as a shareholder, as well as the consideration payable by him therefor, is contractual. He does not need to be issued with a certificate for his membership to take legal effect.

Consequently, there is, no doubt whatsoever that, since the respondent is a subscriber to the regulations of the company (as evidenced by exhibit 1), he, pursuant to section 30(1), became a member of the company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became a shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5).”

*In Re London, Hamburg, And Continental Exchange Bank (Evans’s Case)*¹¹¹⁰ - Evans signed the memorandum of association of a company as the holder of ten shares and acted for a short time as a director of the company. Other directors were then appointed, and Evans never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up. Evans applied to have his name taken off the list of contributories of the London, Hamburg, & Continental Exchange Bank, Limited. Sir G.J. Turner, L.J. stated @ pgs. 429 and 430:

¹¹¹⁰ (1867) L.R. 2 Ch. App. 427.

"I feel very little doubt in this case. Mr. Evans originally subscribed to the memorandum of association, and became one of the first directors, and, therefore, his first duty was to take care that his name was entered upon the register, because the 23rd section of the Act says that "The subscribers of the memorandum of association of any company, under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of shareholders." It was, therefore, the plain duty of Mr. Evans to enter his own name on the register. This, however, he did not do, but went on leaving the matter exactly as it stood. Then, can he take advantage of his own neglect? for if he had entered his name on the register he could only have got rid of his liability by a regular transfer, and it is impossible to say that he transferred the shares. If, indeed, all the shares had been allotted to others, a question might have arisen; but 4000 shares only were allotted subject to confirmation, and this never took place; therefore there are still 4000 shares not allotted, and, for the shares in respect of which he must be considered allottee, he must be placed upon the list."

Lord Cairns, L.J. stated @ pg. 430 that:

"I regret, so far as it is proper to express regret, that we must come to this conclusion, because, no doubt, Mr. Evans has acted bon, fide, and considered that after the 10th of June, 1863, he had nothing more to do with the company, and he never availed himself of his rights, or received a dividend. At the same time the provisions of the Act are intended to meet this case, and must be strictly pursued. It is plain that the original subscribers are, by the Act of Parliament, deemed to have taken the shares set opposite their names, which could not then be parted with except in a proper manner, and by proper authority. It was the duty of Mr. Evans, and his co-directors, at once to have entered upon the register of shareholders the names of the directors, as owners of shares, and then they could be relieved from liability only by a transfer, and the substitution of other names, in the way pointed out by the Act; but nothing of this kind was done. It is said that the shares which Mr. Evans would have had, were allotted to other people, but it seems that the allotment was not final, and that there were left at all times shares sufficient to answer the right of Mr. Evans. I think that his right was never taken away from him, and that his liability was never got rid of. Though, in form, the register need not now be rectified, the list of contributories will be made out as if it were rectified: that is, with ten shares against the name of Mr. Evans. This motion must, therefore, be dismissed, with costs."

Re Florence Land and Public Works Co, Nicol's Case¹¹¹¹ - Fry LJ stated @ pg. 445 that
“Even though the Act makes the entry on the Register obligatory, it does not appear to me that entry on the Register is a condition precedent because until the company is formed no register can be made and until there are some members the company cannot be formed.”

17.11.2 Acquiring shares by agreement with the company

This relates to persons who acquire or purchase shares from the company after the incorporation of the company. The company issues shares to the interested investor pursuant to an agreement under which the investor provides consideration in cash or in-kind for the shares acquired.¹¹¹² The agreement may be a share purchase or share sale agreement between the company and the investor depending on who is drafting or making the offer for purchase. In some cases, it is called share sale and purchase agreement to indicate the act of the company and the buying investor respectively. Section 33(2) of Act 992 makes provision for this manner of acquisition when it provides that “(2) Any other person who agrees with the company to become a member of the company and whose name is entered in the register of members is a member of the company.” As noted, shares cannot be issued by the company for free, the shareholder must pay for the shares either by cash consideration or non-cash consideration.¹¹¹³

The issue of shares by the company is done by directors as the organ vested with the powers to administer the business of the company.¹¹¹⁴ The power to administer the business of the company involves raising capital for the company through the issue of shares. In issuing the shares, the directors must comply with the requirements stated in section 189(1)(a)(i) of Act 992 which requires that in issuing the shares to third parties, a company must first offer the shares to existing shareholders or the directors must obtain approval by ordinary resolution of the company prior to direct issue of the shares to non-shareholders.

In re West Coast Dyeing Industry Ltd; Adams and another v. Tandoh¹¹¹⁵ - an action by Adams for remedy of oppression was challenged by Tandoh on the ground that Adams has no locus as he was not a shareholder of the company, but was a nominee of Tandoh. That no shares were allocated to Adams, neither had he paid for any shares. On that issue, Abban JA stated @ pg. 567 to 577 that:

“Another aspect of the matter is that the appellant, not being a subscriber or original member, any shares intended to be allocated to him ought to have been offered in writing first to the

¹¹¹¹ (1885) 29 Ch. D 421.

¹¹¹² Section 45(1) of Act 992 mandates that shares must be paid for.

¹¹¹³ Ibid.

¹¹¹⁴ Section 144(3) of Act 992.

¹¹¹⁵ [1984-86] 2 GLR 561.

existing members of the company in accordance with regulation 10(1) and (2) of the regulations of the company (exhibit AA), and as required by section 202(1)(a) and (b) of Act 179. It was only after the existing shareholders of the company had declined the offer that those shares could be issued to the appellant. There was no scintilla of evidence that this mandatory provision of section 202(1)(a) and (b) and incorporated in the company's said regulations was ever complied with before the respondent purported to allocate the shares to the appellant either in the appellant's own right or as the respondent's nominee.

There was little wonder therefore that no share-certificate was ever issued to the appellant in compliance with section 53(1)-(3) of Act 179. And in view of the non-compliance with the provisions of the said section 202, it would have been unlawful on the part of the company to issue any share-certificate to the appellant or to register him as a shareholder in the register of the company. In other words, it would have been of no legal consequence whatsoever, whether or not the appellant's name was in the company's register and whether or not he was issued with a share-certificate. Thus, in fact and in law the appellant was not and had never been a member of the company."

In acquiring shares by agreement, the requirement of section 33(2) of Act 992 is that the person must first have an agreement with the company to become a shareholder and, secondly, have the name entered in the register of members. Two conditions are, therefore, required to be satisfied for a person to become a shareholder of a company by agreement. First, there must be an agreement between the person and the company by which the person agrees to purchase the shares of the company. Secondly, the name of the person must be entered in the register of members as a shareholder. There are conflicting authorities as to whether the first condition without the second defeats the person's status as a shareholder. That is, where there is an agreement between the company and a person who is to be a shareholder of the company, but the name of such a person has not been entered into the register of members, is that person a shareholder of the company? Section 33(2) of Act 992 provides that the two conditions must be satisfied. The section provides "(2) *Any other person who agrees with the company to become a member of the company and whose name is entered in the register of members is a member of the company.*" In drawing the distinction as to whether both conditions must be satisfied to make one a shareholder, the court has drawn a distinction between issue of shares and allotment of shares.

*Conte v. Kpeglo and another*¹¹¹⁶ - the liquidator appointed by the court for winding up J. Conte Ltd. called upon the High Court to settle the list of contributories as provided by section 103 of the Companies Ordinance. The difficulty arose since the only admissible evidence as to the contributories was the minutes book, all other documents having been lost or cancelled. The first respondent claimed that the majority of the shareholders and directors of J. Conte Ltd. had voted for him 10,000 shares valued at £G1 each, free of charge for services he had rendered to the company.

¹¹¹⁶ [1964] GLR 311.

Basing its decision on the oral evidence of the first respondent and a letter he had received from the appellant, the High Court declared that the first respondent had been allotted these 10,000 shares, thus giving him 10,001 shares in the final disposition of the contributories of the company. On appeal, it was submitted inter alia that the trial judge erred in holding that the letter supported a finding that the 10,000 shares had been allotted. This letter could only be evidence of an offer of shares and there was no evidence of an acceptance. In the alternative, if the letter operated as an issue of shares, then the first respondent should have been called upon to make payment for them in accordance with section 107 of the Companies Ordinance. In reply it was submitted that since the letter was written by a layman then the word "allotted" should be interpreted in its ordinary meaning as signifying a completed and performed contract. That court held on appeal that: (1) an allotment of shares is an appropriation of shares by the directors or the managing body of a company to a particular person. This may take the form of an offer of shares to the allottee or an acceptance of an application for shares by the allottee, but an allotment by itself does not necessarily create the status of membership. The allotment may be subject to conditions. (2) The wording of the letter could amount to either an offer of shares by the company to the first respondent or an acceptance by them of an application for shares. With respect to the first alternative, there was no evidence of an acceptance by the first respondent; and with respect to the second alternative, there was no evidence of payment or completion of conditions by the first respondent. Ollennu JSC stated @ pgs. 314 to 316 that:

"We do not share the views of counsel for the first defendant. The letter, exhibit D, purports to have been written in compliance with the requirements of company law with respect to allotment of shares in the company; therefore technical words used in it must be given their ordinary technical meaning; and it is with that construction that we have to consider the evidential value of the letter, exhibit D.

It is evident from the ruling that the ground upon which the learned judge of the High Court accepted the evidence of the first defendant is, according to him, that that evidence is supported by the letter exhibit D, that he is "allotted" twenty per cent. of the whole shares of J. Conte Ltd.

What then is meant by the use of the term "allotment" when used in company law with respect to shares? We find guidance on this in Gower's Modern Company Law (2nd ed.) at p. 348. There the learned author, discussing the subject of how a person becomes a shareholder in a company, points out that the process involves two distinct legal operations: (a) an agreement and (b) entry of the name on the register. He says that "both must be present before the person concerned becomes a member and shareholder."

The agreement involves one of the following: (i) an original allotment of shares, i.e. appropriation of shares accompanied by a form of application, which is filled in and submitted to the company by an applicant for shares, (ii) allotment at any other time upon application for shares, or (iii) allotment made by the company upon its

own resolution, and not in response to any preceding application: See *Palmer's Company Precedents*, (17th ed.), Part 1, pp. 142-143.

As to original allotment, Gower (*supra*) points out at p. 348 that the publication of a prospectus "is not an offer" by the company, "but a mere invitation to submit offers by completing and returning the application form . . ." He states further at p. 349:

"The board of directors then consider the various applications and decide whether or not to accept them or some of them, and whether for the full amount or only part—in the case of a public issue the prospectus will normally have stated the policy to be adopted in the event of over-subscription. Their decision to accept is known as allotment, but it has no legal effect until notified to the applicant. This notification will be by dispatch of allotment letters which will often be renounceable for a limited time. Once the allotment letter has been dispatched the agreement is complete.

But the allottee is still not a shareholder. He has not yet been entered on the register—indeed particular shares identified by number have probably not been appropriated to him. This will not occur until he is duly placed on the register, and if the allotment letter is renounceable he himself may never become a shareholder."

Of the second class of allotment, i.e. allotment made upon application, again the application is an offer by the applicant, the acceptance by the company in such a case is, as Palmer says (*supra*) at p. 143, ordinarily evidenced by what is termed "allotment." He then cites the definition of allotment given by Chitty J., in *Nicol's Case*²:

"What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances... It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person

who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract."

Again in *Spitzel v. Chinese Corporation Ltd.*, Stirling J., also defined and distinguished two things: "allotment" and "issue" of shares. He said:

"In the first place, I have to consider what meaning is to be attached to these two words [allotment and issue]. First of all, what is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership. The allotment may be, and probably generally is [where it is an offer], such as to give a title to the shares the moment the allottee communicates his acceptance of it to the company whose directors make the allotment; but it seems to me that the allotment may be subject to a condition—as, for example, that the allottee should not only indicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to A.B. on the terms that the title of A.B. should not arise until he had paid a sum of money to the company, and this being so, a contract may provide, as I think, that allotment shall be subject to conditions."

Applying the principles laid down in these two authoritative definitions, we would say that at its very best, the interpretation of the letter, exhibit D, most favourable to the first defendant is, that it is either an offer by the company of shares to the first defendant, or an acceptance by them of an application for shares by the first defendant made in his letter referred to in the exhibit. In either case, it has to be accepted by the first defendant to create a binding contract between him and the company to issue shares to him, but until he pays for them, or fulfils any other conditions attached to it, no particular shares identified by number can be appropriated to him, consequently he would not be entitled to be recognised as owning more than the one share he is proved by the minutes of the company as holding, and his name cannot be entered on the register.

Thus the natural inference to be drawn from the statement in exhibit D that, "you are allotted 20 % of the whole shares," is that the company were prepared to issue such shares to him if he had accepted and paid for them. There is nothing in exhibit D from which it can be inferred that the offer to the first defendant in this case could not have attached to it the conditions usually attached to such offer, e.g. payment of cash for the same.

The learned judge of the High Court therefore erred in holding that exhibit D supported the oral evidence of the first defendant and concluding that 10,000 shares at £G1 each had been allotted to the first defendant on the condition that they should be free of charge for services rendered to the company.

Now there is no evidence that this offer, if made in the normal course of business, as it should be, was accepted by the first defendant to create a binding contract. That being the case the question of an order by the court under section 107 of the Companies Ordinance, requiring the first defendant to pay cash for those shares does not arise. For that reason also, it is unnecessary to deal with the other points raised by counsel for the plaintiff."

In the above case, the court seeks to indicate that the allottee of shares is not a shareholder until his name has been entered in the register of members and the allottee has paid for the shares.

In re Northern Engineering Co, Ltd and the Companies Code, 1963 (Act 179), s. 217; Luguterah v. Northern Engineering Co. Ltd¹¹¹⁷ - Northern Engineering Co. Ltd. was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000 shares. It was established that all the shares were subscribed to and allotted to its four subscribers—each holding 25 per centum of the shares. It was later alleged that there was an increase in the shares to 100,000 and shares were issued to additional eight shareholders. On the issue of whether the eight persons were shareholders, Taylor J stated @ pgs. 501 and 502 as follows:

"The relevant provisions of the Companies Code regulating membership of a company are section 30(1)-(6) and they read:

"... (2) Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company. ..." ...

The position of persons like the eight respondents who have agreed to become members is regulated by the provisions of section 30(2) of the Code. Commenting on the corresponding section of the English enactment, i.e. section 23 of the Companies Act, 1862, Fry L.J. in Nicol's Case (1885) 29 Ch.D. 421 at p. 447, C.A. said that the section "makes the placing of the name of a shareholder on the register a condition precedent to membership." I agree with this interpretation and I adopt it here."

¹¹¹⁷ [1979] GLR 477.

The above position, it is suggested must be looked at by the courts again in future cases. It is important that one must examine the requirement of the register and the purpose of entry of names into the register of members in order to make it a condition of membership where a person acquires shares by agreement. Section 35 of Act 992 which provides for the requirement of the register states that: *“(1) ... a company shall keep in the country a register of the members and shall enter in the register*

(a) in respect of members of the company

- (i) the names and addresses of the members and, in the case of a company having shares, a statement of the shares held by each member, and of the amount paid, or agreed to be considered as paid, on the shares of each member, and of the amount remaining payable on the shares;*
- (ii) the date at which a person was entered in the register as member;*
- (iii) the nature of the interest of each member; and*
- (iv) the date at which a person ceased to be a member ;”*

Section 39 of Act 992 provides for the purpose of the register as *“(1) The register of members is prima facie evidence of the matters which by this Act are directed or authorised to be inserted in the register.”*

By section 35 of Act 992, the requirement of the register is to enter the particulars of members in the register. A person must, therefore, become a shareholder prior to the entry of his or her particulars in the register. The entry of the name and particulars in the register is, therefore, not what should make the person a shareholder. The section expressly provides that the company must keep a register of members and *“shall enter in respect of members of the company ...”*¹¹¹⁸. The section, therefore, presupposes that the person is a member prior to the entry of the particulars of the member in the register. A reasonable conclusion, therefore, is that the register is to contain the names of persons who are already shareholders and it is not the register that makes the person a shareholder. This position is supported by section 39 of the Act which states the purpose of the register as a prima facie evidence of particulars entered in the register. The register is only evidence of the particulars entered in the register. The entry is, therefore, for evidential purposes and not to confer membership. Provided a person can prove ownership in another manner where the name is not entered into the register of members, the failure to enter the particulars in the register should not, therefore, defeat the shareholding of a person. Further support to this position can also be found in section 38 of the Act which permits a member to apply to the court to rectify the register in the event of omission of particulars of such member in the register. If the member can apply for rectification for the particulars to be entered in the register, the failure should not be used to defeat the membership.

¹¹¹⁸ Emphasis mine.

It is a sounder principle to hold that a person who concludes an agreement with the company to acquire shares becomes a shareholder. The entry of the name in the register as required by section 33(2) of the Act is to evidence the shareholding. Section 33(2) of Act 992 must therefore be understood to mean it is the agreement that makes a person a shareholder, such shareholding is evidence by the entry into the register of members. A shareholder whose name is not entered in the register of members should therefore not cease to be a shareholder on the simple reason that the company fails to enter the required particulars in the register. The person can enforce the agreement by which he or she becomes a shareholder and apply to the court for rectification of the register by entry of the required particulars of that shareholder.

17.11.3 Acquiring the shares by transfer from existing shareholders

Shares can also be acquired from an existing shareholder who transfers the shares to another person. The person acquiring the shares (the transferee) may purchase the shares from a shareholder (the transferor) or the transferor may gift the shares to the transferee, or through any other transaction. The transferee becomes a shareholder of a company through the transfer of shares by an existing shareholder to the transferee. Section 98(1) of Act 992 provides *“(1) Except as expressly provided in the registered constitution of a company, shares are transferable without restriction by a written transfer in common form.”* Under the section, shares are transferable without restriction unless the registered constitution restricts the right to transfer the shares. The only requirement is that the transfer must be in writing. Subject to having a written instrument evidencing the transfer, the shareholder, unless otherwise stated in the registered constitution, can transfer his shares to any person and for any consideration or as a gift just like any other asset of the holder.

The only restriction to be observed on the right of transfer are those stated in the registered constitution. Section 98(2) of Act 992 provides that *“(2) Subject to section 322, the registered constitution of a company may impose restrictions on the transferability of shares, including power for the directors to refuse to register a transfer and provisions for compulsory acquisition or rights of first refusal in favour of other members or officers of the company.”*

The Act, therefore, permits the registered constitution to contain restrictions on the right of a shareholder to transfer shares and confers on the company the ability to compulsorily acquire the shares of a shareholder. It should be noted that restriction on the right to transfer shares are only provided in the registered constitution of a private company.¹¹¹⁹ Sections 322 of Act 992 expressly provides that:

“(1) Despite subsection (2) of section 98, the constitution of a public company shall not impose a restriction on the right to transfer shares of the company and if the constitution purports to impose that restriction, it shall be void.

¹¹¹⁹ Sections 7 and 322 of Act 992.

- (2) Subsection (1) shall not,**
(a) prohibit a restriction on the right to transfer shares on which there is an unpaid liability; or
(b) preclude a company from refusing to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction to be of unsound mind."

The position of the law, therefore, is that shares of public companies are transferable without restriction, whilst the Act requires at least one restriction on the right of shareholders to transfer shares of a private company. Section 98 of Act 992 further provides as follows:

- "(3) A restriction shall not be imposed under subsection (2) on the transferability of any shares after the shares have been issued unless the holders of the shares consent in writing to the transfer.**
(4) Despite subsection (1), a company may refuse to register a transfer of shares to a person who is an infant or to a person found by a court of competent jurisdiction in the Republic to be an infant or a person of unsound mind."

Even for a private company, no restriction can be imposed after the issue of the shares without the consent of the shareholder. Neither does the failure to state specific restrictions prohibiting transfer to infant or persons of unsound mind.

As earlier indicated, the requirement of the transfer under section 98(1) of the Act is that the transfer must be in writing. Shares cannot be transferred by verbal agreement. There must be a written instrument (document) evidencing the transfer of the shares from the transferor to the transferee¹¹²⁰. For a share transfer to make a person a shareholder, it must be registered with the company¹¹²¹. Section 101 of Act 992 provides:

- "(2) For the purposes of subsection (1), the company is not bound or is not compelled in any way to recognise, any other rights in respect of share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered in the register in respect of the share or debenture, the transferor remains, so far as concerns the company, the holder of the share or debenture."**

Two documents are required for the purpose of registering a share transfer. These two documents are the instrument of transfer and the share certificate of the transferor¹¹²². Share transfer instrument

¹¹²⁰ Section 98(1) of Act 992.

¹¹²¹ Section 101(2) of Act 992.

¹¹²² Section 101(3) & (5) of Act 992.

must also be stamped as exempt under the Stamp Duty Act, 2005 (Act 689). The share transfer instrument and the share certificate must be lodged with the company for registration¹¹²³.

Section 101 of Act 992 provides:

“(3) Despite anything contained in the constitution of a company or in a contract, that company shall not register a transfer of shares or debentures unless a proper instrument of transfer duly stamped, if chargeable to stamp duty, has been delivered to the company.

(5) Unless otherwise provided in the constitution of a company or the terms of the debenture, the company may refuse to register transfer if the transfer is not accompanied by the appropriate share certificate, debenture stock certificate, or the company is bound to issue a renewal or copy of that certificate in accordance with subsection (2) of section 55 or section 85.”

Subsection (6) of section 101 of Act 992 provides that *“Transfer may be lodged for registration by the transferor or transferee”*. That is the requirement of submitting the share transfer instrument and the share certificate can either be done by either the transferor or the transferee. The non-registration of a transfer will lead to the non-recognition of the transferee by the company. This means that unless the share transfer is registered with the company, the company will continue to recognise the transferor as holder of the transferred shares in question. It is therefore in the interest of the transferee to see to it that the transfer is registered.

*Ofori v. Ecobank Ghana Ltd and Others*¹¹²⁴ - this case involves acquisition of shares of Cal Bank Ltd on the Ghana Stock Exchange. After the transfer of shares and instruction to transfer the money to the seller, which was concluded through the stock exchange, there was intervention by the Bank of Ghana which raised the issue as to whether the transaction was concluded in accordance with the securities rules. Pwamang JSC on the issue of the essence of the entry of name in the register of members stated as follows:

“With due respect to the trial judge, we are unable to agree with her that entry in the register is not sufficient proof of transfer of shares of a company. Section 95(1) of the Companies Act, 1963 (Act 179) that she referred to is not the relevant provision. It is rather sections 30, 36 and 98 that govern the issue. They are as follows:

Section 30-Membership of Companies—Constitution of Membership.

(1) The subscribers to the Regulations shall be deemed to be members of the company and on its registration shall be entered as members in the register of members referred to in section 32 of this Code.

¹¹²³ Section 101(1) of Act 992.

¹¹²⁴ (J4/11/2016) [2018] GHASC 49 (25 July 2018).

- (2) *Every other person who agrees with the company to become a member of the company and whose name is entered in the register of members shall be a member of the company.*
- (3) *Every member shall have such rights, duties and liabilities as are by this Code and the Regulations of the company conferred and imposed upon members.*
- (4) *In the case of a company with shares each member shall be a shareholder of the company and shall hold at least one share, and every holder of a share shall be a member of the company.*
- (5) *Membership of a company with shares shall continue until a valid transfer of all the shares held by the member is registered by the company, or until all such shares are transmitted by operation of law to another person or forfeited for non-payment of calls under a provision in the Regulations, or until the member dies.*
- (6) *Membership of a company limited by guarantee shall continue until the member dies, or validly retires or is excluded from membership in accordance with a provision to that effect in the Regulations.*

36. Register to be evidence

The register of members is prima facie evidence of any of the matters which are, by this Act, directed or authorised to be inserted in the register."

98. Registration of transfers

- (1) *Subject to sections 99 and 100, a notice of a trust, express, implied or constructive or of any equitable, contingent, future, or partial interest in a share or debenture or a fractional part of a share or debenture shall not be entered in the register of members or debenture holders or receivable by the company.*
- (2) *For the purposes of subsection (1), the company shall not be bound by, or be compelled in any way to recognise, any other rights in respect of a share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered in the register in respect of the share or debenture the transferor, so far as concerns company, remains the holder of the share or debenture.*

In the case of Luguterah v. Northern Engineering Co. Ltd [1979] GLR 477 at page 502 Taylor J (as he then was) said as follows;

"The position of persons like the eight respondents who have agreed to become members is regulated by the provisions of section 30(2) of the Code. Commenting on the corresponding section of the English enactment, i.e. section 23 of the Companies Act, 1862, Fry L.J. in Nicol's

Case(1885) 29 Ch. D 421 at p. 447, C.A. said that the section" makes the placing of the name of a shareholder on the register a condition precedent to membership." I agree with this interpretation and I adopt it here."
Therefore, as has been expressly provided for by section 98(2) of Act 179, it is the entry of the name of a transferee of shares in the register of members that confirms that he is the new owner of the shares stated against his name from the date of that entry.

Sophia Akuffo, JSC (as she then was) in the case of Adehyeman Gardens Ltd v Assibey [2003-2004] SCGLR1016 at p. 1026, approved of the above holding of Taylor J and added as follows;

"the mere fact that a person claiming to be a shareholder of a company has not been issued with any share certificates, is not material to that person's legal status as a member and shareholder."

The combined effect of sections 30 (2) & (5), 36, 98(2) of Act 179 and the decisions referred to above is that ownership of shares is determined by the entries in the register of members so when shares have been transferred the title of the buyer to the shares is vested from the time the purchaser's name is entered in the register of members."

On receipt of the documents for registration, the company may either proceed to register the transfer or decline to register it. Where a company refuses to register a transfer, the law requires it, within two months after the date on which the transfer was lodged with it, to send to the transferee and transferor a notice of the refusal¹¹²⁵. Where the company fails to comply with this requirement, the company and every officer of the company who is in default are liable to pay a fine¹¹²⁶. Section 101(8) of Act 992 provides *"Where a company defaults in complying with subsection (7), that company and every officer of the company that is in default is liable to pay to the Registrar an administrative penalty of five hundred penalty units."*

The requirement of entry of the name and the particulars of the transferee in the register of members is not applicable to a company where the shares are to be transferred through a scheme established under the Central Securities Depository Act, 2007 (Act 733).¹¹²⁷

17.11.4 Acquiring shares by transmission of shares by operation of law

A person can become a shareholder by acquiring shares transmitted by operation of law from another person. Transmission of shares by operation of law deals with two situations. That is, upon

¹¹²⁵ Section 101(7) of Act 992.

¹¹²⁶ Section 101(8) of Act 992.

¹¹²⁷ Section 101(9) of Act 992.

the death of a shareholder or in the event of the declaration of a shareholder as bankrupt. Section 102 of Act 992 deals with transmission of shares by operation of law upon the death of a shareholder or declaration of a shareholder as bankrupt or insolvent. Section 102 of Act 992 provides:

- “(1) In the case of the death of a shareholder or debenture holder,*
(c) the survivors, where the deceased was a joint holder, and
(d) the legal personal representatives of the deceased where the deceased
was a sole holder or last survivor of joint holders
shall be the only persons recognised by the company as shareholders or
debenture holders.
- (2) A person on whom the ownership of a share or debenture devolves by reason of*
that person being the legal personal representative, receiver, or trustee in
bankruptcy or the holder, or by operation of law may, on the evidence being
produced that the company may properly require, be registered personally as the
holder of the share or debenture or transfer the same to any other person, and
the transfer shall be as valid as if that person had been registered as a holder at
the time of execution.”

The death of a shareholder terminates the shareholding of the shareholder in a company. Section 33(6) of Act 992 provides that *“(6) Membership of a company with shares continues until (c) the member of the company dies.”* Once a shareholder dies, Act 992 provides who becomes a shareholder in his stead. Section 102 provides that upon the death of an existing shareholder, the shares transmit by operation of law to surviving shareholders in the event of joint shareholding, and in the case of a sole shareholder or the last surviving shareholder, to the legal personal representative of the shareholder. The legal personal representative of a deceased shareholder will depend on whether the deceased died testate or intestate. Where the deceased dies testate, the legal personal representative will be the executor of the dead shareholder’s will and where the shareholder dies intestate, the legal personal representative will be the administrator of the estate of the deceased shareholder.

The second situation provided for under section 102 of the Act is in relation to a declaration of a shareholder as bankrupt or insolvent. In that event, the shares of the bankrupt or insolvent shareholder transmit by operation of law to the receiver or trustee in bankruptcy of the shareholder.

By the requirement of the Act, once any of the above events occur, the person on whom the ownership of shares devolves by reason of that person being a legal personal representative, a receiver or trustee in bankruptcy of the shareholder may, on providing evidence of that fact to the company, be registered personally as the holder of those shares or transfer the shares to some other person and the transfer will be as valid as though that person had been registered as the holder at

the time of the execution of the transfer.¹¹²⁸ Even though the company maintains the right to refuse registration as it would have done for transfer of shares, the company does not have the right to refuse to register a legal personal representative, a receiver or trustee in bankruptcy of a shareholder personally as the owner of the shares that have devolved on that person by the position occupied.¹¹²⁹ The law requires that such a person enjoys the right attached to the shares as a shareholder notwithstanding the non-registration of the person as a shareholder, except that the person is not entitled to attend and vote at meetings of the company until the person is registered as a member.

*Politis and Another v. Plastico Ltd*¹¹³⁰ – the fact of which are in the judgment of Amissah JA @ pgs. 10 to 12 as follows:

“The applicants herein are personal representatives of one Dr. Dimitra Politis who while she lived was the holder of the majority shares in, and one of the two directors of, a company by the name of Plastico Ltd. On 23 December 1966, the applicants obtained an order from this court that the company should rectify its register of members by placing the names of the applicants, obviously in substitution of the late Dr. Politis, on the register. The applicants have now brought this application under section 217 of the Companies Code, 1963 (Act 179), for an order declaring certain acts of the company, or, of the director surviving Dr. Politis, null and void. Mr. Amissah-Aidoo who represents the company and one other respondent to this application has raised the preliminary objection that the applicants qua administrators of the late Dr. Politis have no locus standi to bring this application. The only, and presumably the best authority he has for this proposition is a sentence from Halsbury’s Laws of England (3rd ed.), Vol. 6, p. 256, para. 533, which reads as follows:

“Although the legal representatives of a deceased member do not become members unless themselves registered, a transfer of the share or other interest of a deceased member by his personal representative is as valid as if he were a member at the time of the execution of the transfer.”

... was to convince the court that a personal representative administering an estate of which shares in a company form a part, was not a member of the company until he was registered. Counsel need not have gone as far as delving into the toms of Halsbury for the learning that he conveyed to the court. Much nearer home is our own, perhaps less well-known, Companies Code, the position of the personal representative is provided for in a little more detail than in the sentence of Halsbury which the researches of counsel disclosed. Section 99 of the Companies Code, 1963 (Act 179), is as follows:

¹¹²⁸ Section 102(2) of Act 992.

¹¹²⁹ Section 102(3) of Act 992

¹¹³⁰ [1967] GLR 9.

"99. (1) In the case of the death of a shareholder or debentureholder the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was a sole holder or last survivor of joint holders, shall be the only persons recognised by the company as shareholders or debentureholders.

- (2) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law may, upon such evidence being produced as the company may properly require, be registered himself as the holder of the share or debenture or transfer the same to some other person and such transfer shall be as valid as if he had been registered as a holder at the time of execution of the transfer:*

Provided that the company shall have the same right, if any, to decline registration of a transfer by such person as it would have had in the case of a transfer by the registered holder but shall have no right to refuse registration of the person himself.

- (3) A person upon whom the ownership of a share or debenture devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law shall, prior to registration of himself or a transferee, be entitled to the same dividends, interest and other advantages as if he were the registered holder and, in the case of a share, to the same rights and remedies as if he were a member of the company, except that he shall not, before being registered as a member in respect of the share, be entitled to attend and vote at any meeting of the company:*

Provided that the company may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share or debenture and if the notice is not complied with within ninety days, the company may thereafter suspend payment of all dividends, interest or other moneys payable in respect of the share or debenture until the requirements of the notice have been complied with."

Neither counsel chose to place before me the reason why the applicants came to court on the earlier occasion for an order for the rectification of the register of members. But it would appear from section 99(2) quoted above that, upon the production of such evidence as the company may require, a personal representative is entitled to automatic registration as the holder of the shares of the deceased and therefore as a full member of the company."

Republic v. High Court, Accra; Ex parte Appiah and others¹¹³¹ – following the death of Kofi Safo (the Deceased) in April 1998, his widow Grace Safo (1st Plaintiff) and his brother Elvis Appiah (1st Defendant) were granted letters of administration to administer the estate of the deceased. The inventory of the estate filed included house No. D 767/4, Beach Avenue, Accra which the Defendants claimed belonged to the 2nd Defendant, a limited liability company. The Plaintiffs however claimed that the Deceased owned 100 per cent shares in the 2nd Defendant Company. This claim was disputed by the Defendants who contended that they had interest in the shares and that the Deceased held the shares in trust for them. In an action by the Plaintiff in the High Court for, inter alia, an order requiring the 1st Defendant to account for all sums of money received in respect of the estate of the Deceased, the court on the issue of devolution of the deceased's shares stated per Appiah JSC @ page 425 that:

“Upon the death of a shareholder, his shares, unless otherwise directed by the deceased himself, are vested in his legal representatives, executors or administrators who would later distribute them to the beneficiaries who then would have their name entered in the register of the company as members. Consequently, the first plaintiff and first defendant having been appointed the administrators of the estate, hold whatever interest the deceased had in the company in trust for the beneficiaries.”

As indicated above in relation to transfer of shares, the company has the right to refuse registration. The same right is conferred on the company to refuse to register the transfer by a legal personal representative or trustee in bankruptcy. However, the company cannot refuse to register the legal personal representative or, the trustee or receiver in bankruptcy on whom ownership of the shares devolved by operation of law as the holder of the shares. Section 102(3) of Act 992 provides that “(3) *The company has the right to decline registration of a transfer under subsection (2) as it would have had in the case of a transfer by a registered holder but does not have a right to refuse registration personally of that person.*”

The law requires that such a person enjoys the right attached to the shares as a shareholder notwithstanding the non-registration of the person as a shareholder, except that the person is not entitled to attend and vote at meetings of the company until he is registered as a member. Section 102(4) of Act 992 provides that “(4) *A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law is entitled, before registration personally of that person or transferee, to the same dividends, interest and other advantages as if that person were the registered holder and, in the case of a share, to the same rights and remedies as if that person were a member of the company, but that person is not entitled before being registered as a member in respect of the share, to attend and vote at a meeting of the company.*” The person will, therefore, be

¹¹³¹ [1999-2000] 2 GLR 420.

entitled to claim dividends that have accumulated prior to the person assuming the position of a legal personal representative, or receiver or trustee in bankruptcy even if the person elects not to be registered as the shareholder.

Section 102(5) of Act 992 however provides that “(5) *For the purposes of subsection (4), the company may at any time give notice requiring that person to elect to be registered personally or to transfer the share or debenture, and if the notice is not complied with within ninety days, the company may suspend payment of the dividends, interest or any other moneys payable in respect of the share or debenture until the requirements of the notice have been complied with.*” The legal personal representative or the trustee in bankruptcy will, therefore, be unable to receive payments from the company unless he opts to be registered as a shareholder or transfer the shares. This is to avoid a situation where a person continues to receive monetary benefits from the company without stepping into the shoes of the deceased holder of the shares by being registered as a shareholder or transferring to a transferee to be so recognised.

In *Politis and Another v. Plastico Ltd (No.2)*¹¹³² Amissah JA stated @ pgs. 32 to 33 that:

“At the time that the new shares were supposed to have been issued, that is on 12 December 1966, the applicants had already been granted letters of administration of the estate of Dr. Politis. And as I have said in my earlier ruling (p.9 supra) [Politis and Another v. Plastico Ltd [1967] GLR 9] on the preliminary objection, they were entitled, by virtue of section 99(3) of the Code, to the same dividends, interest and other advantages as if they were the registered holders of the shares and also had the same rights and remedies as if they were members of the company, save that they were before registration not entitled to attend and vote at meetings of the company. However, a look at the entries concerning the applicants in the register shows that not only have they not benefited from this new issue, but even the particulars of these shares which devolved on them as a result of the death of Dr. Politis are not entered.”

In order to protect persons other than the legal personal representative that may have interest in the shares upon the death of the shareholder or declaration of the shareholder as bankrupt, section 103 of Act 992 provides that such a person with interest is permitted to serve on the company copies of notice and an affidavit in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I. 47). The company is required upon the service of the notice to enter the notice in the register of members and no payment or transfer of shares shall be effected contrary to the terms of the notice unless the notice expires.¹¹³³ The company is liable to compensate the affected person if it fails to comply with the

¹¹³² [1967] GLR 24.

¹¹³³ Section 103(1) of Act 992.

requirement of entering the notice and not effecting any payment or transfer of shares contrary to the notice.¹¹³⁴

The requirements above are not applicable to shares regulated under a scheme set up under the Central Securities Depository Act, 2007 (Act 733).

17.12 Share certificate and effect of share certificate

Shares are intangible movable assets held by the shareholders. In order to evidence ownership of the shares, the law provides that the company must issue a share certificate to the shareholders.¹¹³⁵ The issue of the share certificate is in addition to the requirement of entry of the name of the shareholder in the register of members.¹¹³⁶ The requirement for the issue of a share certificate is provided in section 55 of Act 992. The section states:

- “(1) Subject to the Central Securities Depository Act, 2007 (Act 733), a company shall, within two months after the issue of any shares of the company or after the registration of the transfer of a share, deliver to the registered holder of the share, a certificate certified by one director and the Company Secretary indicating*
- (a) the number and class of shares held by that holder and the definitive numbers of shares,*
 - (b) the amount of money paid on the shares and the amount remaining unpaid, and*
 - (c) the name and address of the registered holder.”*

The Central Securities Depository Act, 2007 (Act 733) permits immobilization and dematerialization of share certificate. Immobilization of share certificate refers to a situation where a depository sets up under Act 733 takes possession of the share certificate, whilst dematerialization of share certificate means providing electronic evidence of share transfer to evidence ownership of shares rather than the paper certificate. Subject to Act 733, the Companies Act, 2019 still mandates the issue of share certificate to evidence ownership in two instances. Where the company issues shares and where there is a transfer of share from a shareholder to another person. The requirement is for the share certificate to be issued within two months after the issue of the shares or after registration of the transfer of shares by the company. The share certificate must have the particulars listed under

¹¹³⁴ Section 103(3) of Act 992.

¹¹³⁵ This requirement is in addition to the requirement for the submission of return of issue of shares under section 46 of Act 992. But the section 46 requirement is limited to when the company issues shares and does not cover transfer of shares from one shareholder to another person.

¹¹³⁶ Section 33(1) and (2) of Act 992.

paragraphs (a) to (c) of subsection (1) of section 55 of the Act. The share certificate must be certified by a director and the Company Secretary.

Where the issued share certificate is lost, defaced or destroyed, the company, upon request by the registered shareholder, must issue a new certificate upon payment of a prescribed fee.¹¹³⁷ The shareholder must also provide the company with indemnity and pay out-of-pocket expenses for the company to investigate the basis of the request.¹¹³⁸ Section 55(2) of Act 992 provides *“(2) Where a share certificate is defaced, lost or destroyed, the company at the request of the registered holder of the shares, shall renew the certificate on payment of a fee prescribed by the company and on the terms as to evidence and indemnity and the payment of the out-of-pocket expenses of company of investigating evidence that the company may reasonably requires.”* The obligation is on the company to issue a certificate to replace the lost, destroyed or defaced certificate of the shareholder. The obligation is activated by a request of the shareholder. The performance of the obligation is however subject to conditions to be satisfied by the shareholder in making reasonable payments for the replacement and cost incurred in investigating the reason for the request.

Failure of the company to issue a share certificate in accordance with the section or replace a lost, defaced or destroyed certificate will result in imposing liability on the company and officers of the company in default to pay an administrative penalty of fifty penalty units.¹¹³⁹ The person may also apply to the court for a share certificate where the company fails to provide the certificate in accordance with the section and the court may order the company to deliver the certificate and the company and its officers to bear the cost of and incidental to the application.¹¹⁴⁰ Subsections (4) and (5) of section 55 of Act 992 provides that:

“(3) Where a company defaults in complying with this section, the company and an officer of the company who is in default are liable to pay to the Registrar, an administrative penalty of fifty penalty units.

(4) Where an application is made to the Court by a person entitled to have the certificate delivered to that person, the Court may order the company to deliver the certificate and may require the company and that officer to bear the cost of, and incidentals to the application.”

Effect of share certificate

There are two effects of a share certificate under section 56 of the Act. Section 56 of Act 992 provides that:

¹¹³⁷ Section 55(2) of Act 992.

¹¹³⁸ Ibid.

¹¹³⁹ Section 55(3) of Act 992.

¹¹⁴⁰ Section 55(4) of Act 992.

- “(1) Statements made in the share certificate under the common seal of the company or as certified by two directors and the Company Secretary of the company, are prima facie evidence of the title to the shares of the person named in the certificate as the registered holder and of the amounts of money paid and payable on the certificate.*
- (2) Where a person changes a position to the detriment of that person in reliance in good faith on the continued accuracy of the statements made in the certificate, the company is estopped in favour of that person from denying the continued accuracy of those statements and shall compensate that person for the loss suffered by that person in reliance on those statements and which that person would not have suffered had the statement been or continued to be accurate.*
- (3) Subsection (1) and (2) do not affect a right the company may have to be indemnified by any other person.*
- (4) The provisions of subsections (1) to (3) do not apply in the case of shares which can be transferred through a scheme of a central depository under the Central Securities Depository Act, 2007 (Act 733) or any other relevant enactment.”*

For a share certificate to have the stated effect, it must have the common seal of the company or where it does not have a common seal, it must be certified by two directors and the Company Secretary.¹¹⁴¹ This requirement seems inconsistent with the prescription under section 55(1) of the Act which provides that the share certificate issued by the company must be certified by a director and a secretary. It stands to reason that a share certificate issued by a company complying with section 55(1) of Act 992 will not have the effect provided under section 56 of the Act. It is suspected that this may be a mistake arising from making changes in sections 53 and 54 of the repealed Companies Act, 1963 (Act 179) in sections 55 and 56 of the new Companies Act, 2019 without synchronizing the requirements of both sections in Act 992. It is believed that this mistake will be corrected by the Law Reform Commission.¹¹⁴² Be as it may, it is the hope that in the event it comes up for interpretation in court, the effect provided in section 56 of Act 992 will apply to share certificate issued by a company which satisfies the requirements of section 55(1) of Act 992 of being certified by a director and a secretary, and not the two directors and a Company Secretary or the requirement of the seal of the company stated in section 56 of Act 992.

As indicated the Act provides for two effects of a share certificate. First, the share certificate is a *“prima facie evidence of the title to the shares of the person named in the certificate as the registered holder and of the amounts of money paid and payable on the certificate.”*¹¹⁴³ That is, unless a contrary evidence is provided, the share certificate is proof of the title of the person named as a shareholder

¹¹⁴¹ Section 56(1) of Act 992.

¹¹⁴² See the Law Reform Commission Decree, 1975 (N.R.C.D. 325) for the functions of the Law Reform Commission.

¹¹⁴³ Section 56(1) of Act 992.

to the shares, as well as the amount paid and remains payable for the share. The primary effect of a share certificate, therefore, is to evidence ownership of the shares and secondly, evidence the amount paid and remaining payable on the shares. Further, subsection (2) of section 56 of Act 992 provides that *“(2) Where a person changes a position to the detriment of that person in reliance in good faith on the continued accuracy of the statements made in the certificate, the company is estopped in favour of that person from denying the continued accuracy of those statements and shall compensate that person for the loss suffered by that person in reliance on those statements and which that person would not have suffered had the statement been or continued to be accurate.”* This is to protect third parties who relied on the continued accuracy of the statement on the share certificate to their detriment. The protection offered to third parties operates under the principle or doctrine of estoppel where the company is deemed to make a representation of the continued accuracy of the statements made in the share certificate. A person who relies on the continued accuracy of such statements and changed his position to his detriment is entitled to compensation from the company if the statement turns out not to be accurate. Subsection (2) of section 56 of the Act requires the company to compensate the person for the loss suffered by the person in reliance on the statements provided the person would not have suffered the loss had the statement been or continued to be accurate.¹¹⁴⁴ The section does not negate the right of the company to claim indemnity from any other person whose act led to the liability of the company.¹¹⁴⁵ The effect stated above is not applicable to shares transferred through a scheme of central depository under the Central Securities Depository Act, 2007 (Act 733) or any other enactment.¹¹⁴⁶

A share certificate of a company which has been issued by the company even in circumstances that generally may fall under “vitiating factors under the law of contract” remains the share certificate of the company and has the above two effects.

Bloomenthal v. Ford¹¹⁴⁷ - the appellant lent money to a limited company upon the security of a promissory note on the terms that the company should give him fully paid-up shares as collateral security. The company handed to him certificates for shares which stated on the face of them that the appellant was the registered holder and that the shares were fully paid up. As a matter of fact, the shares were shares which had never been allotted, and nothing had been paid on them. The company was ordered to be wound-up, and the appellant was placed on the list of contributories. It was held that the company was estopped from denying that the shares were fully paid up and that the appellant could not be made liable as a contributory. The Lord Chancellor (Halsbury) stated @ pgs. 1849 to 1850 that:

¹¹⁴⁴ Section 56(2) of Act 992.

¹¹⁴⁵ Section 56(3) of Act 992.

¹¹⁴⁶ Section 56(4) of Act 992.

¹¹⁴⁷ [1895-99] All ER 1845; [1897] AC 156; 76 LT 205; 13 TLR 240.

"There is a long series of cases, no one of which is important to quote, because the proposition of law has never been doubted, so far as I am aware, to prove that if a man is induced to act upon a statement, and acts upon it because he believes it, and that statement is untrue, it is not competent for the person who has made the representation to say afterwards: "I will show another state of facts than that which I represented, and you ought not to have believed what I said." I believe no such proposition can be affirmed upon any authority, and it would be a very lamentable thing indeed for the course of business—and indeed for the course of human life—if the law did not recognise the responsibility of persons who make statements and induce others to act upon them so that they should not afterwards be permitted to turn round and say that what they stated was untrue, having altered the position of those whom they deceived by the statements they made."

Lord Herschell stated @ pg. 1851 in response to the argument that the appellant should have known of the inaccuracy that:

"I cannot myself think that where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man's acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, no doubt there is no estoppel. But supposing he did believe it, and did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, "If you had thought more about it you would have seen it was not true.""

However, where the share certificate of the company has been forged, it does not have the two effects stated, as a forged share certificate is not a certificate of the company.

*Ruben and another v. Great Fingall Consolidated and another*¹¹⁴⁸ – in this case, Rowe, the secretary of the defendant company forged the share certificate of the company by signing the signature of the two directors of the company and fraudulently using the seal of the company. The forged share certificate was used to secure a loan from the bank. The company refused to enter the bank on the register as shareholders. The plaintiffs who arranged for the loan repaid the bank and brought an action against the company for the refusal. It was held that the certificate was false and fraudulent from the beginning to the end. The impression of the seal, though made by the impression of the real seal of the company, was counterfeited, and no better than a forgery. The signatures of the directors were forgeries, pure and simple, and every statement in the document a lie. Of itself, this fraudulent certificate could give no right against the company. The fact that it was concocted in and sent forth

¹¹⁴⁸ [1907] AC 439.

from the company's office by the company's secretary could not give it an efficacy it did not intrinsically possess. The secretary could have no authority to guarantee the genuineness or validity of a document which was not the deed of the company. It was not incumbent on the company to lock up their seal and guard it as a dangerous beast. The court referred to the proposition stated by Willes, J., in *Barwick v English Joint Stock Bank*, LR 2 Ex 259, at p. 265: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service of and for the master's benefit." Where the servant, as in the present case, is acting fraudulently for his own illegal purposes, no representation by him relating to the matter, will bind his employers. The representation is part of the fraud and cannot rightly be considered to be made by the servant as an agent or on behalf of his master.

As stated, section 56(3) of Act 992 provides that subsections (1) and (2) do not negate the right of the company to claim indemnity from any other person whose act led to the liability of the company.

In *Corporation of Sheffield Crop v. Barclay & Company Ltd and others*¹¹⁴⁹, Lord Chancellor (Halsbury) stated that:

"In this case two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation and demanded, as they were entitled to do if the transfer was a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill after the death of Timbrell discovered the forgery that had been committed and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained. Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest that there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very

¹¹⁴⁹ [1905] UKHL 556; [1905] AC 392, [1904-7] All ER 747; 21 LTR 642

*different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries if they like. If they find that an intending borrower has a co-trustee, they ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as if genuine transfers are brought they are entitled to do, that the stock shall be registered in their name or that of their nominees, and they are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by action on this "demand" have incurred a considerable loss. As I have said, I think that if it were *res Integra* I should think that the bank were liable; but I do not think that it is *res Integra*, but it is covered by authority. In *Dugdale v. Lovering* (32 L.T. Rep. 155, L. Rep. 10 C.P. 196) Mr. Cave, arguing for the plaintiff, put the proposition thus—"It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This, though only the argument of counsel, was adopted and acted upon by the Court, and I believe that it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate."*

Lord Davey also stated:

"On these facts the Lord Chief-Justice, who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability which they have incurred, but his judgment has been reversed by the Court of Appeal. Before referring to the numerous authorities which have been cited. I will first state the grounds upon which I have come to the conclusion that the Lord

Chief-Justice was right and that his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But of course it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request."

17.13 Register of members and registration of transfer

Shareholders of a company have the right to have their names entered in the register of members.¹¹⁵⁰ Section 35 of Act 992 expressly provides for the entry of the stated particulars of shareholders in the register of members within twenty-eight days upon concluding an agreement to take shares and in respect of particulars of a beneficial owner, within twenty-eight days of receiving the necessary particulars. The particulars required to be entered into the register of members in relation to a shareholder include:

- (a) the name and address of the shareholder,
- (b) the shares held by the shareholder, the amount paid or agreed to be paid, and the amount remaining payable,
- (c) the date of entry in the register,
- (d) the nature of the interest of the shareholder,
- (e) the date at which the shareholder ceased to be a shareholder,
- (f) particulars of the beneficial owner of the shares, and

¹¹⁵⁰ Sections 33, 101 and 103 of Act 992

- (g) in the event the shareholders are more than fifty, index of the names of shareholder and beneficial holder.

In relation to the beneficial owner, the particulars required are:

- (a) name and former name of the beneficial owner,
- (b) date and place of birth,
- (c) telephone number,
- (d) nationality, national identity number, passport number or other appropriate identification, and proof of identity,
- (e) residential, postal and email address, if any,
- (f) place of work and position held,
- (g) nature of the interest including details of the legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership, and
- (h) confirmation as to whether the beneficial owner is a political exposed person.

The Company Registry has now designed a beneficial ownership disclosure form which must be completed and filed within twenty-eight days of the company receiving the particulars.

The company is permitted to appoint a registration officer who is responsible for making the required entry and complying with the requirements under sections 35 and 36 of the Act.¹¹⁵¹ The registration officer is liable for non-compliance just like the company.¹¹⁵²

It is an offence to fail to provide the required information or providing false or misleading information to the Registrar. Section 35(14) states that:

“(14) A person who

(a) fails to provide the information required under subsection (2), or

(b) provides false or misleading information to the Registrar

commits an offence and is liable on summary conviction to a fine of not less than one hundred and fifty penalty units and not more than two hundred and fifty penalty units or a term of imprisonment of not less than one year and not more than two years or both.”

The offence is punishable upon summary conviction to a fine or term of imprisonment or both a fine and term of imprisonment.

Non-compliance with the requirements by the company and its officers is also made an offence. Section 35(15) of Act 992 provides that *“(15) Where a company defaults in complying with this*

¹¹⁵¹ Section 35(12) of Act 992.

¹¹⁵² Ibid.

section the company and every officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the default continues."

Section 36 of Act 992 provides for the right of the shareholders to inspect the register of members and have copies provided to the shareholders. The company under section 37 of Act 992 has the power to close the register for a period of not more than thirty days in each year upon giving reasonable notice. A person aggrieved or a member may make an application to the court for rectification of the register where the person's name has been entered or omitted without just cause or the particulars are not correctly entered.¹¹⁵³ Section 39 of Act 992 provides that *"(1) The register of members is prima facie evidence of the matters which by this Act are directed or authorised to be inserted in the register."* The primary purpose of the register of members is to establish who the members of the company are at each point in time. It is prima facie evidence of all matters required to be entered in the register. As prima facie evidence, contrary evidence is permitted to disprove matters entered in the register of members. However, the evidential value of the register of members is not, where the circumstance admit, applicable to shares of a company held in a depository under a scheme provided under the Central Securities Depository Act, 2007 (Act 733).¹¹⁵⁴

In respect of transfer of shares, a company is not bound to register a notice of trust, contingent, future or partial interest in shares or fractional part of shares.¹¹⁵⁵ The only interest to be registered is the absolute right to the entirety of the shares.¹¹⁵⁶ The company is only required to register the interest in the register upon submission of a duly stamped instrument of transfer and the share certificate.¹¹⁵⁷ The company is also required to register the interest where shares are transmitted by operation of law.¹¹⁵⁸ The transfer must be lodged for registration by either the transferor or transferee.¹¹⁵⁹ The company is required to inform the transferor or the transferee within two months if the company refuses to register the transfer.¹¹⁶⁰ A company in breach of the requirement to inform the transferor and transferee within the two months is liable to pay an administrative penalty to the Registrar. These requirements are not applicable to shares transferred through a scheme under the Central Securities Depository Act, 2007 (Act 733).

¹¹⁵³ Section 38 of Act 992.

¹¹⁵⁴ Section 39(2) of Act 992.

¹¹⁵⁵ Section 101(1) of Act 992.

¹¹⁵⁶ Section 101(2) of Act 992.

¹¹⁵⁷ Section 101(3) and (5) of Act 992.

¹¹⁵⁸ Section 101(3) of Act 992.

¹¹⁵⁹ Section 101(6) of Act 992.

¹¹⁶⁰ Section 101(7) of Act 992.

18.0 CAPITAL MAINTENANCE AND DISTRIBUTIONS

18.1 Introduction

The resources contributed to the company as capital is for the purpose of undertaking the business of the company. In view of this, the capital must be maintained for the company's business. The capital must be expended in satisfying obligations of the company to its creditors and suppliers as well as related operational and capital expenditure. What is frowned upon by the law is a transaction that has the effect of returning the capital of the company to shareholders who contributed to the capital, in which case the capital available for the company's business and payment of creditors and suppliers is reduced. The concept or doctrine of capital maintenance is thus to ensure that once capital is contributed to the company, the capital must be used for the purpose of the business of the company and not be reduced through distribution to the shareholders or by returning the capital to the shareholders, or through dealing in shares or other transactions which will reduce the stated or legal capital of the company.

The capital maintenance rule relates to companies with shares, both limited and unlimited. However, an unlimited company is exempted from some of the strict prescriptions of the capital maintenance rule. The application is, therefore, more in relation to a limited company with shares. A company limited by guarantee does not have shares and, therefore, shareholders, and the rules are not applicable to such a company. More importantly, members of this company are not entitled to returns as they are prohibited by the constitution of the company.¹¹⁶¹ The income and property of a company limited by guarantee are to be used solely for the objects of the company.¹¹⁶²

18.2 Stated capital

Capital, as used in relation to the capital maintenance rule, refers to the capital raised from the shareholders of the company and profits retained by the company as capital. This is referred to as the legal or stated capital of the company and is dealt with under section 68 of Act 992. Subsection (1) of section 68 of the Act provides for the elements that constitute the stated capital of a company. The subsection provides:

“68. (1) The stated capital of a company with shares consists of the sum of the following items:

- (a) the total proceeds of every issue of shares for cash, including the amounts paid on calls made on shares issued with an unpaid liability, less deductions for transactions costs that are direct and incidental to share issue,*

¹¹⁶¹ Section 29(3)(b)(iii) of Act 992.

¹¹⁶² Ibid.

(b) the total value of the consideration, as stated in the agreement, received for every issue of shares otherwise than for cash, and

(c) the total amount which the company by special resolution resolved to transfer to stated capital from reserves, as defined in section 70 including the credit balance on the share deals account referred to in section 65.

(2) Paragraph (a) or (b) of subsection (1) does not require the proceed or value of the consideration received on the re-issue of treasury shares to be added to stated capital."

Stated capital thus is the total of valuable consideration from four sources:

- (a) the sum of cash received for issue of shares less transaction cost
- (b) non-cash consideration received for issue of shares,
- (c) capitalised profit and
- (d) profit transferred from the account opened by the company in trading in its own shares (that is the share deals account).

The only deduction permitted is direct and incidental transaction cost incurred in issuing shares for cash consideration.

18.3 Capital maintenance rule

The capital maintenance rule provides that the stated capital of the company can only be used for the purpose of the business of the company. This stated capital cannot be reduced by returning the capital to the shareholders, distribution to the shareholders or transactions with the shareholders that reduce the stated capital. The capital maintenance rule prohibits any such reduction. This does not mean the stated capital is kept as a reserved fund that is static and not subject to change. The stated capital can be reduced or lost in normal trading activities or business of the company. That is not and cannot be prohibited by law. The prohibition under the capital maintenance rule does not prevent loss of capital in normal trading or business of the company. The rule prohibits activities or transactions that result in returning the capital of the company to the shareholders.

The classical case that provides for the capital maintenance rule is the case of *Trevor v. Whiteworth*¹¹⁶³. In that case, a company bought back almost a quarter of its own shares. During the liquidation of the company, one shareholder applied to the court for the balance of amounts owed to him after the buyback. The Court of Appeal held that he should be paid. On appeal to the House of Lords, it was held that the buyback was ultra vires the company. Lord Herschell stated in relation to the capital maintenance rule as follows:

¹¹⁶³ (1882) 12 App. Cas. 409.

“If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company’s liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result... I cannot think that the employment of the company’s money in the purchase of shares for any such purpose was legitimate.”

“One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company’s trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that company is trading with a certain amount of capital already, paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.”¹¹⁶⁴

The essence of the rule is to preserve the stated capital of the company by keeping the capital out of the reach of the shareholders. The stated capital is the nominal capital that must be used to satisfy the liabilities of the company. It is the amount that members of the public who become creditors look up to for the satisfaction of liabilities owed to them by the company. As such, the related purpose of the rule is to ensure the maintenance of the stated capital for the satisfaction of such liabilities.

In *Guinness v. Land Corporation of Ireland*¹¹⁶⁵, Cotton LJ stated @ pgs. 375 to 376 as follows:

“That section provides that in the case of a company limited by shares being wound up, no contribution shall be required from any member exceeding the amount if any unpaid on the shares in respect of which he is liable as a present or past member; that the capital of the company as mentioned in the memorandum is to be the fund which is to pay the creditors in the event of the company being wound up. From that

¹¹⁶⁴ (1887) 12 App. Cas. 409 at 423 et. seq.

¹¹⁶⁵ (1882) 22 Ch. D 349.

it follows that whatever has been paid by a member cannot be returned to him ... is of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid ... no part of the capital mentioned ... can be taken out of the fund to which the creditors have to look except for the purpose of employing it for the objects of the company."

In *Hill v. Permanent Trustee Co of New South Wales Ltd*¹¹⁶⁶, the Privy Council per Lord Russell stated @ pg. 731 as follows:

"A limited company not in liquidation can make no payment by way or return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any other name, it still must remain a payment on division of profits."

*In Re Exchange Banking Co. (Flitcroft's Case)*¹¹⁶⁷ – the financial statements prepared and presented by the directors of the Exchange Banking Company to shareholders based upon which the shareholders declared dividend were untrue. Between 1873 and 1878 the directors paid half-yearly dividends totalling £3,192 to the shareholders when the directors knew items in the accounts were bad debts, irrecoverable and consequently there were no distributable profits. The shareholders acted on the reports and declared dividends. The liquidator brought an action against the directors to recover the amount paid to the shareholders as dividend. It was held that the directors were liable to repay the unlawful dividends. On appeal, it was held dismissing the appeal that the capital invested by shareholders could not be returned to them, and dividends should be paid out of profits only, although the courts deferred to company directors to define their own rules for determining when that was so. Lord Jessel MR stated as follows:

"It follows then that if directors who are quasi trustees for the company improperly pay away the assets to shareholders, they are liable to replace them, it is no answer to say that the shareholders could not compel them to do so. I am of the opinion that the company could in its corporate capacity compel them to do so, even if there were no winding up... directors in each case are to be declared jointly and severally liable and not only jointly liable... The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. [He...] gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders,

¹¹⁶⁶ [1930] AC 720.

¹¹⁶⁷ (1882) 21 ChD 519.

though it may be a right which he cannot enforce otherwise than by a winding-up order. It follows then that if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them..."

The cases establish the general principle that there is a prohibition on reduction of stated capital. However, there are genuine transactions that may be permitted by statute that may lead to a reduction in stated capital and reduction of stated capital expressly permitted by the law, as well as those that on the surface may be construed as leading to reduction in stated capital but are not. There are payments permitted to be made to shareholders as distributions, there are instances permitted where the stated capital may be reduced and there are transactions in shares that are permitted which may seem a reduction in stated capital. A good understanding of the specific principles under the capital maintenance rule and the permitted exceptions to the rule including lawful distribution is, therefore, important to determine whether a specific transaction can be undertaken. It is therefore important to look at the substance of the specific activity or transaction to determine first if it is a breach of the rule and second, even if it is a breach, whether it falls within the permitted exception or is a lawful distribution. In stating the capital maintenance rule in the case of *Progress Property Co Ltd v. Moorgarth Group Ltd*¹¹⁶⁸, the court considered the various authorities and held that the courts must examine the substance of such transaction and not the form of the transaction or the description put on the transaction by the parties.

*Progress Property Co Ltd v. Moorgarth Group Ltd*¹¹⁶⁹ - As part of a complex series of transactions to enable the minority shareholder in the appellant company, Progress Property Ltd (PP Ltd), to buy the majority shareholding, PP Ltd agreed to sell a wholly-owned subsidiary, Your More Stores Ltd (YMS Ltd), to the respondent in an arm's length sale at market value. The market value was calculated as being £63,225 by taking the value of YMS Ltd's properties (£11.83m) less liabilities for creditors (some £8m) and deducting £4m to release PP Ltd from an indemnity or counter-indemnity which PP Ltd was believed to have given to cover the costs of repairs to YMS Ltd's properties. In that event, it appeared that PP Ltd had never provided the indemnity and therefore there was no indemnity from which it could be released. PP Ltd brought an action against the respondent for the return of the shares in YMS Ltd, claiming that the sale price was a gross undervalue, being the amount, some £4m, by which it had been reduced to take account of the release of the non-existent indemnity, and further claiming that the transaction was in substance an unlawful distribution of its assets. It was accepted that the sale had been negotiated in the honest belief that the sale was at market value. The deputy judge dismissed the claim on the grounds that even if there had been an unintentional sale at an undervalue, the sale of the shares was a genuine sale and was not ultra vires PP Ltd. PP Ltd appealed to the Court of Appeal which dismissed the appeal, also holding that the

¹¹⁶⁸ [2011] 2 BCLC 332; [2011] 1 WLR 1.

¹¹⁶⁹ Ibid.

sale of the YMS Ltd shares was not a disguised distribution of assets but an intra vires sale of shares for a proper purpose, even if it was at an undervalue. The appellant appealed to the Supreme Court, contending that whenever a company entered into a transaction with a shareholder which resulted in a transfer of value not covered by distributable profits, regardless of the purpose of the transaction, the transaction ought to be treated as an unlawful return of capital. It was held that whether a transaction infringed the common law rule of unlawful return of capital to a shareholder was a matter of substance, not form. The label attached to the transaction by the parties was not decisive, since the essential issue was how a sale was to be characterised. The court's real task was to inquire into the true purpose and substance of the impugned transaction. That called for an investigation of all the relevant facts, including sometimes the state of mind of the persons who orchestrated the corporate activity. A distribution described as a dividend but actually paid out of the capital was unlawful, however technical the error and however well-meaning the directors who paid it. A transaction which was an improper attempt to extract value by the pretence of an arm's length sale was also unlawful, but if the transaction with a shareholder was genuinely at arm's length it would stand, even if it appeared with hindsight to have been a bad bargain. A mere arithmetical difference between the consideration given for an asset and its retrospective valuation in subsequent proceedings did not of itself mean that there was a distribution of capital. In assessing the adequacy of the consideration a margin of appreciation could properly be allowed. A relentlessly objective rule that there was an unlawful return of capital whenever the company entered into a transaction with a shareholder which resulted in a transfer of value not covered by distributable profits, regardless of the purpose of the transaction, would be oppressive and unworkable and would tend to cast doubt on any transaction between a company and a shareholder. This will be the case even if negotiated at arm's length and in perfect good faith, whenever the company proved with hindsight that it had got significantly the worse of the transaction. The appeal was dismissed because the sale of YMS Ltd to the respondent was a genuine sale and not a dressed-up return of capital, and because (per Lord Mance) PP Ltd's liability under the indemnity or counter-indemnity was owed separately to the respondent unrelated to the value of YMS Ltd.

Lord Walker SCJ. stated as follows:

"A limited company not in liquidation cannot lawfully return capital to its shareholders except by way of a reduction of capital approved by the court. Profits may be distributed to shareholders (normally by way of dividend) but only out of distributable profits computed in accordance with the complicated provisions of the Companies Act 2006 (replacing similar provisions in the Companies Act 1985). Whether a transaction amounts to an unlawful distribution of capital is not simply a matter of form. As Hoffmann J said in Barford Ltd v Perion Ltd [1989] BCLC 626 at 631:

'Whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance.'

Similarly Pennycuik J observed in *Ridge Securities Ltd v IRC* [1964] 1 All ER 275 at 288, [1964] 1 WLR 479 at 495:

'A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend or, with leave of the court, by way of reduction of capital, or in a winding up. They may of course acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described, and, if they attempt to do so, the disposition is ultra vires the company.'

... PPC's case, as finally formulated at first instance, relied not on s 263 of the 1985 Act (now replaced by ss 829 and 830 of the 2006 Act) but on what Mummery LJ referred to (at [23]) as 'the common law rule':

'The common law rule devised for the protection of the creditors of a company is well settled: a distribution of a company's assets to a shareholder, except in accordance with specific statutory procedures, such as a winding up of the company, is a return of capital, which is unlawful and ultra vires the company.'

The rule is essentially a judge-made rule, almost as old as company law itself, derived from the fundamental principles embodied in the statutes by which Parliament has permitted companies to be incorporated with limited liability. Mummery LJ's reference to *ultra vires* must be understood in the wider and looser sense of the term identified in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1984] BCLC 466 at 485–487, 514–515, [1986] Ch 246 at 276–278, 302 per Slade LJ, Browne-Wilkinson LJ respectively. But in this appeal, there is no difference between the parties as to the narrower and wider meanings of *ultra vires* in the company law context.

Whether a transaction infringes the common law rule is a matter of substance, not form. The label attached to the transaction by the parties is not decisive. That is a theme running through the authorities, including *Ridge Securities Ltd v IRC* [1964] 1 All ER 275, [1964] 1 WLR 479 and *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626 to which I have already referred. I shall take some of the best-known cases in chronological order.

The *Ridge Securities* case was concerned with a complicated and artificial tax-avoidance scheme carried out at a time when companies were still subject to income tax (rather than corporation tax). Pennycuik J ([1964] 1 All ER 275 at 286, [1964] 1 WLR 479 at 493), upheld the Special Commissioners' disallowance of payments of interest 'grotesquely out of proportion to the principal amounts secured' as not being interest within the meaning of s 169 of the Income Tax Act 1952. That was simply a point of construction on the taxing statute. More radically, Pennycuik J

also dealt with a company law point not raised before the Special Commissioners, and held that the payments of so-called interest were in fact gratuitous (and so unlawful) dispositions of the company's money. In the crucial passage ([1964] 1 All ER 275 at 288, [1964] 1 WLR 479 at 495, set out at [1], above) the words 'however described' are important.

Re Halt Garage (1964) Ltd [1982] 3 All ER 1016 was, on its facts, at the other extreme from the Ridge Securities case as regards the sophistication of the parties involved and the outlandishness of the impugned transaction. The company owned what was essentially a husband-and-wife business running a garage near Woburn Sands. From 1964 the couple worked very hard to build up the business, which included recovering broken-down vehicles from the newly-opened M1. They paid themselves modest remuneration as directors. But unfortunately in 1967 the wife became seriously ill and they decided to move to the Isle of Wight. They tried to sell the business but repeatedly failed to do so, and at one stage the husband was commuting between the Isle of Wight and Bedfordshire in an attempt to look after his invalid wife and the ailing business. Other misfortunes followed and the company went into insolvent liquidation in 1971.

The liquidator challenged the propriety of director's remuneration paid to the husband and wife during the company's decline. Oliver J upheld the husband's remuneration but reluctantly disallowed most of the wife's last two years' remuneration. He observed (at 1043):

'The real question is, were these payments genuinely director's remuneration? If your intention is to make a gift out of the capital of the company, you do not alter the nature of that by giving it another label and calling it "remuneration".'

That was, with respect, hardly apt on the facts of the case. The evidence suggested that the couple knew little about company law and took the advice of their accountant. But the case does show that if the label of remuneration does not square with the facts, the facts will prevail and the result may be an unlawful distribution, even if the directors in question intended no impropriety. Later in his judgment Oliver J recognised that, observing (at 1044):

'In the absence of any evidence of actual motive, the court must, I think, look at the matter objectively and apply the standard of reasonableness.'

In Aveling Barford Ltd v Perion Ltd [1989] BCLC 626 a Singapore businessman, Dr Lee, who indirectly owned and controlled Aveling Barford, procured the sale by it to Perion (a Jersey company also controlled by Dr Lee) of a country house and 18 acres of land at Grantham, formerly used as an employees' social and sports club. This property had development potential and had been valued by Strutt and Parker at £650,000 and by Humberts (for prospective mortgagees) at £1,150,000. The price

on the sale to Perion was £350,000 (with a provision of doubtful authenticity for £400,000 overage if the property sold for over £800,000 within a year). In the event it was sold within a year for over £1.5m. That was the context in which Hoffmann J made the observations set out in [1], above. The need to look at substance rather than form also extended to Dr Lee's being treated as the real shareholder in Aveling Barford and the real purchaser of the land: Hoffmann J made a passing reference to this (at 632) but it was not an issue in the case.

Hoffmann J referred to the Ridge Securities case and Re Halt Garage and concluded (at 633) with an instructive passage referring to the Rolled Steel Products case:

'It is clear however that Slade LJ excepted from his general principle cases which he described as involving a "fraud on creditors" (see [1984] BCLC 466 at 508, [1986] Ch 246 at 296)). As an example of such a case, he cited Re Halt Garage. Counsel for the defendants said that frauds on creditors meant transactions entered into when the company was insolvent. In this case Aveling Barford was not at the relevant time insolvent. But I do not think that the phrase was intended to have such a narrow meaning. The rule that capital may not be returned to shareholders is a rule for the protection of creditors and the evasion of that rule falls within what I think Slade LJ had in mind when he spoke of a fraud on creditors. There is certainly nothing in his judgment to suggest that he disapproved of the actual decisions in Re Halt Garage or Ridge Securities. As for the transaction not being a sham, I accept that it was in law a sale. The false dressing it wore was that of a sale at arm's length or at market value. It was the fact that it was known and intended to be a sale at an undervalue which made it an unlawful distribution.'

Hoffmann J's acceptance that the sale was not a sham, but was a transaction in a 'false dressing', has an obvious parallel in developments which were taking place at the same time in landlord and tenant law. In Street v Mountford [1985] 2 All ER 289, [1985] AC 809 Lord Templeman famously struck down an artificial arrangement designed to avoid a tenancy protected by the Rent Acts. He declared ([1985] 2 All ER 289 at 299, [1985] AC 809 at 825) that the court should be astute 'to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts'. But three years later in AG Securities v Vaughan, Antoniadis v Villiers [1988] 3 All ER 1058 at 1067, [1990] 1 AC 417 at 462 Lord Templeman said that it would have been more accurate to have used the word 'pretence', and the rest of the Appellate Committee took the same line (Lord Bridge of Harwich [1988] 3 All ER 1058 at 1061, [1990] 1 AC 417 at 454 'an attempt to disguise the true character of the agreement'; Lord Ackner [1988] 3 All ER 1058 at 1070, [1990] 1 AC 417 at 466 'the substance and reality of the

transaction†... he sought vigorously to disguise them'; Lord Oliver of Aylmerton [1988] 3 All ER 1058 at 1071, [1990] 1 AC 417 at 467 'an air of total unreality about these documents'; Lord Jauncey of Tullichettle [1988] 3 All ER 1058 at 1078, [1990] 1 AC 417 at 477 'mere dressing up in an endeavour to clothe the agreement with a legal character which it would not otherwise have possessed').

Antoniades v Villiers was decided before the *Aveling Barford* case and *Hoffmann J* may well have had it in mind when writing his judgment. There is however one obvious difference between the typical case of a disguised company distribution and the typical case of a tenancy disguised as a licence in order to avoid the Rent Acts. There is no identity of interest between the landlord and the putative licensee – quite the reverse – and the latter agrees to enter an artificial arrangement, against his or her interest, because of the weak bargaining position of anyone looking for affordable accommodation in an overcrowded city. In the disguised company distribution case, by contrast, the same human beings are usually interested directly or indirectly, on both sides of the corporate manoeuvring: *Dr Lee* in the *Aveling Barford* case, anonymous financiers in the *Ridge Securities* case. The fact that the same individuals are interested on both sides is not of course, by itself, a cause for alarm, since company reconstructions are carried out for all sorts of entirely proper purposes (and now have the benefit of ss 845 and 846 of the 2006 Act). The point to which I draw attention is simply that where there is a degree of identity of interest between both sides to a corporate transaction, both sides are likely to be in agreement as to its real purpose and its true nature and substance.

A question of characterisation

The essential issue then, is how the sale by PPC of its shareholding in YMS is to be characterised. That is how it was put by Sir Owen Dixon CJ in *Davis Investments Pty Ltd v Comr of Stamp Duties (New South Wales)* (1958) 100 CLR 392 at 406 (a case about a company reorganisation effected at book value in which the High Court of Australia were divided on what was ultimately an issue of construction on a stamp duty statute). The same expression was used by Buxton LJ in *MacPherson v European Strategic Bureau Ltd* [2000] 2 BCLC 683 (para 59). The deputy judge did not ask himself (or answer) that precise question. But he did (at [39]–[41]) roundly reject the submission made on behalf of PPC that there is an unlawful return of capital 'whenever the company has entered into a transaction with a shareholder which results in a transfer of value not covered by distributable profits, and regardless of the purpose of the transaction'. A relentlessly objective rule of that sort would be oppressive and unworkable. It would tend to cast doubt on any transaction between a company and a shareholder, even if negotiated at arm's length and in perfect good faith, whenever the company proved, with hindsight, to have got significantly the worse of the transaction.

In the Court of Appeal Mummery LJ developed the deputy judge's line of thought into a more rounded conclusion (at [30]):

'In this case the deputy judge noted that it had been accepted by PPC that the sale was entered into in the belief on the part of the director, Mr Moore, that the agreed price was at market value. In those circumstances there was no knowledge or intention that the shares should be disposed of at an undervalue. There was no reason to doubt the genuineness of the transaction as a commercial sale of the YMS1 shares. This was so, even though it appeared that the sale price was calculated on the basis of the value of the properties that was misunderstood by all concerned.'

In seeking to undermine that conclusion Mr Collings QC (for PPC) argued strenuously that an objective approach is called for. The same general line is taken in a recent article by Dr Eva Micheler commenting on the Court of Appeal's decision, 'Disguised Returns of Capital – An Arm's Length Approach' [2010] CLJ 151. This interesting article refers to a number of cases not cited to this court or to the courts below, and argues for what the author calls an arm's length approach.

If there were a stark choice between a subjective and an objective approach, the least unsatisfactory choice would be to opt for the latter. But in cases of this sort the court's real task is to inquire into the true purpose and substance of the impugned transaction. That calls for an investigation of all the relevant facts, which sometimes include the state of mind of the human beings who are orchestrating the corporate activity.

*Sometimes their states of mind are totally irrelevant. A distribution described as a dividend but actually paid out of capital is unlawful, however technical the error and however well-meaning the directors who paid it. The same is true of a payment which is on analysis the equivalent of a dividend, such as the unusual cases (mentioned by Dr Micheler) of *Re Walters' Deed of Guarantee*, *Walters' 'Palm' Toffee Ltd v Walters* [1933] Ch 321, [1933] All ER Rep 430 (claim by guarantor of preference dividends) and *Barclays Bank plc v British & Commonwealth Holdings plc* [1996] 1 BCLC 1 (claim for damages for contractual breach of scheme for redemption of shares). Where there is a challenge to the propriety of a director's remuneration the test is objective (*Re Halt Garage*), but probably subject in practice to what has been called, in a recent Scottish case, a 'margin of appreciation': see *Clydebank Football Club Ltd v Steedman* 2002 SLT 109 at [76] (discussed further below). If a controlling shareholder simply treats a company as his own property, as the domineering master-builder did in *Re George Newman & Co* [1895] 1 Ch 674, [1895–9] All ER Rep Ext 2160, his state of mind (and that of his fellow-directors) is irrelevant. It does not matter whether they were consciously in breach of duty, or*

just woefully ignorant of their duties. What they do is enough by itself to establish the unlawful character of the transaction.

The participants' subjective intentions are however sometimes relevant, and a distribution disguised as an arm's length commercial transaction is the paradigm example. If a company sells to a shareholder at a low value assets which are difficult to value precisely, but which are potentially very valuable, the transaction may call for close scrutiny, and the company's financial position, and the actual motives and intentions of the directors, will be highly relevant. There may be questions to be asked as to whether the company was under financial pressure compelling it to sell at an inopportune time, as to what advice was taken, how the market was tested, and how the terms of the deal were negotiated. If the conclusion is that it was a genuine arm's length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm's length sale, it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries.

Pretence is often a badge of a bad conscience. Any attempt to dress up a transaction as something different from what it is likely to provoke suspicion. In the Aveling Barford case there were suspicious factors, such as Dr Lee's surprising evidence that he was ignorant of the Humberts' valuation, and the dubious authenticity of the 'overage' document. But in the end the disparity between the valuations and the sale price of the land was sufficient, by itself, to satisfy Hoffmann J that the transaction could not stand.

The right approach is in my opinion well-illustrated by the careful judgment of Lord Hamilton in Clydebank Football Club Ltd v Steedman 2002 SLT 109. It is an example of the problems which can arise with football clubs owned by limited companies, where some small shareholders see the club as essentially a community enterprise, and other more commercially-minded shareholders are concerned with what they see as underused premises ripe for profitable redevelopment. The facts are complicated, and the main issue was on s 320 of the 1985 Act (approval by company in general meeting of acquisition of non-cash asset by director or connected person). But the judge also dealt with a claim under s 263 (unlawful distribution). He held that the sale of the club's derelict ground at Kilbowie Park, and another site originally purchased under an abortive plan for a new ground, was a genuine arm's length sale even though effected at a price £165,000 less than the value as eventually determined by the court after hearing expert evidence. Lord Hamilton said (at [76]):

'... It is also clear, in my view, that a mere arithmetical difference between the consideration given for the asset or assets and the figure or figures at which it or they are in subsequent proceedings valued

retrospectively will not of itself mean that there has been a distribution. If the transaction is genuinely conceived of and effected as an exchange for value and the difference ultimately found does not reflect a payment "manifestly beyond any possible justifiable reward for that in respect of which allegedly it is paid", does not give rise to an exchange "at a gross undervalue" and is not otherwise unreasonably large, there will not to any extent be a "dressed up return of capital". In assessing the adequacy of the consideration, a margin of appreciation may properly be allowed.' The words quoted by Lord Hamilton are from *Re Halt Garage and the Aveling Barford case*.

Lord Hamilton said (at [79]):

'... It is plain, in my view, that directors are liable only if it is established that in effecting the unlawful distribution they were in breach of their fiduciary duties (or possibly of contractual obligations, though that does not arise in the present case). Whether or not they were so in breach will involve consideration not only of whether or not the directors knew at the time that what they were doing was unlawful but also of their state of knowledge at that time of the material facts. In reviewing the then authorities Vaughan Williams J in [Re Kingston Cotton Mill Co (No 2) [1896] 1 Ch 331 at 347] said: "in no one of [the cases cited] can I find that directors were held liable unless the payments were made with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation". Although this case went to the Court of Appeal, this aspect of the decision was not quarrelled with (see [1896] 2 Ch 279) ...'

I agree with both those passages."

The capital maintenance rule is examined under four concepts. First, permitted payment to shareholders in the form of dividend in cash and non-cash dividends, which does not infringe the capital maintenance rule.¹¹⁷⁰ Second, the company in some instances may return assets of the company to shareholders. Third, there are instances in statute where a company is permitted to reduce stated capital with or without the approval of the court.¹¹⁷¹ Fourth, whilst the statute prohibits a number of transactions in shares which are likely to lead to reduction of stated capital, the statute made a number of exceptions. The first two situations cover distributions. Lawful distributions do not infringe the capital maintenance rule. Distribution relates to companies with shares.¹¹⁷² The discussion is, therefore, under the following headings.

¹¹⁷⁰ *Hill v. Permanent Trustee Co of New South Wales Ltd* [1930] AC 720.

¹¹⁷¹ *Ibid*. See also *Trevor v. Whitworth* (1882) 12 App Cas 409;

¹¹⁷² See 'shares entitle the holders to distribution' under Chapter 17 on Shares.

- (1) Payment of dividend
- (2) Return of assets
- (3) Lawful reduction of stated capital
- (4) Prohibited transactions on shares

18.4 Lawful payment of dividend

Notwithstanding the capital maintenance rule, companies with shares, both limited and unlimited, may pay dividends to shareholders. The very essence of shares is that the shares entitle the holder to share in the distribution of the income of the company.¹¹⁷³ Business companies are formed to make profit for distribution to the shareholders. Companies limited by guarantee are prohibited from payment of dividends.¹¹⁷⁴ The constitution of a company does not need to provide for the right of distribution of dividend in relation to companies with share as the right is conferred under the Companies Act, 2019 subject to conditions stated in the Act. The process leading to the payment of dividend must, therefore, be strictly in accordance with the Act and the constitution of the company so it does not amount to unlawful payment which may infringe the capital maintenance rule.

Section 72 of Act 992 provides *“(1) Except in a winding up, a company shall not pay a dividend to the shareholders of the company ... unless, the company has complied with the distribution test.”* The payment of dividend is thus subject to compliance with the distribution test. The “distribution test” is defined under the First Schedule of Act 992 as follows:

““distribution test” includes circumstances where

- (a) a company is able to pay its debts as they fall due; and*
- (b) the amount or value of any payment, return or distribution made by the company does not exceed its retained earnings immediately before the making of the payment, return or distribution.”*

In addition, section 76 of Act 992 which deals with declaration of dividends provides:

“(1) Subject to sections 72 and 75, and in the case of a private company, its registered constitution where applicable, a company may by ordinary resolution, declare dividends in respect of a year or any other specified period, but a dividend shall not exceed the amount recommended by the directors.

¹¹⁷³ See First Schedule of the Companies Act 2019 on the definition of ‘shares’.

¹¹⁷⁴ Section 75 of Act 992 provides:

“(1) A company limited by guarantee shall not at any time pay dividend or make a distribution or return of the assets of the company to members of the company.

(2) Where a payment, distribution or return is made in contravention of subsection (1), a member to whom it is made shall restore same to the company with interest at the yearly interest rate of ninety-one day government treasury bill, and every officer of the company who is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units.”

- (2) *In relation to public companies, subsection (1) shall be supplemented by section 321.*
- (3) *A dividend shall be paid within sixty days after the resolution of the shareholders confirming payments or after dividends have become payable.*
- (4) *Where a dividend is to be paid in accordance with subsection (3), the shareholders shall be notified of the amount of dividend recommended by directors for payment.*
- (5) *A registered constitution of a company may prescribe modes for the payment of dividend without reference to the resolution of the shareholders."*

From the above sections, there are a number of requirements for a company to lawfully pay dividend to shareholders. The default sequence for payment of dividend is:

- (a) dividend is recommended by directors subject to the distribution test;
- (b) the dividend is declared by the shareholders; and
- (c) the directors must ensure payment to the shareholders.

The first step cannot be taken without complying with the "distribution test".

18.5 Distribution Test

The "distribution test" must be complied with prior to the recommendation by the directors under section 76 of the Act. The "distribution test" provides for two critical requirements to be satisfied prior to the recommendation of dividend by directors.

First, there must be 'profit' or what is referred to in the Act as 'retained earnings' which in accounting terms is net profit after tax. Dividend can only be paid out of profit or 'retained earnings'. The distribution test provides *"the amount or value of any payment, return or distribution made by the company does not exceed its retained earnings immediately before the making of the payment, return or distribution."*¹¹⁷⁵ The directors must have looked at the financial statement immediately prior to making the recommendation for declaration of dividend by the shareholders to determine there is retained earnings. If there is no retained earnings or profit, no recommendation can be made by the directors.

Retained earnings is defined under sections 70 and 71 of Act 992. Under the repealed Companies Act, 1963, retained earnings was referred to as "income surplus". The directors must determine from the financial statement of the company that there is retained earnings or income surplus as the first requirement for the recommendation for declaration of dividend. The definition of retained earnings is provided in sections 70 and 71 of Act 992. Section 70 of Act 992 defines reserves of a company and

¹¹⁷⁵ Frist Schedule of Act 992.

section 71 of Act 992 requires listed deductions to be made from reserves to obtain retained earnings. The sections provide:

“70. The reserves of a company with shares is the amount of money by which the assets of the company, other than unpaid calls and other sums of money payable in respect of the shares of the company and not including treasury shares, less the liabilities of the company, as shown in the accounts of the company prepared and audited in accordance with sections 127 to 142, exceed the stated capital of the company.”

“71. The retained earnings of a company with shares is the reserves, as defined in section 70, less the amounts of money attributable to

- (a) an unrealised appreciation in the value of an asset of the company, other than an appreciation in the value of an asset as would, under normal accounting principles, be credited to the income statement, unless the amount the appreciation has been transferred to stated capital; and*
- (b) a balance standing to the credit of the share deals account immediately before the ascertainment of the retained earnings.”*

Retained earnings is reverse minus items stated in section 71 of the Act. Reserve is the net assets of the company minus the stated capital. The net asset is the total asset minus the total liability. The value of the total assets does not include amounts owe on shares, which may be treated as company's receivables on shares, and value of treasury shares. Once the net assets exceed the stated capital, the difference is the company's reserves. The retained earnings is calculated by deducting from the reserve the unrealised appreciation on the value of assets and balance on the credit of the share deals account. But added is unrealised appreciation in the value of the assets of a company which under normal accounting principles is credited to the income statement unless transferred to stated capital.

The company must have retained earnings for the directors to recommend dividend.

Secondly, the directors must look to the future to determine that the payment of dividend will not affect the ability of the company to pay its debt when it is due for payment. Dividend will only be recommended when the directors are able to determine that in the event the recommended amount is declared and paid as dividend, the company will be able to pay its debt as the debts fall due. It does not mean the company should be debt-free prior to declaring dividend. The requirement is that, as and when the debts are due for repayment, the company is able to pay the debt after the payment of the dividend.

Once the two requirements are satisfied, that is there is retained earnings and the company will be able to pay its debt when the debt falls due even after payment of dividend that the directors intend

to propose, the directors may recommend to shareholders the amount for declaration as dividend. Section 76 of Act 992 provides that the shareholders cannot declare an amount that exceeds the amount recommended by the directors as dividend. The shareholders can declare an amount that is less or up to the recommended amount but not more. The declaration must be by ordinary resolution. The dividends declared must be paid within sixty days from the date of confirmation of dividend or the date that the dividend is due.¹¹⁷⁶ The registered constitution of the company may prescribe for payment of dividends without a declaration of dividends by the shareholders.¹¹⁷⁷ Thus, the registered constitution may provide that the directors have the power to pay dividends without shareholders' resolution once the payment will be in compliance with the distribution test.

For public companies, section 321 of Act 992 permits the directors, unless prohibited under the registered constitution, to pay to the shareholders interim dividends on account of dividends to be declared by the company in accordance with section 76, provided that such payment is in compliance with the distribution test under section 72(1) of the Act.

As noted earlier, the capital maintenance rule does not affect the lawful payment of dividends as the payment does not result in the reduction of the capital.

18.6 Unlawful payment of dividend

Any dividends paid contrary to the above principles is an unlawful payment of dividend. Payment of dividend will be unlawful in a number of instances including:

- (a) if not paid out of the retained earnings or profit;
- (b) if recommended in circumstances where it affects the ability of the company to pay its debt when due;
- (c) if the amount declared by the shareholders exceeds the amount recommended by the directors;
- (d) if the declaration is not by at least an ordinary resolution of the shareholders;
- (e) if recommended, declared or paid by a company limited by guarantee; or
- (f) if paid out of stated capital.

In any of the above instances, the dividends distributed to shareholders will be unlawful. Section 72 of Act 992 provides for consequences of such unlawful payment of dividends. Section 72 provides:

“(2) Where a payment, return or distribution is made in contravention of this section,

(a) every director of the company who is in default is jointly and severally liable to restore to the company the total amount of money

¹¹⁷⁶ Section 76(4) of Act 992.

¹¹⁷⁷ Section 76(5) of Act 992.

- by which the payment, return or distribution contravenes this section, with interest on that amount at the yearly interest rate of the ninety-one day government treasury bill;*
- (b) *unless, within twelve months, after the date of the payment, return or distribution, the total amount of money with interest on the payment, return or distribution is restored to the company by the directors in accordance with paragraph (a) of this subsection, every shareholder is liable to restore to the company, the amount of money received by the shareholder in contravention of this section; and*
- (c) *if the directors of the company make a restoration to the company in accordance with paragraph (a) of the subsection, they shall have a right to be indemnified by a shareholder who has received an amount of money knowing that it contravenes this section to the extent of the amount received by the shareholder with interest on that account at the yearly interest rate of the ninety-one day government treasury bill."*

Either the directors or shareholders are liable to refund the amount wrongly distributed to shareholders as dividend to the extent of the excess amount in relation to the amount that should have been paid as dividend. The directors are to refund the amount. Failing the return by the directors within twelve months after the payment of the dividend, the shareholders are liable to refund to the company the amount received unlawfully. The refund of the amount by the directors is to be done with interest based on the yearly interest rate of ninety-one day government treasury bill. However, no such requirement is imposed on refund of the amount unlawfully received by the shareholders. This means the shareholders are not required to refund the amount with interest. However, in the event directors refunded the amount, the shareholders are liable to indemnify the directors. The obligation on the shareholders to refund to the directors is based on proof that the shareholders received the amount with the knowledge that the payment was unlawful.

A company limited by guarantee which pays dividend in contravention to section 75(1) of the Act is liable to restore the dividend plus interest to the company.¹¹⁷⁸ The officers responsible for the default are liable to pay an administrative penalty to the Registrar.¹¹⁷⁹ Section 72 of the Act also provides for preventive measures to avoid the payment of the unlawful dividend. Section 72 of Act 992 provides:

"(3) A shareholder, an officer or a creditor of the company or the Registrar may apply to the Court for an injunction restraining a company from paying a dividend or from making a return or distribution in contravention of this section or for an order for restoration in accordance with subsection (2).

¹¹⁷⁸ Section 75(2) of Act 992

¹¹⁷⁹ Ibid.

(4) An application by a shareholder or creditor shall be made in a representative capacity on behalf of the shareholder or the creditors and the other shareholders or creditors of the company and section 205 shall apply.”

A shareholder, an officer or a creditor of the company or the Registrar may apply for an injunction against the payment of dividend as a preventive measure. The action by a shareholder or creditor must be in a representative capacity.

Lawful payment of dividend does not lead to reduction of stated capital as the dividends are not paid out of capital. Payment of unlawful dividend may, however, affect stated capital, particularly where the breach of the requirements relates to payment of dividend where the company did not have retained earnings for the financial year or period under consideration for which the dividend is paid.

18.7 Unclaimed dividend

In the event a dividend lawfully recommended by directors, declared by ordinary resolution of shareholder and paid remains unclaimed from three months, the law requires the company to open an interest bearing account and pay the unclaimed dividend into the account.¹¹⁸⁰ If the amount remained unclaimed for twelve months after that period, the company must pay the amount to the Registrar.¹¹⁸¹ The Registrar is required to open an interest bearing account with the approval of the Board of the company for the safekeeping of the unclaimed dividend.¹¹⁸² The company at the time of paying the amount to the Registrar must give notice to the respective shareholders or the estate of the shareholders of the payment of the unclaimed dividend to the Registrar.¹¹⁸³ The notice must be sent to the last known address by the company. The shareholder or the estate of the shareholder may upon satisfactory proof claim the dividend.¹¹⁸⁴ The Registrar is also required to publish the details of shareholders with unclaimed dividend annually in the Companies Bulletin and a daily newspaper of wide circulation.¹¹⁸⁵ The Registrar is to keep the unclaimed dividend for seven years.¹¹⁸⁶ If the dividend remains unclaimed for seven years, the Registrar is to pay fifty percent to the Consolidated Fund and the remaining is to be donated or applied for the purpose of investor education, research, entrepreneurial development and advancement of company law.¹¹⁸⁷

¹¹⁸⁰ Section 73(1) of Act 992.

¹¹⁸¹ Section 73(2) of Act 992.

¹¹⁸² Section 73(4) of Act 992.

¹¹⁸³ Section 73(6) of Act 992.

¹¹⁸⁴ Section 73(7) of Act 992.

¹¹⁸⁵ Section 73(8) of Act 992.

¹¹⁸⁶ Section 74(1) of Act 992.

¹¹⁸⁷ Section 74(2) of Act 992.

18.8 Capitalisation issue and non-cash dividends

The capital maintenance rule prohibits the reduction in stated capital. The rule, however, permits actions that may increase the stated capital. Under section 68(1) of Act 992, capital is defined to include retained profit. That is, *“the total amount which the company by special resolution resolves to transfer to stated capital from reserves”*. In that respect, the Act permits the company to retain profit that may otherwise be distributed as dividend, and rather issue shares, which are deemed to be paid for, to the shareholders entitled to the dividend. In other words, share issued by the company must be paid for. However, an exception created is where the company retained profits that could otherwise be distributed as dividends but issue shares to the shareholders in place of the cash dividend. The shares are issued in proportion to the shareholding of the shareholders or the rights attached to the shares. In other words, lawful dividend may be paid as cash dividend or as a non-cash dividend, that is in shares.

Section 77 of Act 992 deals with capitalisation issue and non-cash dividend. Section 77 of the Act provides:

“(1) When a company resolves to transfer a sum of money from reserves to stated capital pursuant to paragraph (c) of subsection (1) of section 68, the company, on the recommendation of the directors may by the same or subsequent special resolution, resolve that unissued shares in the company be issued and credited as fully paid to the members who would have been entitled to receive the sum of money had it been lawfully distributed by way of dividend and in the same proportions so that the sum of money so transferred to stated capital shall be deemed to be paid, otherwise than in cash, on the shares.

(2) An issue under subsection (1) shall be referred to as a capitalisation issue.”

Capitalisation issue occurs when a number of conditions are satisfied. First, the company must resolve to retain profit by transferring the amount from reserves to stated capital account. The resolution must be by a special resolution of the shareholders pursuant to a recommendation by the directors. Second, the shareholders by that same special resolution or subsequent special resolution, still on the recommendation of directors, resolves that unissued shares of the company be issued to shareholders who would have been entitled to the dividend in proportion to the dividends the shareholders would have received. The issued shares are treated as fully paid for by the shareholders. Capitalisation issue operates in the nature of set-off, where the amount that should have been received by the shareholders as dividend is used to offset the amount the shareholders would have paid for the new shares issued by the company. It should be noted that the resolution for retaining the profit and that of issuing the shares, whether one resolution or two separate resolutions, are special resolutions. The resolutions are passed based on the recommendation of the directors. In addition, the shares are issued in proportion to the shareholding of the shareholders.

That is, the same way the dividend would have been shared based on the shareholding, the unissued shares are issued to the shareholders in the same proportion. The shares issued are deemed to be paid for. Such payment however is not treated as payment in cash. However, even though not treated as payment in cash, the requirements for non-cash payment for the shares of a company is not applicable.¹¹⁸⁸

Section 77 of Act 992 also permits the company to set-off retained earnings that may have been lawfully distributed as dividend to shareholders against unpaid liability on the shares held by the shareholders. Subsection (3) of section 77 of Act 992 provides:

“(3) A company, on the recommendation of the directors, may resolve that a sum of money standing to the credit of the retained earnings of the company, and which could have lawfully been distributed by way of dividend shall be applied, on behalf of the members who would have been entitled to receive same if it had been distributed by way of dividend, in paying up amounts of money for the time being unpaid on the shares held by the members, and that sum shall be deemed to have been paid on a call made on those shares and shall be transferred to stated capital pursuant to paragraph (a) of subsection (1) of section 68.”

The difference between this set-off and that of capitalisation issue is that no additional shares are issued to the shareholders. The set-off is against the existing liability of the shareholders on shares held by the shareholders which the shareholders have not paid or fully paid for. The implementation is by a resolution passed by the shareholders based on a recommendation by the directors. The section did not mention a special resolution, so the resolution is by ordinary resolution of the company. The amount transferred to the stated capital is treated as payment for the existing liability on the shares on a valid call being made by the company.

The Act also permits a company upon declaration of dividend to direct, upon recommendation of directors, that payment wholly or partly be made by distribution of securities for money of fully paid shares or debentures of any other body corporate, or fully paid debentures of the company of an amount equivalent to dividend directed to be paid.¹¹⁸⁹ The section thus permits securities in other body corporates to be issued to shareholders in place of dividend, or the dividend converted to debentures in the company declaring dividend. In the event that occurs, directors are to give effect to the resolution in addition to taking any of the steps stated in subsection (5) of section 77 of Act 992. The subsection provides:

“(5) The directors shall give effect to the resolution and

¹¹⁸⁸ Section 45(3) of Act 992.

¹¹⁸⁹ Section 77(4) of Act 992.

- (a) may make provision that they think fit for the case of the shares, debentures, or securities for money becoming attributable in fractions,*
- (b) may issue fractional certificates or, in the case of distribution in accordance with subsection (4), but not in the case of a capitalisation issue in accordance with subsection (1), and*
- (c) may sell the shares, debentures or securities for money represented by those fractions and distribute the net proceeds of the sale among the members otherwise entitled to those fractions in due proportion.”*

No consent is required from the concerned individual for the allotment of the shares or debentures.¹¹⁹⁰ The transfer of the shares or debentures in any other body corporate can be signed on behalf of the transferee by a person nominated by the directors, and the signature shall be effective and binding on all the members.¹¹⁹¹ This may be the case if a shareholder to whom the transfer is to be effected refused to sign the transfer.

The critical element of capitalisation issue in relation to the capital maintenance rule is that even though no money is paid for the shares issued to shareholders, the stated capital is not reduced. Rather the stated capital is increased by the transfer from the reserve to the stated capital account. Capitalisation issue, therefore, does not breach the capital maintenance rule.

18.9 Return or distribution of assets

Distribution does not only relate to dividends – cash dividends or capitalisation issues. A company may undertake distribution by return of assets to the shareholders. This may be done by a company that is a going concern or in winding up. In liquidation proceedings – official or private – the net assets, which are the assets left after the liquidator has satisfied all the liabilities of the company, is distributed among the shareholders in proportion to their shareholding or the rights attached to the shares.¹¹⁹² This does not breach the capital maintenance rule as the net assets are distributed to shareholder after satisfaction of the liabilities of the company. A going concern company may also return assets to the shareholders. This may be done with or without a court order. The capital maintenance rule requires that return of assets to shareholders does not result in the reduction of stated capital required for the business of the company and satisfaction of liabilities to the creditors. As such, the return of assets must be strictly in accordance with the provisions of the Companies Act, 2019.

¹¹⁹⁰ Section 77(6) of Act 992.

¹¹⁹¹ Section 77(6) of Act 992.

¹¹⁹² See chapter 24.0 on Liquidation.

Section 72 of Act 992, which deals with payment of dividend also deals with return or distribution of assets of the company to shareholders of the company. Section 72 of the Act provides:

“(1) Except in a winding up, a company shall not pay a dividend to the shareholders of the company or, except in accordance with sections 78 to 82 make a return or distribution of any of the assets of the company to the shareholders of the company unless, the company has complied with the distribution test.”

The section subjects the return or distribution of assets to the distribution test. First, a company shall not pay a dividend to shareholders of the company unless the company has complied with the distribution test. Second, unless being done in accordance with sections 78 to 82, a company cannot make a return or distribution of any of the assets of the company to the shareholders of the company unless the company has complied with the distribution test. In both cases, the distribution test is not applicable when the company is winding up. The subsection thus permits return or distribution of the assets of the company to the shareholders. However, the subsection requires that a return or distribution of assets of the company to the shareholders of the company must only be legally done in compliance with the distribution test. The distribution test does not however apply to return or distribution of assets of the company in accordance with sections 78 to 82 of the Act or in the winding up of the company. In any other case, the company must comply with the distribution test prior to return of assets to shareholders.

As noted earlier, the ‘distribution test’ provides for two critical requirements to be satisfied prior to the recommendation of dividend, return or distribution of assets by directors. Firstly, there must be ‘retained earning’. The value of the assets to be returned must not be more than the retained earnings of the company prior to the return of the assets. The distribution test provides ***“the amount or value of any payment, return or distribution made by the company does not exceed its retained earnings immediately before the making of the payment, return or distribution.”*** The directors must have looked at the financial statement immediately prior to undertaking the return to ensure the value of the assets to be returned to shareholders does not exceed the retained earnings of the company immediately before the return of the asset. If there is no retained earnings, there cannot be return of assets except in accordance with sections 78 to 82 of the Act or except in the winding up of the company.

Secondly, the directors must look to the future to determine that the return of assets will not affect the ability of the company to pay its debts when the debts fall due. The assets of the company can only be returned to shareholders when the directors are able to determine that the return will not affect the ability of the company to pay its debts as the debts fall due. This does not mean that the company has no debt. The requirement is that as and when the debts are due for repayment, the company is able to pay the debts.

Once the distribution test is complied with, the company can undertake the return of the assets of the company to the shareholders. It is the responsibility of the directors to ensure the company complies with the distribution test prior to the return of the assets to the company. Even though not expressly stated in the Act, it is suggested that even though the company may have satisfied the distribution test, the company must pass a resolution that resolves to return or distribute the assets prior to the actual return or distribution of the assets to the shareholders of the company.

The consequences for unlawful distribution or return of assets are the same as that of unlawful payment of dividend as prescribed under section 72(2) of Act 992. Section 72(2) and (3) of the Act permit a shareholder, an officer or a creditor of the company or the Registrar to take preventive actions to prevent the unlawful distribution or return of assets to shareholders of the company.

18.9.1 Return of assets with court order

Sections 78 to 82 of Act 992 deal with distribution or return of assets with the approval of the court, which according to sections 72 and 78(4) of the Act does not need to comply with the distribution test. Section 78 of Act 992 provides as follows:

- “(1) Subject to the confirmation by the Court, a company limited by shares may, by special resolution, ... (c) resolve to pay or return to the shareholders any of the assets of the company which are in excess of the requirements of the company;
(2) A resolution under subsection (1) shall in this Act be referred to as a resolution requiring confirmation.”*

Paragraph (c) of subsection (1) of section 78 of the Act permits a company limited by shares by special resolution to resolve, subject to approval by the court, to return assets of the company which are in excess of the requirement of the company to the shareholders. A company limited by guarantee cannot undertake a return of assets to the members as this is prohibited by section 75 of Act 992. There is no prohibition on return of assets to shareholders of an unlimited company. The requirements in section 78(1) of Act 992 are restricted to companies limited by shares.

The assets to be returned or distributed to the shareholders of the company must be assets that are in excess of what is required by the company limited by shares. The company cannot, therefore, return or distribute assets that are required for the business of the company.

Section 79(1) of Act 992 requires that *“(1) Where a company passes a resolution requiring confirmation, the company may apply to the Court for an order confirming the resolution.”* The application must be made to the High Court.¹¹⁹³ The lack of compliance with the distribution test, which is a safeguard for the purpose of the capital maintenance rule, is mitigated by the right of

¹¹⁹³ First Schedule of the Companies Act, 2019 provides that *“‘Court’ means the High Court”*.

creditors to oppose the application for confirmation of the resolution to return assets to the shareholders of the company. Section 79 of the Act provides for the application to the High Court and processes the Court must follow in the event a creditor opposes the application. Section 79 of Act 992 provides:

“(1) Where a company passes a resolution requiring confirmation, the company may apply to the Court for an order confirming the resolution.

(2) Where the resolution requiring confirmation involves ... payment or return to any shareholder, ... the following provisions shall have effect unless, having regard to the special circumstances of the case, the Court otherwise directs:

(a) a creditor of the company who at the date fixed by the Court is entitled to a debt or claim which if that date were the commencement of the winding up of the company, would be admissible in proof against the company, is entitled to oppose the confirmation;

(b) the Court shall settle a list of creditors so entitled to oppose, and for that purpose shall ascertain, as far as possible without requiring an application from a creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days which creditors not entered on the list are to claim to be so entered, or are to be excluded from the right of opposing the confirmation; or

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined, does not consent to the confirmation, the Court may dispense with the consent of that creditor on the company securing payment of the debt of that creditor or claim by appropriating as the Court may direct, the following amount:

(i) if the company admits the full amount of the debts or claim, or though not admitting, it is not willing to provide for the debt or claim, then the full amount of the debt or claim, or

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015).

- (3) The Court may refer the application to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the resolution for reduction and to report on the resolution to the Court.**
- (4) The remuneration of the reporters shall be fixed by the Registrar and the expenses of the investigation shall be borne by the company."**

Creditors have the right to oppose the application for confirmation of the resolution to return or distribute assets of the company to the shareholders of the company. The creditors entitled to oppose are the creditors that if the company were to commence winding up on that date, their debts would be admissible in proof against the company. The court must settle a list of the creditors through enquiry without necessarily requiring an application to be made. The consent of such creditors must be obtained prior to the confirmation of the resolution unless the debt of the creditor is discharged or not determined. If the consent is not obtained, the Court may dispense with the consent of the creditor if the company secures the payment of the debt of that creditor or the claim, up to the full amount of the debt or the amount that the Court may determine. The involvement of the creditors in the process ensures that the interest of the creditors is not adversely affected by the return of the assets to the shareholders.

The Court may confirm or reject the application or may confirm the application subject to conditions prescribed by the Court. Section 80 of Act 992 provides:

"The Court may make an order confirming the resolution on the terms and conditions specified by the Court, if satisfied,

- (a) with respect to every creditor of the company who under section 79 is entitled to oppose, that the consent of that creditor has been discharged or secured.*
- (b) That sections 78 and 79 have been duly complied with, and*
- (c) That the resolution requiring confirmation is fair and equitable."*

The resolution takes effect when registered by the Registrar and published in the Companies Bulletin.¹¹⁹⁴

The capital maintenance rule requires the capital of the company to be used exclusively for the business of the company and satisfaction of liabilities to creditors and supplies. Compliance with the distribution test in the return of the assets without court approval ensures creditors debt are paid by the company when due. Since the distribution test is not required in distribution or return of assets with court approval, the inbuilt mechanism where the court examines the return of the assets and the right of creditors to oppose the application ensure that the interest of creditors, who are to look up to the stated capital for the payment of their debt, is protected.

¹¹⁹⁴ Section 81 of Act 992.

The choice of a company to return assets of a company to the shareholders with or without court approval depends on whether the company is able to satisfy the distribution test and the nature of the assets to be returned, particularly whether the assets are excess assets. For example, if the value of the assets is more than the retained earnings, then the distribution or return of the assets cannot be done without court approval. If the company has no retained earnings for the period, then the return of the assets can only be by a special resolution of the company confirmed by the court.

18.10 Reduction of stated capital

The capital maintenance rule prohibits reduction of stated capital unless permitted by statute.¹¹⁹⁵

In *Hill v. Permanent Trustee Co of New South Wales Ltd*¹¹⁹⁶, the Privy Council per Lord Russell stated @ pg. 731 as follows:

“A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called ‘dividend’ or ‘bonus’, or any other name, it still must remain a payment on division of profits.”

Act 992 permits lawful reduction of capital in a number of instances. An unlimited company is permitted to reduce its stated capital by ordinary resolution¹¹⁹⁷ whilst a company limited by shares is permitted to reduce stated capital subject to the approval of the court¹¹⁹⁸. Capital may also be deemed reduced where proceed from fresh issue of shares is used to redeem redeemable preference shares.¹¹⁹⁹

Section 69 of Act 992 deals with permitted reduction of stated capital notwithstanding the capital maintenance rule. Subsection (1) of section 69 of the Act deals with the instance where proceeds from fresh issue of shares used to redeem redeemable preference share is deemed to be a reduction of stated capital. This is treated in more detail under the chapter on permitted transaction on shares. The point to note here is that the proceed from the issue of shares are to be added to stated capital and thus increased the stated capital. However, if the proceed is used to redeem redeemable preference shares, it is not added to the stated capital and thus does not increase the capital. If the notional addition was done prior to the use of the proceed to redeem the shares, it is essentially a

¹¹⁹⁵ Trevor v. Whitworth (1887) App Cas 409.

¹¹⁹⁶ [1930] AC 720.

¹¹⁹⁷ Section 69(2) of Act 992.

¹¹⁹⁸ Section 69(3) of Act 992.

¹¹⁹⁹ Section 69(1) of Act 992.

reduction of the stated capital, hence is deemed to be a reduction of the stated capital according to section 69(1) of Act 992.

The section also permits direct reduction of stated capital in two instances. An unlimited company is permitted to reduce the stated capital by ordinary resolution. A company limited by shares is permitted to reduce stated capital by a special resolution confirmed by the court. Section 69 of Act 992 provides:

- “(2) An unlimited company may, reduce its stated capital by ordinary resolution.
(3) Subject to subsections (1) and (2) and to section 66, a company may not reduce its stated capital except in accordance with sections 78 to 82.”*

Subsection (2) permits an unlimited company, by an ordinary resolution, to reduce its stated capital. There is no requirement of court approval or consent from creditors for an unlimited company to reduce stated capital. Even though, no specific role is provided for directors in the reduction of stated capital, as the organ responsible for determination of the capital requirement of the company as part of the powers of the directors to manage the business of the company, it stands to reason that the requirement of reduction of the capital may be exercised based on the recommendation of the directors.

Even though an unlimited company is permitted to reduce its stated capital by ordinary resolution, such reduction does not defeat the capital maintenance rule because of the unlimited liability attached to the shares. The shareholders have unlimited liability¹²⁰⁰ and can be called upon to satisfy the liability of the company in the event of winding up if the assets of the company are not enough to satisfy the liability.¹²⁰¹ Thus, notwithstanding the reduction of the stated capital of the company, shareholders are ultimately liable in the event the company is unable to satisfy its liability and is to be wound up.

The second permitted reduction is in relation to a company limited by shares. Subsection (3) of section 69 of the Act permits the reduction to be done with court approval under sections 78 to 82 of the Act. Section 78 of Act 992 provides:

- “(1) Subject to confirmation by the Court, a company limited by shares may, by special resolution, (a) reduce the stated capital of the company in anyway;
(2) A resolution under subsection (1) shall in this Act be referred to as a resolution requiring confirmation.”*

A company limited by shares can reduce the stated capital notwithstanding the capital maintenance rule by complying with sections 78 to 82 of the Act. Section 78(1) of the Act requires the company to

¹²⁰⁰ Section 7(2)(c) of Act 992.

¹²⁰¹ Section 40 of Act 992.

pass a special resolution which resolves that the stated capital of the company should be reduced. The resolution passed is subject to confirmation by the court. Under section 79(1) of the Act, upon passing the special resolution, the company must apply to the court for the confirmation of the resolution. The section permits creditors, if so permitted by the court, to oppose the application for confirmation of the resolution. The court upon application by the company may confirm the resolution subject to conditions.¹²⁰² The resolution takes effect when registered by the Registrar and published in the Companies Bulletin.¹²⁰³

The requirement of application to the court by a company limited by shares permits creditors to intervene and oppose the confirmation if the return will adversely affect the ability of the company to satisfy liabilities owed to the creditors. Unlike in the instance of return or distribution of excess assets of the company to shareholders, in the application for confirmation of resolution for reduction of stated capital by the company, creditors cannot as of right intervene. The intervention is at the discretion of the court. The subjection of the resolution to confirmation by the court allows the court the opportunity to examine the reason for the reduction and likely consequences of the reduction prior to confirming the resolution for reduction of stated capital. It is unlikely the court upon such examination will approve the resolution if it is determined that the reduction will have an adverse effect on the business of the company and deprive creditors of payment.

The creditors have the right to oppose the application for confirmation of the resolution to reduce the stated capital of the company. The creditors permitted to oppose the application are the creditors that if the company were to commence winding up on that date, their debts will be admissible in proof against the company. Where a creditor is permitted to oppose the application, the court must follow the same process it would have followed as a creditor opposing confirmation of the resolution to return or distribute excess assets to the shareholder, as explained above.

The requirements for lawful reduction of stated capital, particularly subjecting it to confirmation of the court, is to maintain the integrity of the capital maintenance rule. The rule dictates that capital should not be reduced but maintained for the business of the company and satisfaction of liabilities of creditors. On the other hand, there may be genuine reasons for the reduction of stated capital which may not adversely affect the aim of the capital maintenance rule. The rationale of the requirements stated under the Act, particularly the requirement of confirmation by the court, is to ensure the balance between the need to uphold the goal of capital maintenance rule and the genuine business reason to reduce stated capital.

The next chapter deals with the last concept of the capital maintenance rule which is prohibitions of transactions.

¹²⁰² Section 80(2) of Act 992.

¹²⁰³ Section 81 of Act 992.

19.0 PROHIBITED TRANSACTIONS IN SHARES

19.1 General prohibitions

Capital maintenance rule prohibits reduction in stated capital. The reference is to the stated or legal capital which relates to items including considerations received for the issue of shares of the company. As such, there is a direct correlation between what a company does with its shares and the stated capital. In view of this, one of the concepts of the capital maintenance rule is to prohibit stated transactions in the shares of a company that may have the effect of reducing stated capital. The prohibitions are provided in section 58 of Act 992. Section 58 of Act 992 provides:

- “(1) Except as provided in this Act, a company shall not,*
- (a) alter the number of its shares or the amount of money remaining payable on those shares;*
 - (b) release a shareholder or former shareholder from a liability on the shares;*
 - (c) provide financial assistance, directly or indirectly, for the subscription or purchase of the shares of the company or the shares of its holding company; or*
 - (d) acquire, by way of purchase or otherwise, any of its issued shares or any shares of its holding company.”*

From section 58(1) of Act 992, there are five prohibited transactions in shares that a company is not permitted to engage in. The five prohibitions are that:

- (a) a company must not alter the number of its shares;
- (b) a company must not alter the amount of money remaining payable on its shares;
- (c) a company must not release a shareholder or former shareholder from liability on its shares;
- (d) a company must not provide direct or indirect financial assistance for the purchase or subscription of its shares or shares of its holding company; or
- (e) a company must not acquire by way of purchase or otherwise its issued shares or shares of its holding company.

The provision, however, starts with *“Except as provided in this Act”*, which means the Act provides for some exceptions to the prohibitions. It is, therefore, important that notwithstanding the prohibitions, one must look to other sections of the Act to determine the exceptions to the prohibited transactions. A review of the Act indicates there are exceptions to each of the prohibited transactions in shares. The scope of the prohibitions and the exceptions are explained in this chapter.

The consequences of engaging in a prohibited transaction, which does not fall into any of the exceptions under the Act, is provided in section 58 of Act 992. The section provides:

- “(4) In the event of a breach of this section,***
- (a) if the breach is of paragraph (a) or (b) of subsection (1), the purported alteration or release is void and every officer of the company who is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units;***
 - (b) if the breach is of paragraph (c) and (d) of subsection (1), then,***
 - (i) knowledge of the breach, voidable by the company and a payment made by the company in respect of that transaction is immediately repayable with interest at the yearly interest rate applicable to the ninety-one day government treasury bill or a higher rate that the Court may order, and***
 - (ii) whether or not the transaction is avoided, every officer of the company who is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units or twice the amount of money of a provision or payment made by the company in respect of the transaction, whichever is the greater.”***

Per the section, if the company alters the number of its share, alters the liabilities on the shares or releases a shareholder from liability in breach of the prohibition, the alteration or release is void. Secondly, every officer of the company who is in default is liable to pay an administrative penalty to the Registrar. If the breach is in relation to providing financial assistance for the acquisition of its shares or shares of its holding company or acquiring its shares or shares of its parent company, which assistance or acquisition is not permitted by the Act, the provision of the financial assistance or the acquisition is voidable by the company. Since the provision of financial assistance by the company for the acquisition of its share or that of its holding party, or the acquisition of the company of its shares or that of its holding company involves a third party, the Act does not treat the transaction as void, but voidable. It will only be voidable if the third party has knowledge of the breach. This may be due to the presumption of regularity which is to protect third parties. In the event the transaction is declared voidable, the Act requires that the payment made by the company in providing the financial assistance or acquiring the shares must be refunded to the company with interest at the yearly interest rate of the ninety-one day government treasury bill or a higher rate determined by the court. In addition, officers involved in providing financial assistance or acquiring the shares of the company or its holding company in breach of the prohibition are liable to pay an administrative penalty or twice the amount of financial provision made, whichever is greater, to the Registrar.

19.2 Alteration of the number of shares

Section 58(1)(a) of Act 992 provides that a company is prohibited from altering the number of its shares. A company is registered with authorised shares, which is the total number of shares that the company can issue. The section prohibits alteration of the number of the authorised shares of the company. The exceptions to this prohibition are provided in section 59(1) of Act 992. Under the section, a company is permitted to increase or decrease the number of its authorised shares. Section 59 of Act 992 provides:

“(1) Subject to subsection (3), a company may

- (a) increase the number of the shares of the company by creating new shares; or*
- (b) reduce the number of the shares of the company by cancelling shares which have not been taken or agreed to be taken by a person or by consolidating its existing shares, whether issued or not, into a smaller number of shares.”*

The subsection, therefore, permits, notwithstanding section 58(1)(a) of the Act, a company to alter the number of its authorised shares either by increasing or reducing the number of shares. The increase in the number of shares is done by creating new shares. For the increase of the number of shares by creating new shares, a company with a registered constitution must alter the registered constitution by passing a special resolution to create new shares to increase its authorised shares since the alteration of shares must be effected by alteration of the registered constitution.¹²⁰⁴ For a company without a registered constitution, the default constitution is deemed to be the constitution of the company.¹²⁰⁵ Incorporated in the default constitution is the number of shares with which the company is registered which is stated in the application for registration under section 13(2)(n)(ii) of the Act.¹²⁰⁶ Alteration in the number of shares of such company must also be done by special resolution which alters the number of shares deemed to be incorporated in the default constitution pursuant to section 26(5) of the Act. Alteration of shares by increasing the number of shares by creating new shares must therefore be done by a special resolution which amends the constitution, registered or default, of the company.

An increase in the number of shares of a company does not breach the capital maintenance rule. In fact, by increasing the number of authorised shares, there are more shares at the disposal of the company to issue to increase the stated capital. The increase of the number of authorised shares will, therefore, lead to an increase in the stated capital.

¹²⁰⁴ Section 30 of Act 992.

¹²⁰⁵ Section 25 of Act 992.

¹²⁰⁶ Section 26(5) of Act 992.

Reduction of the number of shares may be done in two ways. First, the reduction in the number of shares may be done by the cancellation of shares which have not been taken or agreed to be taken. Shares that can be cancelled are the unissued shares that there is no agreement to take shares by any person. Unissued shares that there is an agreement to take those shares in the future cannot be cancelled. That is, even though the unissued shares have not been issued by the company, there is an agreement between the company and a third party that the third party will acquire the unissued shares in the future. The cancellation will result in the reduction of the authorised shares. In that respect, it must also be done by a special resolution which amends the constitution of the company, whether registered constitution or default constitution. By limiting the ability of the company to cancel only the unissued shares to which there is no agreement to take those shares, the stated capital is not affected since the stated capital is based on issued shares.

Secondly, the number of shares may be reduced by the consolidation of the number of shares of a company. Consolidation of the number of shares refers to combining, bringing together or merging a number of shares into a smaller number of shares. For example, consolidating one thousand original shares into just one new share. The consolidation results in the reduction of the total number of shares. There are a number of reasons a company may consolidate its share. For example, a company may consolidate its shares where the price per share is difficult to calculate in relation to the stated capital where the division of stated capital over the number of the issued shares result in such decimal figure which is less than the smallest denomination of a currency. The consolidation of the number of shares of the company must be done by special resolution since the effect is the amendment of the constitution of a company, either registered or default constitution.

In order to ensure that the consolidation does not affect the stated capital, the law requires consolidation of the amount paid on the shares, the unpaid liability and fixed amount due by way of dividend or repayment relating to the shares. Section 59(2) of Act 992 provides that:

“(2) On a consolidation of shares

(a) the amounts of money paid,

(b) an unpaid liability on the shares, and

(c) a fixed sum of money by way of dividend or repayment to which the shares were entitled shall also be consolidated.”

The consolidation must, therefore, relate to all amounts attributable to the shares as the amount paid for the shares, the amount remaining payable, a fixed sum payable in any distribution, or the amount at which the shares are redeemable.

A critical requirement for alteration of the number of authorised shares of a company, whether by increasing or reducing the number of shares is a special resolution. The special resolution will be

required since the alteration will result in the alteration of the authorised shares stated in the registered constitution or deemed stated in the default constitution by reference to the application under section 13(2)(n)(ii) of Act 992.

A third option for alteration of authorised shares is by reducing the number of shares by a special resolution approved by the court under section 78 of the Act. Section 78 of Act 992 provides *“(1) Subject to confirmation by the Court, a company limited by shares may, by special resolution, (d) alter the constitution of the company by cancelling any of the shares of the company.”* The cancellation under the subsection refers to any of the shares of the company which may include issued or unissued shares. The cancellation must be done by a special resolution and the special resolution must be confirmed by the High Court for the special resolution to take effect.

One other exemption relating to alteration of shares is alteration by cancellation when a company limited by shares converts to a company limited by guarantee under section 9(1)(b) of Act 992. Under the provision, a requirement for conversion is that all the shareholders must voluntarily surrender to the company the shares of the shareholders held immediately before the conversion. The shares surrendered is required to be cancelled prior to the conversion. Section 9(3) provides that from the date stated on the new certificate issued, *“the shares in the company shall be validly surrendered and cancelled despite the provisions of section 58”*. This is permitted notwithstanding section 58 of the Act. In view of this, section 58(3) of the Act provides that *“(3) Subsection (1) does not prohibit a company from voluntarily acquiring its own shares on the conversion of the company to a company limited by guarantee in accordance with section 9.”* A company is thus allowed to acquire its own shares and alter the shares by cancellation for the purposes of converting from a company limited by shares to a company limited by guarantee.

19.3 Alteration of amount remaining payable on shares

Section 58(1)(a) of Act 992 prohibits a company from altering the amount of money remaining payable on those shares. The essence of the prohibition is not to breach the capital maintenance rule by reducing the stated capital through reducing the amount that shareholders are liable to pay for the shares held by the shareholders. The reduction will mean monies that should increase the stated capital when paid, will no longer be payable to the company. A shareholder thus continues to be liable for the unpaid liability on the shares issued to the shareholder and the liability transfers or transmit with the shares.¹²⁰⁷ The shareholder may be called upon to pay the liability when the company is a going concern or when winding up.¹²⁰⁸ In addition, in order to be fair to the shareholders as well, the company is not to increase the liability of shareholders by increasing the

¹²⁰⁷ Section 40 of Act 992.

¹²⁰⁸ Section 40(2) and (3) of Act 992.

amount the shareholders are liable to pay to the company. The subsection, therefore, prohibits any increase or reduction of the amount remaining payable on shares.

However, there may be instances that it may be prudent for the company to write off liability on shares. One instance is where the company is unlikely to recover the outstanding payment from the shareholders. The Act in section 78(1) permits a company to *“extinguish or reduce the unpaid liability on the shares of the company”*. This is however subject to a special resolution passed by the company which must be confirmed by the High Court.¹²⁰⁹ In order not to undertake the reduction of unpaid liability to the detriment of creditors who must look to the total stated capital for payment, Act 992 permits creditors to oppose the application for confirmation of the resolution.¹²¹⁰ The resolution to reduce or extinguish unpaid liability is only effective if the High Court makes an order confirming the resolution and the order and minutes approved by the court showing the new stated capital of the company, number of authorised shares and issued shares of each class, and amount deemed to be paid and the unpaid liability on the issued shares are registered by the Registrar in the Companies Bulletin.¹²¹¹

A company can also indirectly alter the amount remaining payable on its shares through the process of forfeiture if permitted by the constitution of the company. A shareholder who fails to pay for the shares when payment is due or a call is made can have the shares forfeited due to unpaid liability. Section 61(3) of Act 992 provides that *“(3) A company may forfeit the shares issued with an unpaid liability for non-payment of the sums of money due and payable on those shares.”* Once the shares are forfeited and sold to other persons, the amount remaining payable, that is an unpaid liability, ceases to be payable by the original shareholder. The shareholder does not need to pay for the forfeited shares. A company may also have a lien over the shares for unpaid liability on the shares. The lien may be exercised in accordance with section 105 of the Act. The section permits the company in the exercise of the lien to sell shares with unpaid liability to any other person and recover the unpaid liability on the shares from the purchase price. The purchaser then becomes the new shareholder.

For the process under section 78(1) of the Act, the shareholder continues to hold the shares, whilst for the processes of alteration under sections 61(3) and 105 of the Act, the shares are compulsorily taken from the shareholder. As indicated above, there are inbuilt mechanisms to ensure compliance with the capital maintenance rule in both instances. In the exercise of the right of forfeiture, the shareholders have failed to pay for the shares and the company compulsorily takes the shares. The shares are kept in treasury as treasury shares. This has no effect on the stated capital. In extinguishing or reducing the liability on the shares under section 78(1) of the Act, the creditors of the company

¹²⁰⁹ Section 78 of Act 992.

¹²¹⁰ Section 79(2) of Act 992.

¹²¹¹ Section 80 of Act 992.

have the right to object to the confirmation of the special resolution by the Court. Through the court process, there is mechanism to ensure the liabilities are not reduced or extinguished to the detriment of the creditors.¹²¹²

19.4 Release of shareholder from liability

Section 58(1)(b) of Act 992 prohibits a company from releasing a shareholder or former shareholder from liability on the shares. Section 40 of Act 992 states the liability of past and present shareholders for the shares of the company. Once there is an unpaid liability on the shares, the liability will transfer with the shares provided the past shareholder remains liable for the unpaid liability when the company is winding up if the present shareholder is unable to pay the liability and not more than a year has elapsed since the transfer of the shares.¹²¹³ The liability on the shares depends on whether the company is one with limited liability by share or unlimited. If limited, the liability is up to the amount unpaid on the shares.¹²¹⁴ Under section 58(1) of Act 992, a company cannot release a shareholder or former shareholder from any liability on the shares.

However, as indicated in respect of an alteration of the amount remaining payable on the shares, a company may release a shareholder of liability on the shares either under section 78(1)(b) of Act 992 by extinguishing or reducing the unpaid liability on the shares by resolution subject to confirmation of the High Court, or through forfeiture under section 61(3) of Act 992, or through the exercise of a lien under section 105 of Act 992. The exercise of a lien extinguishes the liability relating to the shareholder even though the liability is recovered from the purchaser who then becomes the new shareholder. The shareholder will continue to hold the shares if the liability on the shares is reduced or extinguished under section 78(1)(b) of Act 992. However, whilst the forfeiting of the shares will release the shareholder from liability¹²¹⁵ under section 61(3) of Act 992, the shareholder will lose the shares to the company. The holder of unpaid shares over which a lien is exercised under section 105 will also cease to be the holder of such shares. The same inbuilt mechanisms as discussed in relation to alteration of liability of a shareholder by reduction is applicable in this instance to ensure compliance with the object of the capital maintenance rule.

¹²¹² Section 79 of Act 992.

¹²¹³ Section 40(4) of Act 992.

¹²¹⁴ Section 40(4)(c) of Act 992.

¹²¹⁵ The constitution of the company may provide that the person remains liable until the company is able to sell the shares and recover the amount from the new shareholder. This is the position in the default constitutions in Second and Third Schedules of Act 992.

19.5 Prohibition of financial assistance

A company is prohibited from acquiring its own shares or the shares of its holding company.¹²¹⁶ In addition, the company is prohibited from financially assisting another person to acquire the shares of the company or the shares of its holding company. Section 58(1)(c) of Act 992 prohibits a company from providing direct or indirect financial assistance towards the acquisition of its shares or the shares of its holding company. A company thus cannot make money available to another person with the intention of the person using the money to purchase the shares of the company or the shares of its holding company. Direct and indirect financial assistance are prohibited. A company cannot, therefore, guarantee or provide security for the payment of the amount due for the purchase of the shares of the company or its holding company, or money borrowed by the person to purchase the shares of the company or the holding company. There are, however, a number of exemptions to the prohibition of financial assistance provision. These are stated in section 60 of Act 992. Section 60 of Act 992 provides as follows:

“Section 58 does not prohibit any of the following transactions:

- (a) the payment of commission or brokerage to a person in consideration of that person subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares in the company, where the payment of commission or brokerage does not exceed ten percent of the price at which the shares are issued or a lesser rate as may be specified in the constitution of the company;*
- (b) where the lending of money is part of the ordinary business of the company, or lending of money is the ordinary business although the money may be used for subscription or purchase of shares in the company or its holding company;*
- (c) the provision by a company of money for the purchase or subscription of shares to be held for the benefit of person genuinely in the employment of the company or an associated company including a director holding a salaried employment in the company or an associated company in accordance with a scheme for the time being in force;*
- (d) the advancing by a company of loans to persons, other than directors, genuinely in the employment of the company or an associated company with a view to enabling those persons to purchase or subscribe for shares to be held by themselves beneficially and not as nominees for the company or any other person;*
- (e) the payment by a company of a lawful dividend on the shares of the company although the dividend received by a shareholder is used to*

¹²¹⁶ Section 58(1)(d) of Act 992.

- discharge a liability on the shares of that shareholder or to repay money borrowed for the purpose of subscribing or purchasing shares;*
- (f) *in the case of a public company some or all of whose equity shares are dealt with on an approved stock exchange, or in respect of which an application has been made to an approved stock exchange for permission to deal in those shares, the payment of any commissions, fees, costs and expenses and the giving of any indemnities and warranties in each case to a person arranging or otherwise involved in underwriting, placing or sale of securities in the company or any other similar transaction, where*
- (i) an application for permission to deal in those securities has been or is to be made to an approved stock exchange, and*
 - (ii) any other financial assistance is given in good faith in the interest of the company."*

Under section 60 of the Act, six exceptions have been made to the prohibition on financial assistance. Whilst some of the exceptions are permitted financial assistance, others are not financial assistance in substance but may, prima facie, be seen as financial assistance hence the need to state those expressly.

The first exception made to section 58(1)(c) of the Act prohibition on financial assistance is the payment of commission or brokerage fees for acquiring or providing services for the acquisition of the shares of the company. A person who serves as an intermediary who either acquires the shares of the company with the aim of reselling those shares to others or introduces persons, in a brokerage arrangement, who acquires the shares of the company is entitled to be paid some benefit for their services. The exception makes provision for the payment of commission or brokerage fees to that person. The exception, however, places a limitation on the payment to ten percent of the price of the shares or such a lower percentage as stated in the constitution of the company. As previously indicated, the first component of stated capital under section 68(1)(a) of the Act permits deduction of incidental and transaction cost from the cash received for the issue of shares. Therefore, the payment of such commission does not reduce the stated capital as the amount is deducted prior to adding the cash to the stated capital.

The second exception relates to a company whose ordinary business includes lending money to customers. What the customer does with the money, is ordinarily not of concern to the company lending the money. Therefore, where the customer used the money to buy the shares of the company or pay amounts outstanding on the shares, or pay amount borrowed to purchase the shares, that will not amount to the breach of the financial assistance prohibition.

The third exception is in relation to an employee share scheme. This relates to where the company makes financial provision for the acquisition of its shares to be held for or by employees for the benefit of the employees. For this exception to be applicable, the company must have a scheme in place which provides for the arrangement by which the company makes financial provision for the purchase of shares to be held by employees. The scheme may be a share option exercisable by employees as part of their benefit package or as part of the human resource policy which may be to give ownership interest to employees to encourage loyalty or for any other reason. Whatever the reason, the scheme must be available prior to the provision of financial assistance which can take the form of a loan or monetary gift for the person in the employment to acquire the shares. Critical also is that the person must be in genuine employment of the company and this may include executive directors who hold salaried position in the company. The scheme may cover acquisition of shares of an associated company. The shares must be for the benefit of the employee and not for any other purpose.

The fourth exception relates to where a company gives loans to employees to acquire shares in the company or an associated company for the benefit of the employee. The employee is not to hold the share as a nominee of the company but must be for the benefit of the employee. Under this exception, no scheme is required to be in place. Secondly, the financial assistance is limited to loan given to the employee which implied it must be repaid by the employee.

The fifth exception provides for payment of lawful dividend by the company where the dividend is used to purchase the shares of the company or discharge unpaid liability on the shares by a shareholder, or to repay the amount borrowed to acquire the shares of the company. As noted earlier, a company is permitted based on the recommendation of directors and resolution of the company to set-off against the dividend payable to a shareholder, the unpaid liability on the shares.¹²¹⁷ In the same vein, nothing stops the shareholder from using dividend paid to the shareholder to pay for the unpaid liability on the shares. A lawful dividend paid by the company becomes money of the shareholder and it is of no concern to the law if the shareholder used the money to purchase additional shares of the company or defray unpaid liability on the shares.

The sixth exception relates to transaction cost and applicable fees as well as financial assistance given for the acquisition of the shares of a public company whose equity shares are traded on an approved stock exchange or who has made an application to trade such shares on an approved stock exchange. It includes a payment to underwriters or persons placing or selling the shares of the company where such persons have made applicable to deal with the shares on an approved stock exchange.

Other than the above six exceptions permitted under the Act, no direct or indirect financial assistance is permitted under the Companies Act, 2019. This sometimes impedes an acquisition of a company

¹²¹⁷ Section 77(3) of Act 992.

in a restructuring arrangement where the assets of the company are required to be used as security for the funds made available to the acquirer to pay the shareholders of the target company. Even though other structures are used to circumvent the financial assistance prohibition in this case, failure to create exceptions to cater for genuine acquisition transaction leads to more complicated structures to avoid the breach of the financial assistance prohibition.

19.6 Acquisition by the company of its own shares

In addition to prohibiting the company from financially assisting others to acquire the shares of the company or shares of its holding company, the company is also prohibited from acquiring its own shares or that of its holding company. The last of the prohibited transaction under section 58(1)(d) of the Act requires a company not to acquire any of its shares or any shares of its holding company. A company thus cannot acquire and be a shareholder of itself, and neither can a subsidiary company hold shares in its holding company. A company acquiring its shares will require the use of the resource of the company that is to be used for its business and payment of creditor to pay itself for shares acquired. That will reduce the potential of increasing its stated capital through issuing the shares to another person. Since a holding company acquires shares in the subsidiary company by paying for the shares in cash or in-kind, the capital maintenance rule prohibits returning the consideration to the holding company through the acquisition of the shares of the holding company by the subsidiary company. A company is also deemed to have acquired the shares for the purpose of the prohibition if the shares are held in trust for the company or registered in the name of a nominee.¹²¹⁸

The facts in the case of *Trevor v. Whitworth*¹²¹⁹ which laid down the capital maintenance rule was about the acquisition of the shares of a shareholder by the company. In that case, a company bought back almost a quarter of its own shares. During the liquidation of the company, one shareholder applied to the court for the balance of amounts owed to him after the buyback. The Court of Appeal held that he should be paid. On appeal to the House Lord, it was held that the buyback was ultra vires the company. Lord Herschell stated in relation to the capital maintenance rule as follows:

“If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company’s liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result... I cannot think

¹²¹⁸ Section 58(2) of Act 992.

¹²¹⁹ (1882) 12 App. Cas. 409

that the employment of the company's money in the purchase of shares for any such purpose was legitimate."

However, a number of exceptions are permitted for a company to acquire its own shares under the Companies Act, 2019. First section 58(3) of Act 992 permits a company to acquire its shares for the purpose of the conversion of a company with shares to a company limited by guarantee. This is permitted notwithstanding section 58(1) of the Act. Section 58(3) of the Act provides that ***"(3) Subsection (1) does not prohibit a company from voluntarily acquiring its own shares on the conversion of the company to a company limited by guarantee in accordance with section 9."***

The main exceptions are provided in section 61 of Act 992. Section 61 of the Act provides:

- "(1) Despite section 58 a company may,***
- (a) create and issue preference shares which are, or at the option of the company are liable, to be redeemed and may convert existing shares, whether issued or not, into those redeemable preference shares subject to sections 62 to 65;***
 - (b) purchase its own shares subject to sections 63 to 67;***
 - (c) acquire its own shares by a voluntary transfer to the company or to nominees for the company subject to compliance with sections 62 to 65; and***
 - (d) acquire its own shares pursuant to the buy-out provisions in section 222.***
- (3) A company may forfeit the shares issued with an unpaid liability for non-payment of the sums of money due and payable on those shares."***

Section 67(1) of Act 992 also provides that ***"(1) Despite section 58, a company which is a subsidiary may acquire shares in its holding company, ..."***

Subsections (1) and (3) of section 61 and section 67(1) of Act 992 read together provide for six exceptions to the prohibition that a company cannot acquire its own shares. The subsections provide that notwithstanding the prohibition under section 58(1), a company can acquire its own shares in the following manner:

- (a) redeem redeemable preference shares
- (b) purchase its own shares
- (c) acquire shares of a holding company
- (d) acquire its own shares by voluntary transfer
- (e) acquire its own share in a buy-out situation under section 222
- (f) acquire its own shares by forfeiture of the shares

Each of these exceptions is subject to conditions provided under the Act which aim at ensuring the acquisition does not result in reduction of the stated capital of the company to the detriment of the creditors who are to look to the stated capital for the satisfaction of their liabilities. Sections 61 and 67 of Act 992 which permit these exceptions have specific provisions which aim at preventing reductions of stated capital through the exception. Section 61 of Act 992 provides:

- “(2) For the purposes of subsection (1) [which deals with all the exception except forfeiture], shares shall not be redeemed, purchased or acquired by the company so long as there is unpaid liability on those shares.*
- (4) On redemption, purchase, acquisition or forfeiture, share shall be available for re-issue unless a company by amendment of the constitution of the company cancels those shares.*
- (5) Shares which are [not] cancelled by virtue of the constitution of the company, shall until re-issued or cancelled, be referred to as treasury shares.*
- (6) Except as provided in section 69, a redemption, purchase, acquisition or a forfeiture by the company of the shares of the company or the cancellation of shares so redeemed, purchased, acquired or forfeited shall not reduce the stated capital of the company.*
- (7) Voting rights shall not be exercised and dividends shall not be payable on treasury shares, and except where otherwise stated, treasury shares shall not be treated as issued shares within the meaning of this Act.”*

Shares with unpaid liabilities cannot be acquired back by the company except through forfeiture. Notwithstanding the exceptions to permit a company to acquire its own shares, the acquisition in any manner must not result in the reduction of stated capital except as provided in section 69 of the Act which permits reduction of stated capital. Section 61(6) of the Act thus expressly mandates that the permitted acquisition must not lead to a reduction of the stated capital. The stated capital must be maintained despite acquisition by the company of its shares or shares of its holding company under the permitted exceptions. Further, shares that are acquired back can be reissued by the company unless the company by amending its constitution cancel those shares. The re-issue of treasury shares does not affect stated capital as the amount received is not to be added to stated capital.¹²²⁰ Adding amounts received from re-issue of treasury shares will amount to double counting since the amounts first received for the issue of the shares were added to stated capital and not deducted when the company acquires the shares back from the shareholder.

Shares acquired back are kept in the treasury of the company hence called treasury shares. Treasury shares have no right attached to them. In other words, no dividend is payable and no voting rights can be exercised in relation to treasury shares. Treasury shares are, therefore, the company's own

¹²²⁰ Section 69(2) of Act 992.

shares acquired back by the company from shareholders and kept in the company's treasury which do not have dividend and voting rights attached to those shares.

An explanation of each of the exceptions is provided below.

19.6.1 Redemption of redeemable preference shares

Section 61(1)(a) of Act 992 makes an exception to the prohibition against acquisition by the company of its own shares by providing that the company can create and issue redeemable preference shares which can be redeemed by the company in compliance with sections 62 to 65 of the Act. The section also permits a company to convert shares that are not redeemable – equity shares and non-redeemable preference shares – into redeemable preference shares. The only shares a company can redeem are redeemable preference shares. Non-redeemable shares cannot be redeemed by the company. The company can, however, convert the non-redeemable shares into redeemable preference shares. After the conversion, the company can then proceed to redeem the redeemable preference shares.

Section 62 of the Act provides for the conditions of redemption. The section first provides for the source of fund for redemption and secondly when redemption must be done. Section 62 of Act 992 provides:

- “(1) Despite a provision in the constitution of the company to the contrary, a company shall not redeem any of its redeemable preference shares except,*
- (a) out of a credit balance on the share deals account referred to in section 65 or out of transfers to that account in the manner referred to in that section from retained earnings as defined in section 71; or*
 - (b) out of proceeds of a fresh issue of shares made for the purposes of the redemption not more than twelve months before the date of redemption.*
- (2) Where the redeemable preference shares have become redeemable and the funds of the company are sufficient to entitle the company to redeem the shares due for redemption, the holder of the shares may serve notice on the company requiring it to effect the redemption.”*

In addition, section 61 of the Act provides conditions that must be satisfied including the requirement that there must be no unpaid liability on the redeemable preference shares for it to be redeemed.¹²²¹

The sections thus provide for five conditions that must be satisfied:

¹²²¹ Section 61(2) of Act 992.

- (a) The shares must be redeemable preference shares.
- (b) There must be no unpaid liability on the shares.
- (c) Funds must be available for the redemption of the shares.
- (d) The shares must be due for redemption. That is the condition to trigger the redemption must have occurred. This can be the time for redemption, a specific event or the request by the shareholder entitled to the right of redemption or the company.
- (e) The shareholder, where required, serves notice on the company to undertake the redemption.

Redemption of shares can only be funded from three sources. These are:

- (a) credit balance in the share deals account,
- (b) amount transferred to the share deals account from retained earnings, or
- (c) amount received from fresh issue of shares provided the time between the issue of shares and the redemption is not more than twelve months.

The first condition for redemption is that the shares must be redeemable preference shares. Only redeemable preference shares are redeemable. The second condition for redemption is that there must be no unpaid liability on the redeemable preference shares. That is the shareholder must have fully paid for the shares. Thirdly, money must be available from one of the above three sources for the redemption. In the absence of funds from any of these sources, a company cannot redeem redeemable preference shares due for redemption. The fourth condition is that the shares must be due for redemption and lastly, the shareholder may serve notice on the company to evidence that the redemption is due. Shares may be due for redemption upon the expiration of the time stated or the occurrence of the event stated. The shares can also be due for redemption at the will of the shareholder or the company without necessarily tying it to a time or event. In which case the shareholder or company must give the notice for redemption.

If the company fails to redeem the shares where the conditions above have been satisfied, the shareholder may apply to the court on behalf of that shareholder and all the other shareholders whose shares are deemed for redemption for an order directed at the company to redeem the shares.¹²²² The court on being satisfied that all the conditions have been satisfied order the company to redeem the shares.¹²²³ Therefore, if any of the conditions is not fulfilled, for example, the company has no money in any of the sources indicated, the court cannot order the company to redeem the shares. In ordering redemption, the court may also order that the company and officers of the company in default should bear the cost of and incidental to the application.¹²²⁴ Since the action is to

¹²²² Section 62(3) of Act 992.

¹²²³ *Ibid.*

¹²²⁴ *Ibid.*

be instituted by a shareholder as a representative action, section 205 of the Act is applicable to the action.¹²²⁵

There is no restriction on the number of redeemable preference shares the company can redeem. The company is entitled to redeem all redeemable preference shares.¹²²⁶ In addition, redeemable preference shares are redeemable subject to these conditions notwithstanding any contrary provision stated in the constitution of the company.¹²²⁷ In the event all the issued shares of the company are redeemable preference shares, the company must ensure that in undertaking any redemption, there is at least one shareholder of a company. This is to avoid penalty and liability imposed on the company under section 41 of Act 992 where the company carries on business without at least one member.

19.6.2 Purchase by a company of its own shares

As an exception to the requirement that the company is prohibited from purchasing its shares under section 58(1)(d) of Act 992, section 61(1)(b) of Act 992 permits a company to *“purchase its own shares subject to sections 63 to 67”*. A company may, therefore, purchase its own shares in accordance with conditions stated in sections 63 to 67 of the Act. Section 63 of the Act permits the company to purchase its own shares.

Sections 63 and 64 of Act 992 provide:

- “63. Despite a provision of the constitution of the company to the contrary, a company shall not purchase any of the shares of the company except where*
- (a) shares are only purchased out of a credit balance on the share deals account referred to in section 65, or out of transfer to the account in the manner referred to in that section from retained earnings;*
 - (b) redeemable preference shares are not purchased at a price greater than the lowest price at which they are then redeemable or will be redeemable at the next date at which they are due or liable to be redeemed; or*
 - (c) the purchase is not made in breach of section 64.”*

- “64. (1) A transaction shall not be entered into by or on behalf of a company which the total number of its shares, or of its shares of any one class, held by persons other than the company or its nominees becomes less than eighty-five percent of the total number of shares, or of shares of that class, which have been issued.*

¹²²⁵ Section 62(4) of Act 992.

¹²²⁶ Section 64(1) and (2) of Act 992.

¹²²⁷ Section 62(1) of Act 992.

- (2) *For the purposes of subsection (1), redeemable preference shares shall be disregarded.*
- (3) *Where, after shares of a class have been issued and the number of those shares has been reduced, subsection (1) shall apply as if the number originally issued, including shares of the class cancelled before the reduction took effect, had been the number as so reduced."*

Both sections 63 and 64 of the Act state the conditions that must be complied with for the purchase by a company of its shares. The conditions indicated are the source of funding for the purchase of the shares, the price payable for the purchase of redeemable preference shares and the maximum number of shares that can be purchased.

A purchase by a company of its shares can only be funded from the share deals account. That is either a credit balance on the share deals account or money transferred to the share deals account from the retained earnings of the company. Unlike redemption, the purchase of shares cannot be funded from proceed of fresh issue of shares.

The price for the purchase of the shares is determined based on the agreement between the shareholder and the company. However, the price payable for the purchase of redeemable preference shares cannot be higher than the price at which the shares are or will be redeemable at the next redeemable date.

It is important to understand the distinction between redemption of shares as against purchase of shares. Redemption is applicable where the constitution of the company attached to those shares the right of redemption and at the time of issue of the shares, the terms of issue provide for the redemption of the shares at the time indicated or upon the occurrence of a stated event. The agreement that the shares will be acquired back, the time or conditions for the acquisition and the price or how the price of acquisition by the company is to be determined are all agreed at the time of issue of the shares. However, for the purchase of shares, no such conditions or requirements are agreed upon at the time of the issue of the shares or the right to buy-back is not attached to the shares at the time of issue. The decision to acquire depends on an offer from the company or the shareholder which the other party is free to accept or reject. So, whilst all types or classes of shares can be purchased by the company upon reaching an agreement with the shareholder at the time of purchase, only redeemable preference shares can be redeemed by the company from the shareholder upon terms agreed at the time of issue subject to conditions in the Act. However, equity shares and non-redeemable preference shares can be converted into redeemable preference, and thus become redeemable.¹²²⁸

¹²²⁸ Paul L Davies (2000). *Gower's Principles of Modern Commercial Law*. 6th ed. London: Sweet & Maxwell, p. 254 explain the distinction between redemption and purchase as "*The essential difference between redemption and purchase*

For the purchase of shares, a critical condition is that the company cannot purchase more than fifteen percent of the total number of its issued shares or where there are different classes of shares, fifteen percent of each class of issued shares. The maximum number of the total number of its issued shares or a class of issued issues cannot be more than fifteen percent of the total issued shares or the total number of the issued shares of that class. The cap of fifteen percent on the purchase of issued share or class of issued shares is not applicable to the redemption of redeemable preference shares. However, the cap is applicable to the purchase of redeemable preference shares and other types of shares. In addition, where the company purchases some of its shares and cancelled the shares, the maximum permissible issued shares the company can purchase is determined based on the original number of total issued shares or class of issued shares. This is to prevent circumvention of the limit by the company where it acquired the fifteen percent shares, cancelled the acquired shares, and then seek to acquire more shares again.

19.6.3 Acquisition of shares of holding company

Section 58(1)(d) of Act 992 prohibits a company from acquiring the shares of its holding company. However, section 67 of Act 992 makes an exception by providing limited instances where a subsidiary company may acquire the shares of its holding company.

Section 67 of Act 992 provides:

- “(1) Despite section 58, a company which is a subsidiary may acquire shares in its holding company, where the subsidiary company is concerned as a personal representative or trustee unless the holding company or subsidiary of the holding company is beneficially interested otherwise than by way of security for the purposes of a transaction entered into by the holding company or subsidiary of the holding company in the ordinary course of a business which include the lending of money.*
- (2) A subsidiary which is a holder of shares of its holding company or a subsidiary which acquired shares in its holding company before it became a subsidiary of that holding company may continue to hold those shares but, subject to subsection (1), shall not have a right to vote at meetings of the holding company or a class of shareholders of the holding company, and shall not acquire any future shares in the holding company, except on a capitalisation issue in accordance with subsection (1) of section 77.”*

is that, under the latter, agreement of the parties (the selling shareholder and the buying company) will be needed at the time of the purchase. Neither party can force the other to sell or buy if he or it does not want to and if he or it does want to, the terms and conditions will have to be agreed at the time of the purchase. In contrast, ... in the case of redeemable shares the terms and conditions of redemption will have been set out in advance in the company's articles at the time the shares are issued. Subject to that difference, the two transactions are, broadly speaking, treated alike.”

Section 67 of Act 992 permits a subsidiary company to acquire the shares of its holding company where the subsidiary company holds the shares as a personal representative or trustee provided the subsidiary company of the holding company is not beneficially interested in the shares other than as security for a transaction entered into by the holding company or subsidiary company in the ordinary course of business. The Act also deals with instances where company A acquires the shares of company B prior to company B becoming the holding company of company A. Subsection (2) permits the subsidiary company (company A) to continue to hold the shares of the holding company (company B). However, the subsidiary company does not have a voting right at general meetings of the holding company or meeting of a class of shareholders. In addition, the subsidiary company cannot acquire any additional shares except by capitalisation issues.

19.6.4 Voluntary transfer of shares

Notwithstanding the prohibition on a company not to acquire its own shares under section 58(1)(d) of Act 992, section 61(1)(c) of Act 992 permits the company to *“acquire its own shares by voluntary transfer to the company or to nominees for the company subject to compliance with sections 62 to 65”*. Voluntary transfer refers to a situation where the shareholder elects to transfer the shares to the company without any obligation on the company including providing consideration for the shares. This may include where the shareholder donates the shares to the company or transfers the shares to the company as a gift. In the case of a voluntary transfer, the limitation in section 64 of Act 992 on the maximum number of total issued shares or the total issued shares of a class the company can acquire is applicable. The company cannot acquire more than fifteen percent of the total issued shares or a class of shares of the company through voluntary transfer.

19.6.5 Acquisition pursuant to buy-out under section 222

Where shareholders of a company pass a special resolution to amend the constitution of the company to vary or dispense with business or object of the company, approve a major transaction, an arrangement, compromise or merger, or variation of class right, a member of a company who voted against the resolution is entitled to require that his shares be bought by the company.¹²²⁹ The shareholder must give written notice to the company within fourteen days of the passage of the special resolution.¹²³⁰ The Board of the company, upon receipt of the written notice, may arrange for the company to purchase the share, arrange for some other person to purchase the shares, arrange for the special resolution to be rescinded, or apply to the court for exemption from purchasing the

¹²²⁹ Section 220 of Act 992.

¹²³⁰ Section 221(1) of Act 992.

shares.¹²³¹ The decision of the Board must be communicated to the shareholder within twenty-eight days of receipt of the written notice.¹²³²

Where the Board decides to purchase the shares of the shareholder, the Board shall within seven days of the notice to the shareholder give written notice to the shareholder stating a fair and reasonable price as at the close of business on the day before the day of the special resolution.¹²³³ A shareholder has the right to object to the price by notice to the company.¹²³⁴ The objection notice must be given within fourteen days of the notice stating the price.¹²³⁵ The ground for the objection must be that the price is not fair and reasonable.¹²³⁶ Where the shareholder agrees to the price of the Board, the company shall purchase all the shares of the shareholder at the stated price.¹²³⁷ Where the member object to the price, the determination is done in accordance with section 223 of Act 992.

The purchase by the companies of its own shares under section 222 of Act 992 is an exception to the prohibition provided under section 58(1)(d) of the Act. The purchase of the shares by the company under section 222 does not need to comply with requirements under sections 64 and 65 which deals with restriction of the numbers of shares the company can acquire and funding source out of the share deals account respectively. This is because section 61(1)(d) of Act 992 is not subject to sections 64 and 65 of the Act. However, the restriction under section 61(2) of the Act, that prohibits a company from acquiring shares with unpaid liability is applicable to acquisition under section 222. A company thus cannot acquire shares from its shareholder under section 222 of Act 992 where the shareholder owes on the shares.

19.6.6 Acquisition by forfeiture

Section 61(3) of Act 992 provides that *“(3) A company may forfeit the shares issued with an unpaid liability for non-payment of the sums of money due and payable on those shares.”* The Companies Act, 2019, therefore, confers on all companies the right to forfeit the shares of shareholders when the shareholder fails to pay for the shares when payment is due. Forfeiture refers to the compulsory acquisition by the company of its shares held by a shareholder for the failure of the shareholder to make the payment due on the shares. Under the repealed Companies Act, 1963, the right of forfeiture can only be exercised if conferred on the company by its Regulations. The Companies Act, 2019 does not provide for any such requirement. Forfeiture may therefore be exercised by a company unless the constitution of the company expressly prohibits the exercise of the right of forfeiture. It is

¹²³¹ Section 221(2) of Act 992.

¹²³² Section 221(3) of Act 992.

¹²³³ Section 222(1) of Act 992.

¹²³⁴ Section 222(2) of Act 992.

¹²³⁵ Ibid.

¹²³⁶ Ibid.

¹²³⁷ Section 222(3) of Act 992.

however prudent for the constitution to state the requirement of forfeiture. Failure to provide for forfeiture in the constitution will render the exercise of that right unlawful by the company even though the Act provides for it since there is no procedure for the exercise. This position is supported by the fact that the forfeiture requirements are stated in the default constitution and excluding the requirements in the registered constitution will likely be interpreted as an exclusion of the application of the right of forfeiture by the company.¹²³⁸

The Second and Third Schedules of the Companies Act, 2019 which have a default constitution for private and public companies limited by shares respectively provides for forfeiture and the procedure for forfeiture of the shares for non-payment of liabilities on shares when payment is due. The Second Schedule of Act 992, Constitution for a Private Company Limited by Shares, provides for forfeiture in regulations 18 to 23 provides as follows:

- “18. Where a shareholder fails to pay any call or instalment of a call, including a sum which is a call under clause 15, the board of directors may at any time after the failure during the time that a part of the call or instalments remains unpaid, serve a notice on the member requiring payment of so much of the call or instalments as is unpaid, together with the interest which may have accrued.*
- 19. The notice shall state a further day not earlier than the expiration of fourteen days from the date of service of the notice on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the times appointed, the shares in respect of which the call was made will be liable to be forfeited.*
- 20. If the requirements of the notice are not complied with, a share in respect of which the notice was given may, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.*
- 21. A forfeited share may be cancelled by alteration of this constitution or may be retained as a treasury share until sold or otherwise disposed of on the terms and in the manner that the board of directors considers fit.*
- 22. A person whose shares have been forfeited ceases to be a member in respect of the forfeited shares and is bound to surrender to the company for cancellation the share certificates in respect of the shares so forfeited but shall, despite that, remain liable to pay to the company the moneys which, at the date of the forfeiture, were payable by that person to the company in respect of the shares, but that liability shall cease if and when the company receives payment in full of the moneys in respect of the shares.*
- 23. A statutory declaration in writing that the declarant is a director or the Company Secretary and that a share in the company has been duly forfeited on*

¹²³⁸ Section 61(3) of Act 992.

the date stated in the declaration, is conclusive evidence of the facts stated in the declaration as against the person claiming to be entitled to the share.”

Clauses 17 to 22 of the Third Schedule of Act 992 have similar provisions on forfeiture requirements in the default constitution of a public company limited by shares. Therefore, unless a company adopted a registered constitution that expressly excludes the forfeiture requirement, a company may be entitled to forfeit the shares with unpaid liability of a shareholder for non-payment of amount due and payable on those shares under section 61(3) of Act 992. The shares may be forfeited when a valid call is made for payment but the shareholder fails to pay or the time agreed for payment has lapsed and the shareholder fails to pay. The procedure for the payment must be in accordance with the constitution of the company in order for the forfeiture to be valid.

In *Adehyeman Gardens Ltd v Assibey*,¹²³⁹ the Supreme Court explained the requirement for forfeiture of shares. Sophia Akuffo JSC stated @ pgs. 1026 to 1027 as follows:

“Consequently, there is, no doubt whatsoever that, since the respondent is a subscriber to the regulations of the company (as evidenced by exhibit 1), he, pursuant to section 30(1), became a member of the company right from the date of its incorporation, holding 200,000 shares as indicated against his name on page 10 of the said exhibit. As a member, he also became shareholder, pursuant to section 30(4), and as such, his membership of the company may cease only upon the occurrence of one of the eventualities stipulated in section 30(5).

By the terms of the Code, until all of his shares are forfeited for non-payment of a validly made call (or until the occurrence of any of the other said eventualities), a subscriber remains a fully-fledged member and shareholder of the company, even if he has not paid a pesewa for his shares. The Code does not prescribe any mode for forfeiture of shares and rather leaves this to be spelt out in the regulations of the company. In respect of the company herein, the relevant provisions are regulations 15-27 which prescribe the processes that must be followed. Firstly there must be a call on the shares. For such a call to be valid:

- (a) the call must be authorised by a resolution of the board of directors and the date of the resolution is deemed to be the date of the call;*
- (b) the shareholder must be given not less than fourteen days' notice “specifying the time or times and place of payment” as well as the amount called upon the shares; and*
- (c) if the terms of the allotment or issue of any shares stipulate a particular date for payment of such shares or any part thereof, then a call is deemed to have been duly made and the payment is deemed to be payable on such fixed date.*

¹²³⁹ [2003-2004] 2 SCGLR 1016 at 1027

If the shareholder fails to pay on the due date for the shares on which a call had been made (or shares on which a call is deemed by the regulations to have been made), then the forfeiture procedure, set out in the regulations, comes into effect. Even then, there are prescribed steps a company must take before shares are forfeited. These are:

- (a) the board of directors must serve on the defaulting shareholder a notice requiring payment of the amount, together with any interest due thereon under regulation 18;*
- (b) the notice must name a date on or before which payment must be made, which payment date should be not less than 14 days from the date of service of the notice;*
- (c) the notice must also state that, in the event of non-payment on or before the payment date, the shares upon which the call was made will be liable to forfeiture; and*
- (d) if no payment is made in accordance with the notice, the shares affected by the call may be forfeited, but such forfeiture must be by resolution of the board of directors.*

There is nothing on the record to show that there was any agreement made at any time between the first appellant and the respondent whereby the respondent became liable to pay for his shares on any fixed date. As a result, it is only by a formal call that any amount may become due on any of his shares."

Once a company validly forfeits the shares of a shareholder, the shareholder ceases to be the holder of the forfeited shares, and the shares revert to the company. The forfeited shares become treasury shares and unless the company amends its constitution to cancel the share, the shares will be available for re-issue.¹²⁴⁰ Until re-issued, no voting right shall be exercised and no dividend shall be payable in respect to those shares.¹²⁴¹

As an exception to the prohibition against acquisition by the company of its own shares, a company is permitted to forfeit its own shares from a shareholder for non-payment of the amount due on the shares. The forfeiture must be in accordance with procedures in the constitution of the company.

It should be noted that rather than exercise a right of forfeiture, a company may opt to exercise a lien on issued shares with unpaid liability under section 105 of Act 992. Section 105 of the Act provides:

"(1) Subject to the Central Depository Act, 2007 (Act 733), a company may, where the constitution of the company so provides, have a lien on any of the issued

¹²⁴⁰ Section 61(4) and (5) of Act 992.

¹²⁴¹ Section 61(7) of Act 992.

shares on which there is an unpaid liability for the moneys, whether presently payable or not, called or payable at a fixed time in respect of those shares.

- (2) The lien shall be an effective charge on the shares and the dividends payable on the shares enforceable in the manner provided by the constitution of the company.*
- (3) Despite a provision in the constitution of the company, the lien of the company shall not extend to shares on which there does not exist an unpaid liability, or to the sums of money due from the shareholder except in respect of the unpaid liability on the shares."*

The lien entitles the company to sell the share with unpaid liability on the shares to another interested purchaser. In other words, the lien over the unpaid issued shares confers an interest on the company to realise the unpaid liability through the sale of the shares of the shareholder to another person. However, a critical requirement for the company to be able to exercise a lien over its issued shares with unpaid liability is that it must be provided in the constitution of the company. Failing provisions in the constitution which confers the right on the company and the procedure for the exercise of the lien, the company cannot exercise a lien over its issued shares for unpaid liability.

The default constitution of a private company limited by shares, Second Schedule of Act 992, provides for the right and procedure for the exercise of lien in clauses 24 to 27, whilst the default constitution of a public company limited by shares in the Third Schedule of the Act provides for the right and procedure of exercising a lien under clauses 23 to 26. Under the default clauses, the company is entitled to sell the shares with unpaid liability to a purchaser and the directors may authorise any person to transfer the shares. The purchaser is then required to be registered as the holder of the share. The proceed from the sale of the shares is to be applied in satisfaction of the unpaid liability and any amount left may be returned to the person who was the shareholder at the time the lien was exercised.

The exercise of a lien does not amount to acquisition by the company of its own shares. The company through the exercise of the lien only sell the shares of a shareholder who failed to pay for the shares to another person to recover the unpaid liability on the shares.

19.7 Share Deals Account

Sections 62 and 63 of Act 992 which deal with redemption and purchase by a company of its own shares respectively provide that the two sources of fund for redemption or purchase are the credit balance in the share deals account or sums of money transferred from retained earnings to the share deals account. In addition, section 68 of the Act provides that one of the elements of stated capital is

the total amount which the company resolves to transfer to stated capital from the credit balance on the share deals account.

The share deals account is dealt with under section 65 of the Act. The share deals account is the account opened by the company when the company seeks to deal or transact in its shares either by purchase or redemption of the shares. However, the share deals account is not required where the redemption is financed from proceeds of fresh issue of shares which has occurred not more than twelve months to the redemption. Other than funding from proceeds of fresh issue of share, the first redemption or purchase of shares can only be carried out through the share deals account. Section 65 of Act 992 provides:

- “(1) Where a company first redeems or purchases any of its shares, otherwise than on redemption of redeemable preference shares out of the proceeds of a fresh issue of shares in accordance with paragraph (b) of subsection (1) of section 61, it shall open a share deals account and shall credit to that account a sum of money not less than the amount of money to be expended on the redemption or purchase by transferring that sum from retained earnings as defined in section 71.*
- (2) There shall be debited to the share deals account the sums of money which the company shall from time to time expend on the redemption or purchase of any of the shares of the company, otherwise than on a redemption of redeemable preference shares out of the proceeds of a fresh issue of shares in accordance with paragraph(b) of subsection (1) of section 62.*
- (3) The net price or the value of the consideration received by the company on the re-issue of any of the treasury shares of the company shall be credited to the share deals account.*
- (4) If at any time the total amount of money to be debited to the share deals account under subsection (2) exceeds the amount of money credited to that account in accordance with subsections (1), (2) and (3), an amount of money equal to the excess shall be transferred to the credit of that account from retained earnings, and a purchase or redemption, otherwise than a redemption of redeemable preference shares out of the proceeds of a fresh issue of shares in accordance with paragraph (b) of subsection (1) of section 62, shall not be made by the company unless its retained earnings is sufficient to enable the transfer to be made.*
- (5) An amount of money shall not be debited or credited to the share deals account, otherwise than in accordance with subsections (1), (2), (3) and (4) except on a transfer to stated capital in accordance with section 68 or under an order of the Court under section 80 or 239.”*

For the first redemption or purchase by the company of its own shares, the company must open the share deals account and transfer the amount required for the redemption or purchase from retained earnings to the credit of the share deals account. The amount received from the re-issue of the treasury shares is debited to the share deals account. If the debit balance on the share deals account is more than the credit balance on the share deals account, the difference will be profit made on trading by the company in its own shares. The profit, which is the net price, is the credit balance on the share deals account of the company. The credit balance cannot be allowed to be more than the debit balance, and the company must transfer money from the retained earnings to the credit of the share deals account to make up any difference. The net price or credit balance on the share deals account can be used to fund further redemption or purchase by the company of its own shares. The net price or credit balance on the share deals account can also be transferred to the stated capital account and add up to the stated capital of the company under section 68(1)(c) of the Act, subject to a special resolution by the company.

The company is to keep a separate book into which the true copy of the share deals account is kept and the book must be kept at the registered office of the company.¹²⁴² The book shall be opened during business hours for inspection by the shareholders without charge and at a fee by non-shareholder subject to reasonable restrictions in the constitution of the company.¹²⁴³ The book shall be opened for inspection for at least two hours each day except Saturday, Sunday or public holidays.¹²⁴⁴ A shareholder or any other person may request for a copy of the shares deals account and upon paying a prescribed fee to the company, the person shall be furnished with the copy within ten days.¹²⁴⁵ A breach of any of these requirements will require the company and every office of the company in default to pay the Registrar an administrative penalty of twenty-five penalty units for each day of the default, and the Court may order inspection or furnishing of a copy.¹²⁴⁶

A summary of explanation of share deals account has been stated by Professor L.C.B. Gower in the commentary on the repealed Companies Act, 1963 (Act 179) as follows:

“All such transaction [in treasury shares] must be shown in a separate account, the share deals account. This account must not be allowed to fall into debit and must be fed from surplus which would otherwise be available for dividend in order to prevent this. A credit balance on the account constitute part of the surplus of the company (see section 69¹²⁴⁷) which may be frozen by transfer to stated capital (see section 66¹²⁴⁸) but not the company’s income surplus available for dividend (section

¹²⁴² Section 65(6) of Act 992.

¹²⁴³ Ibid.

¹²⁴⁴ Section 65(7) of Act 992.

¹²⁴⁵ Section 65(8) of Act 992.

¹²⁴⁶ Section 65(9) of Act 992.

¹²⁴⁷ Now section 70 of Act 992.

¹²⁴⁸ Now section 68 of Act 992.

70¹²⁴⁹). The result is to ensure that shares are only purchased out of such surplus or out of the profit on previous dealings and that any profit on dealings in them is not available for dividend. Indeed it goes somewhere further. Once such a company has transferred from surplus available for dividend to share deals account it cannot re-transfer it except by an increase in stated capital. Hence not only is the profit on deals excluded from the dividend fund but so also is anything transferred to feed the account. In practice, however, it should only be the initial transfer, required under section 63(1)¹²⁵⁰ which should amount to any substantial transfer from surplus.”¹²⁵¹

In summary, the Companies Act, 2019 provides for the five prohibited transactions in shares which may reduce the stated capital of the company. However, there are instances that the Act permits a company to engage in a prohibited transaction. In view of maintaining fidelity to the capital maintenance rule which informed the prohibitions, the Act states requirements that must be complied with to avoid reduction of the stated capital to the detriment of the creditors of the company. Transactions that may reduce the stated capital of the company must be examined first to determine whether the transaction is expressly prohibited by the company. If not, the transaction can be engaged in by the company. If it is prohibited, then the transaction must be examined to determine whether it falls within the permitted exceptions. If it does, then implementation of the transaction must comply with the requirements for exempting the transaction from the prohibited transaction for the transaction to be valid. In examining the transaction, the substance of the transaction must be looked at and not the description given to the transaction.

¹²⁴⁹ Now section 71 of Act 992.

¹²⁵⁰ Now section 65(1) of Act 992.

¹²⁵¹ Gower Report, Commentary on Section 63, pp. 67-8, para. 14.

20.0 DEBENTURES

20.1 Introduction

Another source for a company to obtain resources it requires for its business or object is through borrowing the money required from lenders who may be investors, financial institutions and individuals. A company upon incorporation has the legal capacity to enter into a contract. The legal capacity enables the company to exercise borrowing powers. However, the legal capacity of the company does not automatically mean the company will be able to borrow the money it wants. The lenders will only lend the money to a company if the lenders are satisfied that the company will be able to repay the loan. In addition to the legal capacity of the company, the company must be creditworthy to be able to borrow money. This the company can do either by showing the receivables of the company are enough to pay the debts when due or the company has enough stated capital that the lenders can look up to and/or the company has enough assets that the company can charge in favour of the lenders as security for the repayment. The company may also get third parties to provide assurance in the nature of guarantee or security to the lender for the discharge of the repayment obligation of the company.

The general legal framework for borrowing in Ghana, Borrowers and Lenders Act, 2020 (Act 1052) also applies to borrowing done by a company. The emphasis of Act 1052 is on credit agreement that creates a security. However, the provisions of the Act are applicable to credit agreements generally unless expressly excluded. Section 1 of Act 1052 listed the various security interests which comes under the Act. Section 2 of Act 1052 provides that

- “(1) For the purpose of credit agreements other than credit agreements under section 1, this Act applies to:*
- (a) a credit agreement whether or not the lender or borrower*
 - (i) resides or has the principal office within the country;*
 - (ii) is an institution that belongs to the State;*
 - (iii) is an entity controlled by an institution that belongs to the State; or*
 - (iv) is an entity created by an enactment;*
 - (b) the rights or duties of a borrower or lender before the execution of a credit agreement; and*
 - (c) every transaction, act or omission under a credit agreement.*
- (2) This Act does not affect a right that a borrower may have under enactment that offers consumer protection.”*

A credit agreement is defined under section 4 of Act 1052 as follows:

- “(1) An agreement is a credit agreement if*
- (a) the agreement provides for or is a combination of the following:*

- (i) *a credit facility;*
 - (ii) *a credit transaction; or*
 - (iii) *a credit guarantee; or*
 - (b) *the agreement relates to a transaction that creates a security interest in a property to secure the performance of a present or future obligation, determined or determinable.*
- (2) *For the purposes of subsection (1), an agreement provides for a credit facility if in that agreement*
- (a) *the lender undertakes to lend a stipulated amount to*
 - (i) *the borrower; or*
 - (ii) *another person on behalf of the borrower, within a specified period or at specified intervals agreed on by the lender and the borrower; or*
 - (b) *the lender undertakes to*
 - (i) *defer the obligation of the borrower to repay a stipulated amount lent by the lender to the borrower; or*
 - (ii) *send a bill to the borrower periodically in respect of a stipulated amount, whether or not the amount is a loan or a fee*
- whether or not an interest is payable to the lender in respect of the arrangement.*
- (3) *For purposes of subsection (1), a credit transaction includes an agreement that provides for;*
- (a) *a pawn transaction;*
 - (b) *an instalment agreement;*
 - (c) *a charge on chattels;*
 - (d) *a finance lease;*
 - (e) *hire purchase;*
 - (f) *a sale with reservation of title; and*
 - (g) *an outright assignment of accounts receivable.*
- (4) *An agreement provides for*
- (a) *a credit guarantee if in that agreement a third party promises to satisfy on demand by the lender to whom the guarantee is made, an obligation of the borrower regarding a credit facility or credit transaction to which this Act applies; or*
 - (b) *a secured credit guarantee if in that agreement a third party promises to satisfy on demand by the lender to whom the guarantee is made, an obligation of the borrower in a credit agreement to which this Act applies, and in addition, creates a security interest in property to secure the performance of the promise of the third party."*

A debenture falls within the definition of a credit agreement. In a debenture, the company borrows money from a lender and provide a written acknowledgment of the borrowing. The company is thus the borrower. However, the company may enter into other credit agreements that are not debentures. A company in entering in a debenture may create a security interest in its assets in favour of the lender and must satisfy the requirements under Act 1052 applicable to security interests.

The amount borrowed by a company constitutes its debt capital or loan capital. The lenders become creditors of the company. Such debt capital is not part of stated capital as defined in section 68 of the Companies Act, 2019 (Act 992). The company is liable to repay the debt to the creditors of the company at the time the payment is due in accordance with the agreement between the company and the creditors.

20.2 Debentures

In order to regulate raising capital through borrowing, in the same manner as issuing shares, the Companies Act, 2019 (Act 992) provides for rules to regulate raising loan capital by companies. A debenture refers to a document issued by a company acknowledging the indebtedness of the company. In other words, a debenture is a written acknowledgement by a company of the debts of the company. In most instances, the written acknowledgement is in the nature of a written agreement containing terms and conditions for a loan between the company as a borrower and a lender, who may be a financial institution or an individual. In more simple terms, debenture refers to a loan taken by the company based on a written agreement or evidenced in writing. A verbal agreement under which a company borrows money from a lender, individual or corporate, will not qualify as a debenture. The First Schedule of Act 992 defines debenture as:

““debenture” includes

- (c) a written acknowledgement of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person or money deposited or to be deposited with the company or any other person or the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not;*
- (d) debenture stock;*
- (e) convertible debenture;*
- (f) a bond or an obligation;*
- (g) loan stock;*
- (h) an unsecured note; or*
- (i) any other instrument executed, authenticated, issued or created in consideration of such a loan or existing indebtedness;*

- (j) *but does not include*
 - (i) *a bill of exchange;*
 - (ii) *a promissory note;*
 - (iii) *a letter of credit*
 - (iv) *an acknowledgement of indebtedness issued in the ordinary course of business for goods or services supplied;*
 - (v) *a policy of insurance; or*
 - (vi) *a deposit certificate, pass book or other similar document issued in connection with a deposit or current account at a banking company”.*

The definition under the First Schedule of Act 992 encompasses all written acknowledgement of indebtedness of a company including whether secured or unsecured, convertible or not, or whether the acknowledgement is given in respect of a past debt or debt yet to be obtained or deposit of money. Even though, the term debenture is used mostly in financial terms to refer to a document that creates a charge over assets of a company as security for the repayment obligations of the company as separate from a loan or facility agreement, every loan or facility agreement or any document that evidences the indebtedness of a company is a debenture.

*Lemon v. Austin Friars Investment Trust Ltd*¹²⁵² - the plaintiff was issued with income stock of the company. The income stock was issued with the understanding that the plaintiff will be paid part of the future profit of the company. The company issued an income stock certificate to the plaintiff indicating its indebtedness to pay the plaintiff part of the profit of the company when the company made profit. In an action by the plaintiff when the company refused to permit the plaintiff to inspect a register of members, the plaintiff alleged the income stock certificate was a debenture. It was held that the certificates fulfilled the primary qualification for a debenture - namely, they contained an acknowledgement of indebtedness, notwithstanding that the debt was only payable in the future and upon the contingency of profits being earned by the company. That, as the certificates contained further common characteristic features of a debenture - namely, a charge on assets of the company, although consisting only of a proportion of the profits as and when ascertained and the other indicia above stated, the certificates were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908. Lawrence J. stated @ pgs. 9 to 10 that:

“I am clearly of opinion that these so-called income stock certificates are debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and that the register kept by the company at its office in pursuance of cl. 2 of the conditions indorsed on those certificates is a register of debenture holders also within the meaning of that section.

¹²⁵² [1926] Ch. 1.

*The company being desirous of raising money for the benefit of its undertaking determined upon an issue of 1,400,000l. "income stock" payable out of profits and issued to persons subscribing to that stock documents called "income stock certificates." In the first clause of each certificate the company acknowledges that it is indebted to the registered holder in the sum therein mentioned - in the certificate issued to the plaintiffs the sum is 2100l. - "payable only out of profits as hereinafter mentioned." [His Lordship then read the remaining clauses of the certificates and the conditions stated above and continued:] The main features which, in my opinion, tend conclusively to show that these certificates are debentures are the acknowledgement of the debt, the charge, the fact that they form a series ranking *pari passu*, and the fact that they are issued subject to conditions bearing a marked resemblance to the conditions commonly found in debentures, including a power given to three-fourths in value of the holders to modify the rights conferred on the holders. It would be strange, in the circumstances, if the company, although binding itself to keep a register of the certificates, were to have power to refuse inspection of such register by the registered holders of the certificates. Such a refusal would practically deprive the certificate holders of the benefit of the conditions and might work a serious injustice. If, for instance, a proposal were made by the company to modify or vary the rights of the certificate holders, the first thing that any holders who were opposed to such a proposal would want to know would be who their co-holders were, so that they might approach them with a view to inducing them to join in resisting any such modification or variation.*

Various reasons have been advanced on behalf of the company, however, in opposition to the contention that these certificates are debentures. The first is, that the certificates do not on the face of them purport to be debentures, but, on the contrary, that they refer prominently to the "authorised debenture issue" of 240,000l., thereby showing that the company considered the issue of income stock certificates not to be an issue of debentures. In my opinion, it is wholly immaterial whether the company thought that the certificates were not debentures if in fact they were. It may be that the certificates constitute a class of debentures having characteristics entirely different to those of the class which are designated as "authorised" debentures, but neither this fact nor the fact that the certificates are not styled "debentures" by the company can have the effect of preventing the certificates from being debentures, if in fact they are debentures. Further, it is pointed out that the certificates are not issued under the seal of the company. Although it is true to say that debentures are usually issued under the seal of the company, it is not seriously contended that a debenture must necessarily be a document under seal. Another argument addressed to me was that the certificates do not purport to charge any assets of the company, but only purport to ear-mark

profits, if and when they arise, as the fund out of which the amount mentioned in the certificate will be discharged. Even if the certificates had contained no charge, I think they would, nevertheless, have been debentures, as a charge, although usual, is not an essential requisite of a debenture."

However, the First Schedule of Act 992 in defining debentures broadly excludes bill of exchanges, letters of credit and deposit certificates from banks as these instruments are possessory instruments that essentially qualify as cash in the hands of the person in whose favour they are issued. Also excluded is an acknowledgement for indebtedness to creditors who have provided services or transferred property to the company in the ordinary course of business. The supply of goods on credit with a written acknowledgement from the company of money owed to the supplier is not a debenture. Even though this and other similar transactions including finance lease, hire purchase, and a sale with reservation of title constitute a credit agreement under Act 1052, such transactions are not a debenture under Act 992. A debenture must therefore be a written acknowledgement of indebtedness occurring pursuant to a loan provided to the company.

A debenture represents a written acknowledgement of a loan granted to the company. Debentures, therefore, generally have terms relating to terms of the borrowing including:¹²⁵³

- (a) how much the principal amount of the loan is,
- (b) the interest payable on the loan,
- (c) the terms or schedule of repayment,
- (d) rights and obligations of the borrower (company),¹²⁵⁴
- (e) whether security is provided for the loan,
- (f) what constitute default, consequences of default including default interest,¹²⁵⁵
- (g) representations by the borrower,
- (h) conditions that must be satisfied for disbursement, and
- (i) security for the repayment, if any.

The loan or facility agreement may be very detailed or just few pages covering principal terms. Debenture constitutes a credit facility under the Borrowers and Lenders Act, 2020 (Act 1052). Act 1052 is thus applicable to the issue of debentures by a company. Section 4 of Act 1052 as follows:

"(1) An agreement is a credit agreement if

(c) the agreement provides for or is a combination of the following:

- (iv) a credit facility;***
- (v) a credit transaction; or***
- (vi) a credit guarantee; or***

¹²⁵³ The terms must not be contrary to the provisions of the Borrowers and Lenders Act, 2020 (Act 1052).

¹²⁵⁴ Particularly sections 55, 56, 58 and 59 of Act 1052.

¹²⁵⁵ Must also be consistent with sections 60 to 75 of Act 1052.

- The requirements of Act 1052 must, therefore, be complied with in addition to the requirements under the Companies Act, 2019 (Act 992). A requirement in Act 1052 which is not in Act 992 is the requirement of pre-agreement disclosures by the lender prior to the issue of debenture by the company. Section 57 of Act 1052 provides:

(2) *A lender regulated by the Bank shall not conclude a credit agreement with a prospective borrower unless the lender provides the prospective borrower with a pre-agreement disclosure statement in the form specified in the First Schedule.*

- (a) *the principal amount;*
- (b) *the proposed disbursement schedule of the principal debt;*
- (c) *the interest rate;*
- (d) *the total amount involved in the proposed agreement,*
- (e) *the proposed repayment schedule;*
- (f) *the basis of any cost that may be assessed if the borrower breaches the contract;*
- (g) *any fees that applies to the prepayment of any obligation that is due under the credit facility; and*
- (h) *insurance for the loan.*

- (4) Any charges or fees that are not disclosed to a borrower in a pre-agreement disclosure statement prior to the execution of a credit agreement, shall not be payable and if paid already, shall be refunded with interest at the prevailing rate.***
- (5) A lender who contravenes this section is liable to pay to the Bank an administrative penalty of one thousand five hundred penalty units.***
- (5) A borrower may, in furtherance of subsection (3) sue a lender for damages for loss suffered as a result of a contravention."***

That is, the lender must disclose information on the terms of the lending to the borrower (the company in this case) prior to the issue of the debenture. That is, the information must be disclosed before the parties (borrower and lender) enter into the facility agreement. For financial institutions regulated by the Bank of Ghana, the requirement is that the pre-agreement disclosure statement must be in the form attached to Act 1052. In practice, a lender which is a financial institution may provide a term sheet to the company which spells out the essential terms under which the loan or facility will be provided to the company. This is not a requirement under Act 992, 2019, but a requirement under the Borrowers and Lenders Act, 2020, which must be complied with.

Debentures and debenture stocks are also types of securities. The First Schedule of the Companies Act 2019 defines securities to include debentures.¹²⁵⁶ As such, debentures are financial instruments which, subject to the terms of the instrument, may be traded. Act 992 permits the transfer of debentures under section 100.

20.3 Issue of a debenture or debenture stock

A company is permitted under Act 992 to issue debenture, a series of debentures or debenture stock to raise loan capital. Section 83 of Act 992 provides that ***"(1) A company may raise a loan capital by the issue of a debenture or of a series of debentures or of debenture stock."*** A company therefore may raise a loan capital by entering into a loan or facility agreement with a lender or group of lenders for a stated amount. In that case, a company has issued a debenture. That is, a company issues a debenture when it seeks to obtain a loan of a stated amount from a lender, separate lenders or group of lenders, either as a syndicated loan or participation loan, by entering into a loan or facility agreement. A company may also enter into a series of loans or facilities agreements to obtain loans from lenders in the form of series of debentures. Debentures will be of the same series if the terms are the same in all respect. Section 83(2) of Act 992 provides that ***"(2) Debentures of the same series shall rank at the same rate in all respect although they may be issued on different dates."*** In the case of a debenture or series of debentures, the company obtains or seeks to obtain a loan of stated amount

¹²⁵⁶ See also section 60 of the Central Securities and Depository Act, 2007 (Act 733) and section 216 of the Securities Industry Act, 2016 (Act 929).

from lenders under a debenture or a series of debentures that rank at the same rates in all respect. The dates of issue of debentures in the series may, however, differ.

A company is also permitted to issue debenture stock to raise loan capital under section 83(1) of the Act. Rather than issue a debenture for a block of loan, a company may divide the loan into units each being of a specific price. Investors may take up any number of units and give the company the amount of loan made up of the total price of the number of units taken. Each unit is the debenture stock. The debenture stock is also referred to as bond, notes or marketable loans. The price of the units put together constitute the block of loan. Each unit attracts an interest payable by the company to the investor on an agreed schedule with the redeemable price payable at the end of the term agreed to discharge the debt. The investor can trade the units by transferring to another investor for a price either privately or publicly depending on whether the company is a private or public company. Debenture stock is created under the Act to permit the company to obtain a block of loans from investors in units. Section 83(3) of Act 992 provides that *“(3) Instead of issuing debentures acknowledging separate loans to the company, the loans may be funded by creation of debenture stock of a prescribed amount parts of which, represented by debenture stock certificates, may be issued to separate holders.”*

Debenture represents the loan and debenture stock refers to units of a division of the loan. A company rather than obtain a loan or number of loans from a lender, may divide the loan amount into units and issue the units to investors who may take any number of units or the minimum number specified by the company, and provide the price attached to the unit to the company. Each unit represents a debt owed by the company to the holder of the unit, which is the debenture stock. Each of the units is represented by a debenture stock certificate issued to the holder of the unit. Generally, whilst repayment of a loan is done at specified intervals involving principal and interest due at each point up to the final maturity or repayment date, with debenture stock, a specified amount is payable at each interest period, which is just the interest or called the coupon rate, whilst the stock itself may be redeemable at an agreed price on the expiration of the term.

There may be varied reasons why a company may choose to issue debenture stock rather than a debenture or series of debentures. These include:

- (a) The amount required by the company may be a huge amount that the company is unable to obtain from a particular lender or group of small lenders in a syndicated arrangement.
- (b) Even if a lender or group of small lenders can make the amount available, the terms may not be favourable to the company in comparison to the issue of debenture stock particularly the interest rate and term of the loan.
- (c) The redeemable stock price in respect of debenture stock is generally due at a definite time whilst interest is payable periodically with the redemption of the stock at the redeemable price, what may be compared to the principal in a debenture, at the maturity date. However,

in respect of debenture, the principal and interest are generally payable periodically up to the final maturity date.

Debenture stock is created by indenture or deed poll either under the seal of the company or certified by the signatures of two directors and the Company Secretary.¹²⁵⁷ The indenture or deed poll is created in favour of a trustee for the debenture stockholders.¹²⁵⁸ The trustee acts on behalf of and for the interest of the debenture stockholders. The appointment of a trustee is to avoid multiple deeds issued to each stockholder and dealing with multiple stockholders by the company. The company avoids this by having a contract with the trustee who represents the debenture stockholders. Each debenture stockholder is issued with a debenture stock certificate to evidence the title of the holder and the amount lent to the company.

20.4 Specific Performance to enforce a debenture

Once a company issues a debenture, the debenture holder is under an obligation to perform the obligations under the debenture, which is principally to make the facility or loan available to the company. Even though the loss that may be incurred by the company, in the event the debenture holder fails to make the money available to the company can be compensated by damages, the Act permits the company to enforce the debenture by specific performance. Section 84 of Act 992 provides that *"A contract with a company to take up and pay for any debenture of the company may be enforced by an order for specific performance."* Whilst the general common law position on remedies for breach of contract requires that the remedy of specific performance is granted where the remedy of damages is not enough to compensate for the loss arising from the breach, the section permits the grant of such remedy as a way to enforce the terms of the debenture.

20.5 Types of debentures

A company may issue different types of debentures. The type of debenture issued by the company simply refers to the terms applicable to each of the debenture issued by the company. The written acknowledgement may have a term permitting a debt to be converted to shares or may provide security in the form of a charge to secure a debt or may tie the repayment of a debt to specific events. The different terms in the written acknowledgement create different types of debt or debentures. The Companies Act, 2019 in sections 87 to 89 describes six types of debentures. The description does not close the types of debenture a company may issue since the company and lender may agree on terms that are not necessarily mentioned in the sections. The types described in the sections are explained below.

¹²⁵⁷ Section 83(4) of Act 992.

¹²⁵⁸ Ibid.

20.5.1 Perpetual debentures and redeemable debentures

Since debentures are loans given by lenders to companies as borrowers, the general principle is that the company is liable to repay the loan in accordance with the debenture, that is the written agreement. That is, there is an obligation on the company to redeem the debt by repaying the principal and interest which make up the loan including any fees and charges that are applicable. Section 87 of Act 992 however permits the borrowing company and the lender to agree on a term in the written acknowledgement that the company is not under obligation to redeem the loan or to redeem the loan only upon the occurrence of an event, however remote, or expiration of a period, however long. Section 87 of Act 992 provides *“A condition contained in a debenture or in a trust deed for securing any debentures, shall not be invalid by reason of the fact that the debentures are by that condition made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.”*

A condition in the debenture that makes it irredeemable or redeemable only on the occurrence of a remote event or a very long period is still valid. A debenture may, therefore, be irredeemable. That is, the company is not under an obligation to repay the principal amount. Such a debenture is a perpetual debenture. A perpetual debenture is one that the company is not under an obligation to repay the principal amount and discharge the loan. In relation to debenture stock, the company continues to pay the interest, coupon rate, in perpetuity with no obligation for the company to redeem the debenture stock. Admittedly, a perpetual debenture is extremely rare in Ghana. However, it is possible for a person to lend money to the company on terms that the company continues to pay the interest on the loan with express terms that the principal is not repayable by the company as long as the company continues as a going concern entity. A debenture may also be redeemable. That is, the company is under an obligation to repay the full amount, principal and interest, either periodically, at a definite date or whether tied to an event which is remote, such as when it snows in Accra, Ghana. For a debenture stock, the debenture stock must be redeemed at a definite time, no matter how long, or on the occurrence of an event, no matter how remote.

20.5.2 Convertible debentures and non-convertible debenture

Section 88 of Act 992 permits a company to borrow money by a written agreement on terms which permit the lender and the company to convert the debt into shares at a later date. That is, rather than the company repaying the loan, the company, at the option of the debenture holder, issues shares of the company to the lender to discharge the repayment obligation. Section 88 of Act 992 provides *“Subject to the Central Securities Depository Act, 2007 (Act 733), debentures may be issued on the terms that in lieu of redemption or repayment, the debentures may, at the option of the holder or the company, be converted into shares in the company on the terms that are stated in the debentures.”*

A convertible debenture is a debenture which permits the conversion of the debenture into shares in the company. The terms of the facility or loan agreement permit the lender to request the company to issue shares to the lender rather than the repayment or redemption of the loan or bond. Section 88 of Act 992 provides that the conversion can be at the option of the lender or the company.

A debenture that does not have a term permitting conversion of the loan into shares to be issued to the lender, is non-convertible debentures. A non-convertible debenture does not have a term that permits the company to issue shares in lieu of repayment or redemption of the debenture. This may be done by express prohibition or absence of the term of conversion.

There may be varied reasons why a company may create and issue convertible debentures. The creation of convertible debentures is to permit an investor who is not sure of taking full risk with the company as a shareholder to first lend the money to the company with the option to convert the loan into shares at a future date if the investor so desires. It may also be to permit a company that is unable to repay a loan due to liquidity challenges to repay the loan by giving its shares to the lender. Other reasons may justify the issue of convertible debentures by a company.

20.5.3 Secured debentures and unsecured debentures

A company in borrowing money from a lender may provide comfort to the lender by creating charges over its assets as security for the repayment of the loan. The company provides collateral to the lender. Lenders do not lend money to a company simply because the company has the capacity to borrow. In addition to the capacity, the company must be creditworthy. That is, demonstrate the ability to repay the debt. It does this by showing that its future receivables will be enough to repay the loan or provide security to give comfort to the lender. The security created in favour of the company may take many forms. Where the company creates security in the form of a charge over the assets of the company, that will amount to a secured debenture.

The terms of the debenture may either provide for a charge over the assets of a company or may not provide for such a charge. Where the written terms of the loan provide for a charge over the assets of the company as security for the repayment, the borrowing is a secured debenture. Where it does not, it is an unsecured debenture or naked debenture. Act 992 provides for secured and unsecured debentures in section 89 of the Act as follows:

- “(1) Debentures may either be secured by a charge over the property of the company or may be unsecured by a charge.*
- (2) Debentures may be secured by a fixed charge on some property of the company or a floating charge over the whole or a specified part of the undertaking and assets of the company, or both a fixed charge on a property and a floating charge.*

- (3) A charge securing debentures becomes enforceable on the occurrence of the events specified in the debentures or the deed securing the debentures.*
- (4) Where legal proceedings are brought by a debenture holder to enforce the security of a series of debentures of which that holder holds part, the debenture holder shall sue in a representative capacity personally and on behalf of the other debenture holders of that series and section 205 shall apply.*
- (5) Where the debentures are secured by a charge, section 110 to 120 relating to registration of particulars of charges, shall apply."*

The section permits a company to issue a debenture that is secured by creating a charge over the assets of a company in favour of the debenture holder. A secured debenture, therefore, requires the company to create a charge over the assets of the company to secure the debenture. A charge created over the assets of directors or shareholders of the company for money borrowed by the company does not create a secured debenture in relation to the borrowing company since the charge is not over the assets of the company. This may be secured lending but does not fall into the definition of the section in relation to secured debenture issued by the company.¹²⁵⁹ In addition, where a company issued a debenture, and the directors, shareholders or third parties provide a guarantee for the repayment of the debt of the company, that is not a secured debenture as no charge is created over the assets of the company. The borrowing is supported by a guarantee which section 14(1) of the Contract Act, 1960 (Act 25) requires must be in writing to be enforceable. The is a credit guarantee which is also a credit agreement under the Borrowers and Lenders Act, 2020 (Act 1052).¹²⁶⁰ Subsection (4) of section 4 of Act 1052 provides:

"(4) An agreement provides for

- (a) a credit guarantee if in that agreement a third party promises to satisfy on demand by the lender to whom the guarantee is made, an obligation of the borrower regarding a credit facility or credit transaction to which this Act applies; or*
- (b) a secured credit guarantee if in that agreement a third party promises to satisfy on demand by the lender to whom the guarantee is made, an obligation of the borrower in a credit agreement to which this Act applies, and in addition, creates a security interest in property to secure the performance of the promise of the third party."*

A secured debenture under the Borrowers and Lenders Act, 2020 (Act 1052) constitutes a credit agreement creating a security interest. But not all security interest created under Act 1052 will

¹²⁵⁹ The case of Bank of Africa Ltd v. Gracefield Merchants Ltd & Others Civil Appeal, Suit No. J4/35/2016 in which the Supreme Court gave judgment on 5 February, 2020 illustrates the instance where the second defendant created a mortgage in favour of the appellate for moneys borrowed by the first defendant.

¹²⁶⁰ Section 4(1) of Act 1052.

constitute a charge over the assets of the company. A company is permitted to create a charge over tangible and intangible assets, immovable property receivables and accounts of the company. A credit agreement creating a charge over the assets of a company will constitute a secured debenture. Act 1052 provides that such agreement must be in writing.¹²⁶¹ Act 1052 provides in relation to all security interest that: *"A credit agreement that creates a security interest in property shall be executed in writing, and the credit agreement shall consist of one or more tangible documents or electronic records which, taken together, establish the intent of the parties."*¹²⁶²

Under the Companies Act, 2019 (Act 992), there are two types of charges that a company may create in respect of secured debentures – fixed charge or floating charge.¹²⁶³ A company can also create both fixed and floating charges over its assets.¹²⁶⁴ A charge here refers to a security interest over the charged assets. The charge does not transfer interest of the owner in the charged assets but only grant rights to the person in whose favour the charge is created to be able to enforce the obligation for which the charge is created over the assets by realizing the assets. This position is confirmed under section 7 of Act 1052 when it provides that *"A security interest in property [which includes a charge – fixed or floating] shall not operate as a transfer of title in the property from the borrower to the lender."*

A fixed charge is created by creating the charge over a specific defined asset or assets. A fixed charge may be in the nature of a mortgage over land or building, a charge over a specific car defined by model and registration number, or a charge over a specific machine or asset of the company. A floating charge is a charge created over all or a group of assets of a company, which assets are non-constant assets. That is, the assets keep changing forms either in terms of value or quantity. Examples include a charge over stock-in-trade of the company or receivables of the company or the general assets of the company which changes their form in terms of quantity and value.

For both fixed charge and floating, the secured debenture must identify the lender, borrower, secured obligation and the collateral.¹²⁶⁵ There must be sufficient description of the collateral¹²⁶⁶ and secured obligation¹²⁶⁷. Act 1052 provides that a security interest created over assets automatically extends to identifiable proceeds of the collateral whether or not the credit agreement contains description of the proceeds.¹²⁶⁸

¹²⁶¹ Section 5 of Act 1052.

¹²⁶² Ibid.

¹²⁶³ Section 89 of Act 992.

¹²⁶⁴ Ibid.

¹²⁶⁵ Section 6(2) of Act 1052.

¹²⁶⁶ Section 8 of Act 1052.

¹²⁶⁷ Section 9 of Act 1052.

¹²⁶⁸ Section 10 of Act 1052.

Section 89 of Act 992 permits a company to grant either a fixed charge or a floating charge or both fixed and floating charge to secure the repayment obligation under a debenture. The charge granted to a lender becomes enforceable by the lender once the event stated in the debenture occurs. That event generally is where a company fails to pay part of the debt that is due to be repaid. It may also include the breach of other obligations or covenants in the loan or facility agreement. Enforcement of the charge may be through taking possession of the assets to realise the asset by disposing of the asset, a court action or by the appointment of a receiver and manager, either by the lender or through the court, who realises the assets either by taking possession of the assets and managing the assets for receivable for the lender or disposing of the assets to pay the lender.

A lender who intends to enforce a charge under a series of debentures is required to bring a representative action under section 205 of Act 992 on behalf of the lender and other lenders of the series of debentures. The particulars of a secured charge are required to be registered in accordance with the requirements of the Companies Act, 2019 (Act 992) and the Borrowers and Lenders Act, 2020 (Act 1052) and in the case of immovable property in accordance with the Land Act, 2020 (Act 1036). A mortgage created must satisfy the requirements of these laws and in addition, requirements of the Mortgages Act, 1972 or the Home Mortgage Finance Act, 2008 (Act 770).

A debenture that does not provide for a charge over the assets of the company as security for repayment of a loan taken by the company from lenders is an unsecured debenture. An unsecured debenture is enforceable as chose in action without the right to take possession of the assets of the company. Unsecured creditors rank below secured creditors in relation to the secured assets. An unsecured lender can, therefore, only enforce the right to be repaid money lent to the company through court action, and where the unsecured lender obtains judgement, the judgement is enforced against the company. The unsecured lender can also petition for the administration or liquidation of the company under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015). But unlike a secured creditor, the unsecured creditor cannot proceed against specific assets of the company for the satisfaction of the debts of the unsecured creditor.

It should be noted that debentures may be issued with other varied description. For example, we may have term debentures (fixed-term loan or facility), revolving debentures (revolving loan or facility), syndicated debentures (syndicated loan or facility), or a combination of any of them. These are just terminologies and the focus should be on the substance of the terms of the debenture. Any of these descriptions may come under any of the above types of debentures. Secondly, the six types of debentures described above are not mutually exclusive. A company can issue a secured convertible redeemable debenture, as one debenture. It simply means the debenture issued by the company has terms that permit redemption, conversion and creates a charge over the assets of the company in favour of the debenture holder.

20.6 Shares and debentures

Shares and debentures are both financial instruments by which a company raises capital for its activities. An investor may have a choice between the two instruments in choosing to invest in a company for a return. It is important to bear in mind the benefit or otherwise of each instrument as well as the risk of investing through either shares or debentures in making a choice. Investment in a company through taking shares in the company confers a sort of 'ownership' interest on the shareholder in relation to the company. The shareholder is deemed in a very loose sense to be an "owner" of the company. Whilst investment in a company through taking a debenture of the company is lending of money to the company. The lender is, therefore, a creditor of the company. Some rights conferred on shareholders under the Act are not available to the creditors. Section 83(5) of Act 992 makes this clear by providing that ***"(5) A debenture holder is not a member of the company and despite a provision in the debenture or the constitution of the company, is not entitled to attend and vote at a general meeting of the company."*** Debenture holders cannot attend and vote at a general meeting of a company notwithstanding the rights conferred on the debenture holder under the debenture.¹²⁶⁹ However, nothing prevents the chairman of the board or a person who chairs a general meeting to permit a debenture holder to be in the meeting as an observer. In that case, the debenture holder cannot vote at the general meeting.

The choice of giving money to the company for shares or lending to the company and acquiring a debenture depends on the returns and the risk the investor is willing to take. Generally, a debenture holder of a company, as a creditor, rank in priority to shareholders in relation to payments by the company. In that respect, a debenture holder must be paid his interest and principal by the company from any source available to the company and such payment take priority to payment of dividends to the shareholders. Dividend can only be paid if it will not affect the payment of the debt of the creditors when the debt falls due.¹²⁷⁰ In addition, when the company is in liquidation, the debenture holders must be paid first prior to any payment to shareholders on the shares or return of net assets, if any.

Secondly, the interest and principal of debenture holders must be paid when due even if it is out of the stated capital or assets of the company. Dividend payment and amount for redemption or purchase of shares can, however, not be out of stated capital.¹²⁷¹ The debenture holder, therefore, has a broader source to look up to for repayment of a loan granted to the company than shareholders whose dividends can only be paid out of retained earnings. Even in that case if it must not adversely

¹²⁶⁹ Clause 7(c) of the Eighth Schedule of Act 992 provides that ***"Subparagraph (b) does not preclude any other person from attending a general meeting with the permission of the chairperson of the meeting."***

¹²⁷⁰ See section 72(1) and definition of distribution test under the First Schedule of Act 992.

¹²⁷¹ Redemption of shares may result in the reduction of stated capital through the use of amount received from fresh issue of shares not more than twelve months to the redemption in accordance with section 69(1) of Act 992 as one of the lawful reductions of stated capital permitted.

affect repayment to the creditors. Shareholders, therefore, carry more risk in terms of getting returns on investment.

Thirdly, debenture holders are entitled to fixed payment of the interest and principal that are due. The debenture holder is therefore entitled to a fixed return on their investment. Shareholders, other than preference shareholders as to dividend, do not enjoy fixed return. The returns of shareholders depend on the financial performance of the company for the financial year and the amount declared as dividend. Even in the case of a preference shareholder as to dividend who is entitled to a fixed dividend, the dividend is only paid when there are retained earnings. A shareholder's return on investment, therefore, varies from year to year depending on financial performance.

Fourthly, other than in the very limited case of perpetual debenture, generally, debentures are redeemable by the company. That is, the company must repay the debt to the debenture holder or redeem the debenture stock and discharge the debenture. A shareholder holds shares with no obligation on the company to take back the shares, even where the shareholder so requires the company to do so, except in the case of redeemable preference shares. Generally, a company is prohibited from acquiring its own shares subject to strict exceptions and compliance with conditions stated in Act 992. An important condition is that the redemption or purchase of shares by the company of its shares is subject to the availability of funds in the share deals account, or in the case of redemption, proceeds from fresh issue of shares. Debentures are, however, redeemable from any fund available to the company.

Fifthly, the interest due on debentures, for accounting purposes, are deducted prior to arriving at profit. The interest is thus payable out of the income of the company whilst dividend payable to shareholders can only be paid out of profit. For taxation purposes and subject to the thin capitalisation rule, interest payable on loans are deductible expenses for the purpose of determining chargeable income. Dividends are however determined after payment of the tax due based on the chargeable income of a company.

It may be seen that debenture holders carry less risk than shareholders of a company. It may be in the light of that that shareholders are deemed to be an organ of the company with specific rights granted to take part in decision making of the company through general meetings whilst debenture holders are not given such rights in the constitution of the company or agreement between the company and the debenture holder. However, debenture holders can assume some of such rights under the debenture if expressly provided. The only right that cannot be conferred either in the constitution or agreement on the debenture holder is the right to attend and vote at general meetings of the company.¹²⁷²

¹²⁷² Section 83(2) of Act 992.

From a company's perspective, the choice between raising capital through the issue of shares or debentures also depends on a number of factors. The decision on what option to adopt is that of directors who under the default position of section 144(3) of Act 992 has the power to manage the business of the company. As part of the powers to manage the business of the company, directors must raise the capital required to undertake the business of the company. The directors must make the decision on the option to adopt based on the fiduciary duties imposed on the directors particularly the duty to act in the best interest of the company. This power may be taken from the directors and given to the shareholders through terms in a registered constitution of a company.

Generally, the company will first raise capital through the issue of shares since a company with shares must have at least one shareholder who must have provided valuable consideration for at least one share. The position is supported by the fact that the company must also indicate the proposed stated capital in the application for incorporation.¹²⁷³ In the event a sector specific regulation provides for a minimum capital requirement, that must be satisfied by the shareholders based on the sector specific regulation.

Once the company commences business, the raising of additional capital falls within the responsibilities of the directors unless otherwise expressly indicated in the registered constitution of the company. Factors relating to market conditions, cost of raising capital from either shares or debentures, interest of prospective shareholders or debenture holders to provide money to the company, legal requirement, taxation issues particular thin capitalisation rules, time factor on how long it will take to get money from selling shares or borrowing, project requirements, or financial market conditions among others will inform the decision of the directors. The paramount consideration in the choice of option is that the decision must be a decision taken in the best interest of the company. The shareholders can in some instances maintain some control over this process by prescription in the constitution of the company which prescription may indicate the gearing ratio, that is equity to debt ratio, of the company. In addition, the borrowing by the company which brings the total amount of borrowing above the stated capital is subject to prior approval of the shareholders.¹²⁷⁴ This does not include temporary loans obtained from the company's banker in the ordinary course of business.¹²⁷⁵

20.7 Trustees for debenture holders

As noted earlier, section 83(4) of Act 992 requires that the issue of debenture stock be done through a deed poll or indenture in favour of a trustee for debenture stockholders. Section 83(4) of Act 992 provides "*(4) Debenture stock shall be created by deed under the common seal of the company or*

¹²⁷³ Section 13(2)(n) of Act 992.

¹²⁷⁴ Section 189(9) of Act 992.

¹²⁷⁵ *Ibid.*

certified by the signature of two directors and the Company Secretary in the form of a deed poll or of an indenture in favour of trustees for debenture stockholders." In raising capital through the issue of debenture stock, the debenture stockholders must be represented by a trustee who acts on behalf of and for the interest of the debenture holders.

In addition, section 95 of Act 992 also permits a trustee to be used in the issue of debenture, and not only debenture stock. The debenture can, therefore, directly be between a company and the debenture holder. The section however permits a debenture holder to act through a trustee, whether the debenture is a secured debenture or an unsecured debenture. Section 95(1) of Act 992 provides that *"(1) Whether or not a debenture is secured by a charge over the property of the company, the debenture may be secured by a trust deed appointing a trustee for a debenture holder."* The trustee is appointed through a trust deed. The deed of trust is a document by which a trust is created where a trustee is appointed to act for and on behalf of the debenture holder. The appointment of the trustee is seen as securing the payment obligation under the debenture.

The trustee is required to act in the interest of the debenture holder. Section 95(2) of Act 992 provides *"(2) A trustee shall safeguard the rights of the debenture holder and, on behalf of and for the benefit of the debenture holder, exercise the rights, powers, and discretion conferred on them by the trust deed."* The trustee is appointed to represent the interest of the debenture holders. The essence of the appointment is to ensure the company fulfil the obligation owed to the debenture holders under the debenture. In the event of a secured debenture, the charge is created in favour of the trustee for the benefit of the debenture holder.¹²⁷⁶ Section 95(3) of the Act provides that *"(3) Charge securing a debenture may be created in favour of the debenture holder by vesting the debenture in the trustee."*

A trust relationship is based on the appointment of a trustee where the trustee is to act for the interest of the beneficiary, which is the debenture holder in this case. A breach of the obligation to act in the interest of the debenture holder amounts to a breach of trust which may require the trustee to compensate the debenture holder for the loss suffered. The trustee cannot be exempted from liability arising from breach of trust to the debenture holder. Section 95(4) of Act 992 provides that *"(4) A provision contained in a trust deed or in a contract with a holder of a debenture secured by a trust deed is void in so far as it would have the effect of exempting a trustee of the holder from, or indemnifying the trustee against, liability for a breach of trust or failure to show the degree of care and diligence required of the trustee as trustee having regard to the powers, authorities or discretion conferred on the trustee by the trust deed."* The trustee is therefore liable for breach of trust and any term in the trust deed or a contract which seeks to exempt the trustee from the liability is void.

¹²⁷⁶ Section 95(3) of Act 992.

The debenture holder is, however, permitted to release the trustee from liability or waive compensation entitled to for the breach of trust. Section 95(5) of Act 992 provides that *“(5) Subsection (4) does not invalidate a release otherwise validly given in respect of anything done or omitted to be done by a trustee on the agreement to that release, of a majority of not less three-fourths in the value of the debenture holders present in person, or where proxies are permitted, by proxy at a meeting summoned for the purpose.”* In that respect, there can be a waiver or release of the trustee from liability arising from breach of trust by the trustee. For the release or waiver to be valid, it must be agreed to by holders of at least seventy-five percent of the value of the loan. In essence, a trustee can be released from liability after the breach occurs, but there cannot be a provision exempting the trustee from liability before the occurrence of the breach.

A debenture holder or the Registrar is permitted to apply to the court for the removal and appointment of a replacement trustee for conflict of interest or other justifiable reason. Section 95(6) of Act 992 provides that *“(6) Despite the provisions in the debenture or trust deed, the Court may, on the application of a debenture holder or of the Registrar, remove a trustee and appoint another trustee in the place of the removed trustee if satisfied that the first mentioned trustee has an interest which conflict or may conflict with the interest of the debenture holder or that for a sufficient reason, it is desirable to remove that trustee.”* Where such an application is made, the Court may make an order for the applicant to provide security for costs of the trustee and direct the application to be held in chambers.¹²⁷⁷

Where a trustee dies or retires, a replacement trustee must be appointed in accordance with the trust deed provided the Registrar is permitted to appoint a trustee pending the appointment in accordance with the trust deed.¹²⁷⁸

20.8 Meeting of debenture holders

Debenture holders as a stakeholder of the company may constitute a group that have meetings and take decisions that may be binding on all debenture holders. Section 96 of Act 992 provides that:

- “(1) The terms of the debentures or trust deed may provide for the convening of general meetings of the debenture holders and for the passing, at those meetings, of resolutions binding on the holders of the debentures of the same class.*
- (2) Whether or not the debentures or trust deed contains the provisions referred to in subsection (1), the Registrar may at any time direct a meeting of the debenture holders of a class to be held and conducted in the manner that the Registrar thinks fit, to consider the matters which the Registrar or the trustees, shall bring*

¹²⁷⁷ Section 95(7) of Act 992.

¹²⁷⁸ Section 95(8) of Act 992.

before the meeting, and may give the ancillary or consequential direction that the Registrar thinks fit."

The debenture holders may meet to take decisions binding on the debenture holders in accordance with the debentures or trust deed. That is, the debentures must have provided expressly for the convening of meetings of debenture holders. If not provided, the debenture holders cannot, therefore, on their own have a meeting and take decisions binding on debenture holders who disagree with the decision. However, the Registrar can direct the debenture holders to meet and take decisions on matters tabled by the Registrar or trustee of the debenture holders. The Registrar has the discretion to give consequential directions for the meeting.

20.9 Redemption and re-issue of debentures

The company may at any time redeem the debenture by paying the debt to the lender and discharging the debenture. The payment may have been made on a date or an agreed repayment schedule in the debenture or may be prepayment of the debt. A debenture redeemed by the company may be re-issued by the company. Section 97 of Act 992 provides that:

- "(1) Where a company redeems a debenture previously issued, the company may, subject to subsection [(6)]¹²⁷⁹, re-issue that debenture.*
- (2) The re-issue may be made either by re-issuing that debenture or by issuing another debenture in place of the redeemed debenture.*
- (3) On re-issue, the person entitled to the debenture has the same priority as if the debenture had never been redeemed.*
- (4) The re-issue of a redeemed debenture shall be treated as the issue of a new debenture for the purposes of stamp duty but not for any other purpose including a provision limiting the amount or number of debentures to be issued.*
- (5) For the purpose of subsection (4), a person lending money on the security of re-issued debenture which appears to be duly stamped may give the debenture in evidence in any proceedings without payment of the stamp duty or a penalty unless that person had notice, or with due diligence might have discovered that the debenture was not duly stamped, but the company in either case is liable to pay the proper stamp duty and penalty.*
- (6) This section does not entitle a company to re-issue a redeemed debenture if the company has manifested the intention of the company that the debenture shall be cancelled or if re-issued, is forbidden by a provision in the constitution of the company or in the debenture, trust deed or any other contract entered into by the company."*

¹²⁷⁹ Even though the section stated subsection (5), it is suggested that the correct reference should be subsection (6). This position is supported by the section 94 of the repealed Companies Act, 1963 (Act 179).

A company may repay the loan and discharge the agreement under which the loan is given. The debenture is thus discharged by performance. The complete performance of obligations under a contract discharges the contract. The Act however permits a company to re-issue a redeemed debenture unless the company is not permitted to do so by its constitution or by the terms of the debenture, trust deed or a contract entered into by the company. The re-issue may be done by assigning or transfer of the redeemed debenture, the execution of a deed of adherence, re-issuing the new debenture in place of the redeemed debenture, or any other manner permitted by the terms of the debenture. The holder of the re-issued debenture is placed in the same order of priority as if the debenture has not been redeemed. The re-issued debenture must be stamped upon payment of the required stamp duty. However, a re-issued secured debenture is admissible in evidence notwithstanding that stamp duty and penalty is not paid provided that the holder remains liable to pay the stamp duty and the penalty.

Subsection (7) of section 97 of the Act provides that *“(7) Where a company has deposited any of the debentures of the company to secure advance from time to time on current account or otherwise, the debenture shall not be deemed to have been redeemed by reason of the account of the company having ceased to be in debit while the debentures remained so deposited.”* This deals with situations of overdraft arrangement with a bank based on a written acknowledgement that the company from time to time may overdraw an account and repay the overdrawn amount. Where the company repays the amount and does not owe on the account, but the written acknowledgement remains in place, the debenture is not to be treated as redeemed.

20.10 Documents relating to debentures

The very essence of a debenture is that there must be a written acknowledgement of indebtedness by a company. There must, therefore, be a document for there to be a debenture. A verbal agreement under which a company borrows money from a lender, individual or body corporate, will not qualify as a debenture. A debenture or debenture stock must be evidenced by a written document.

20.10.1 Title document – debenture and debenture stock certificate

As indicated above, a debenture or debenture stock must be evidenced by a written document. The Act requires the title of a debenture holder to be evidenced by the debenture, which is the written document by the company evidencing the indebtedness of the company to the lender. This is the loan or facility agreement entered into between the company and the lender. Debenture stock is created by a deed poll or indenture. The title of the debenture stockholder is evidenced by a debenture stock certificate issued by the company. The Act mandates that the company must issue the debenture or debenture stock certificate to the holder to evidence the title of the holder. Section 85 of Act 992 provides:

- “(1) Subject to the Central Securities Depository Act, 2007 (Act 733) a company shall within two months after the allotment of any of its debentures, or after the registration of the transfer of the debentures, deliver to the registered holder of the debentures, the debentures or a certificate of the debenture stock under the common seal of the company or as certified by two directors and the Company Secretary of that company.*
- (2) Where a debenture or debenture stock certificate is defaced, lost or destroyed, the company, at the request of the registered holder of the debenture, shall issue a certified copy of the debenture or renew the debenture stock certificate on payment of a fee prescribed by the company and on the terms, as to evidence and indemnity and the payment of the out-of-pocket expenses of the company investigating the evidence, that the company may reasonably require.*
- (3) Where a company defaults in complying with this section, the company and an officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of two hundred and fifty penalty units.*
- (4) On an application by a person entitled to have the debentures or debenture stock certificate delivered to that person, the Court may order the company to deliver the debenture stock certificate and may require the company and that officer to bear the cost of, and incidental to, the application.”*

The company is thus required to deliver the debenture or debenture stock certificate within two months after allotment of the debenture or debenture stock or upon registration of the transfer of the debenture on debenture stock. Allotment here refers to the conclusion of the agreement for or the issue of the debenture or debenture stock, and the entry of the name of the holder in the register of debenture holders. Transfer refers to the transfer of debenture or debenture stock from one holder to a new holder. Upon entry of the name of the new holder, the company must issue a debenture or debenture stock certificate within two months. In relation to a debenture, two copies of the loan agreement are signed by the company and the lender, and each party keeps one of the documents. The company is required to issue a certified copy of the debenture or renew the debenture stock certificate in the event that the issued debenture or debenture stock certificate is defaced, destroyed or lost. The holder requesting for the certified copy of the debenture or new debenture stock certificate is required to pay a prescribed fee and provide indemnity and reimburse the company for expenses incurred in investigating the circumstance of the loss, destruction or defacement.

If a company defaults in any of the above obligations, the company and the officer of the company in default is liable to pay an administrative penalty to the Registrar. The holder may also apply to the court for an order directed at the company to fulfil its obligation to issue the debenture or certificate, or the certified copy of the debenture. The court in making the order may also order for the company to bear the cost of the application.

Effect of statements in debentures

Section 86 of Act 992 states the two effects of statements in the debenture as a prima facie evidence of title to the debenture of the person named in the debenture or the certificate, and of the amount stated as indebtedness. Section 86 provides:

- “(1) Statements made in debentures or debenture stocks certificates, including statements made electronically are prima facie evidence of the title to the debentures of the person named in the statement as the registered holder and of the amounts so secured.*
- (2) Where a person changes the position of that person in reliance in good faith on the continued accuracy of the statements made in the debenture or debenture stock certificate, the company is estopped in favour of that person from denying the continued accuracy of the statements and shall compensate that person for a loss suffered by that person in reliance on that accuracy, and which that person would not have suffered had the statement been or continued to be accurate.*
- (3) Subsection (2) does not derogate from a right the company may have to be indemnified by any other person.”*

The section requires that unless contrary evidence is provided, the statements made in the debenture or debenture stock certificate is proof of the title of the person named as a holder to the debenture or stock, as well as the amount of the indebtedness. Secondly, the continued accuracy of the statement is binding on the company. This operates under the doctrine of estoppel and the company is deemed to make a representation of the continued accuracy of the statements made in the debenture or the certificate. A person who relies on the continued accuracy of such a statement and changed his position to his detriment is entitled to compensation if the statement turned out to be inaccurate. Subsection (2) of section 86 of the Act requires the company to compensate the person for the loss suffered by the person in reliance on the statements provided the person would not have suffered the loss had the statement been or continued to be accurate. The section does not negate the right of the company to claim indemnity from any other person whose act led to the liability of the company.¹²⁸⁰

20.10.2 Register of debenture holders and registration of transfer

A company is required to maintain a register of debenture holders and enter into the register, the particulars of debenture holders similar to that of shareholders under sections 35 and 36 of Act 992. Section 99 of Act 992 provides that:

¹²⁸⁰ Section 86(3) of Act 992.

“(1) A company which issues or has issued debentures shall maintain a register of the holders of the debenture.

(2) Subject to sections 106 to 109,

(a) the register of debenture holders shall be kept and maintained at the address at which the register of members is kept; and

(b) sections 35 to 36 shall apply as regards the giving of notice to the Registrar of the place where the register is kept, taking into consideration the details in the register of debenture holders.”

A company is to enter the particulars of the debenture holders in a similar manner as particulars of shareholders are entered. The particulars of a debenture holder that must be entered in the register of debenture include:

- (i) the name and address of the debenture holder
- (ii) statements on the debentures held by the debenture holder
- (iii) the amount provided under the debenture
- (iv) the date of entry in the register
- (v) the nature of the interest of the debenture holder
- (vi) the date at which the debenture holder ceased to be a holder
- (vii) in the event the debenture holders are more than fifty, index of the names of debenture holders and beneficial holders.

The register must be kept at the same place the register of members is kept and open for inspection by the debenture holders. The debenture holders are entitled to inspect and receive copies of the register in a similar manner as shareholders under section 36 and are entitled to receive copies of the register upon payment of the prescribed fee by the company.

A company is also required to register a transfer of debenture by entry in the register of debenture holders. However, a company is not required to register a notice of trust, contingent, future or partial interest in debentures or fractional part of debentures.¹²⁸¹ The only interest to be registered is the absolute right to the entirety of the debenture.¹²⁸² The company is only required to register the interest in the register upon submission of a duly stamped instrument of transfer.¹²⁸³ The company is also required to register the interest where debentures are transmitted by operation of law.¹²⁸⁴ The transfer must be lodged for registration by either the transferor or transferee.¹²⁸⁵ The company is required to inform the transferor or the transferee within two months if the company refuses to

¹²⁸¹ Section 101(1) of Act 992.

¹²⁸² Section 101(2) of Act 992.

¹²⁸³ Section 101(3) and (5) of Act 992.

¹²⁸⁴ Section 101(3) of Act 992.

¹²⁸⁵ Section 101(6) of Act 992.

register the transfer.¹²⁸⁶ A company in breach of the requirement to inform the transferor and transferee within the stipulated two months is liable to pay an administrative penalty to the Registrar. These requirements are not applicable to debentures transferred through a scheme under the Central Securities Depository Act, 2007 (Act 733).

20.11 Transfer of debentures

Just like shares, debentures are transferable from a debenture holder to another person. Section 100 of Act 992 permits the transfer of debentures. Section 100 provides *“(1) Except as expressly provided in the terms of the debentures, debentures are transferable without restriction by a written transfer in common form and the transferee is entitled to the debenture and to moneys secured by the transfer without regard to any equities, set-off, cross-claim between the company and the original or intermediate holder.”* Debentures are, therefore, transferable unless there is a restriction on transferability in the debenture. The requirement for a transfer is that the transfer must be done in writing. There must therefore be an instrument of transfer. The transfer of debenture entitles the transferee to the debenture and amounts due under the debenture. The company is not entitled to any set-off, cross-claims or equities it has against the original debenture holder or intermediate holder, against the transferee.

The terms of the debenture may impose restrictions on the transfer of the debenture including the power of the company to refuse to register the transfer, right of first refusal conferred on other debenture holders, member or officers of the company, or right of the company to redeem the debenture, among others. Section 100(2) of Act 992 provides that *“(2) Subject to section 322, the terms of a debenture may impose restrictions on the transferability of debentures including power for the company to refuse to register a transfer and provisions for compulsory acquisition or rights of first refusal in favour of other debenture holders, members or officer of the company.”*

Section 322 of Act 992 which deals with restrictions on the transferability of securities of public companies provides that *“(2) Despite subsection (2) of section 100, a public company shall not issue a debenture of the company which imposes a restriction on the right to transfer the debenture and if the debenture purports to contain that restriction, it shall be ineffective.”* Restrictions on transferability can, therefore, only be imposed on debentures issued by private companies. Public companies are prohibited from restricting the transfer of debentures and any provision in the debenture to that effect is null and void.

For a restriction on the transfer of debenture of a private company to be effective, the restriction must be endorsed on the face of the debenture or debenture stock certificate. Section 100(3) of Act 992 provides that *“(3) Where a restriction is imposed on the right to transfer a debenture, notice of*

¹²⁸⁶ Section 101(7) of Act 992.

the restriction shall be endorsed on the face of the debenture or debenture stock certificate and, in the absence of that endorsement, the restriction is ineffective as regards the transferee for value whether or not that transferee has notice of the restriction.” Failure to endorse the restriction on the face of the debenture or debenture stock certificate makes the restriction unenforceable against a transferee who acquires the debenture notwithstanding notice of the restriction.

Generally, there are no restrictions on the issue of debenture stocks, which are marketable loans, that are traded on the financial market. Restrictions will limit the appetite for such instructions. However, a private company must restrict the transferability of the debenture stock by endorsing the restriction on the face of the stock certificate.

Upon the transfer of the debenture, the transferee or transferor is required to lodge the instrument of transfer and the debenture or debenture certificate with the company for registration and entry of the name of the transferee in the register of debentures.¹²⁸⁷ The company upon entry of the name of the transferee in the register of debentures must, within two months, deliver a debenture or debenture certificate to the new holder.

20.12 Transmission of debentures by operation of law

Debentures can also be transmitted by operation of law in a similar manner as shares. A person can acquire a debenture through transmission of the debentures by operation of law. Transmission of debentures by operation of law deals with two situations. First, to determine a debenture holder upon the death of the holder and, secondly, in the event of declaration of bankruptcy of the holder. Section 102¹²⁸⁸ of Act 992 deals with transmission of debentures by operation of law upon the death of a debenture holder or declaration of a debenture holder as bankrupt or insolvent.

Section 102 of Act 992 provides that:

- “(1) In the case of the death of a shareholder or debenture holder,*
(a) the survivors, where the deceased was a joint holder, and
(b) the legal personal representatives of the deceased where the deceased was a sole holder or last survivor of joint holders
shall be the only persons recognised by the company as shareholders or debenture holders.
- (2) A person on whom the ownership of a share or debenture devolves by reason of that person being the legal personal representative, receiver, or trustee in bankruptcy or the holder, or by operation of law may, on the evidence being produced that the company may properly require, be registered personally as the*

¹²⁸⁷ Section 101 of Act 992.

¹²⁸⁸ It should be noted that section 102 deals with both shares and debentures without distinction in relation to transmission of the shares and debentures by operation of law.

holder of the share or debenture or transfer the same to any other person, and the transfer shall be as valid as if that person had been registered as a holder at the time of execution."

Once a debenture holder dies, Act 992 provides who becomes a debenture holder in the stead of the deceased. Section 102 provides that upon the death of an existing debenture holder, the debentures transmit by operation of law to surviving debenture holders in the event of joint holding by two or more debenture holders. In the case of the death of a sole holder, the debenture devolves to the legal personal representative of the deceased debenture holder. The legal personal representative of a deceased debenture holder will depend on whether the deceased died testate or intestate. Where the deceased dies testate, his legal personal representative will be the executor of the will of the deceased shareholder and where the shareholder dies intestate, the legal personal representative will be the administrator of the estate of the deceased shareholder.

The second situation provided for under section 102 of Act 992 is in relation to the declaration of a debenture holder as bankrupt or insolvent. In that event, the debenture of the bankrupt or insolvent debenture holder transmits by operation of law to the receiver or trustee in bankruptcy appointed for the bankrupt debenture holder. An individual may be declared bankrupt under the Insolvency Act, 2006 (Act 708) whilst a corporate entity may be so declared insolvent under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015). A receiver or trustee appointed in the proceeding of declaring the individual or corporate entity insolvent automatically becomes a holder of the debenture of the person so declared insolvent.

By the requirement of the Act, once any of the above events occur, the person on whom the ownership of a debenture devolves by reason of that person being a legal personal representative, a receiver or trustee in bankruptcy of the debenture holder may, on providing evidence of that fact to the company, be registered personally as the holder of the debenture or transfer the debenture to some other person and the transfer will be as valid as though that person had been registered as the holder at the time of the execution of the transfer.¹²⁸⁹ Even though the company maintains the right to refuse to register a transfer of debenture, the company does not have the right to refuse to register a legal personal representative, a receiver or trustee in bankruptcy of a debenture holder personally as the owner of the debenture that has devolved on him as such¹²⁹⁰. The law requires that such a person enjoys the right attached to the debenture as a debenture holder including receipt of payment of interest and other advantages notwithstanding the non-registration of the person.¹²⁹¹

¹²⁸⁹ Section 102(2) of Act 992.

¹²⁹⁰ Section 102(3) of Act 992

¹²⁹¹ Section 102(4) of Act 992.

In order to protect persons other than the legal personal representative or, receiver or trustee that may have interest in the debenture upon the death of the debenture holder or declaration of debenture holder as bankrupt, section 103 of Act 992 provides that such a person is permitted to serve on the company copies of notice and affidavit in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I. 47). The company is required upon the services of the notice to enter the notice in the register of debenture and no payment or transfer of debenture shall be effected contrary to the terms of the notice unless the notice expires.¹²⁹² The company is liable to compensate affected persons if it fails to comply with the requirement of entering the notice and effecting any payment or transfer of the debentures contrary to the notice.¹²⁹³

20.13 Secured Debentures

As earlier indicated, debenture has been used to refer to a document by which a company grants security for repayment of a loan taken by the company. However, the Act provides that a debenture refers to all written acknowledgement of indebtedness by a company whether or not security is granted or not.¹²⁹⁴ Secured debentures are just one type of debenture. There are unsecured or naked debentures. Section 89(1) of Act 992 provides that ***“(1) Debentures may either be secured by a charge over the property of the company or may be unsecured by a charge.”*** The Act permits the issue by a company of a secured debenture or unsecured debenture. The secured debenture constitutes a credit agreement creating a security interest and must satisfy the requirements of the Borrowers and Lenders Act, 2020 (Act 1052) in addition to the requirements of the Companies Act, 2019 (Act 992).

A company may borrow and in order to give comfort to the lender that the company will repay the amount borrowed, the company may either grant a security interest over its assets in favour of the lender or get third parties (directors, shareholders or associated companies) to guarantee or provide security to the lenders. Where the company gets a third party to either provide a guarantee¹²⁹⁵ or grant security over assets of the third party in favour of the lender to secure the repayment obligation of the company, that is indirect security. In the other instance, the company may grant security over its own assets in favour of the lender either by transferring possession over its assets to the lender or granting security interest over its assets in favour of the lender.¹²⁹⁶ Transfer of possession over its assets may either be as a pledge or possessory lien over the assets. The grant of the security interest without transfer of possession of the assets is done by way of charge. A charge is therefore a security interest created by the company in favour of the lender or creditor to secure the repayment obligation of the company without transferring possession of the asset to the lender. The charge creates an

¹²⁹² Section 103(1) of Act 992.

¹²⁹³ Section 103(3) of Act 992.

¹²⁹⁴ First Schedule of the Companies Act, 2019; *Lemon v. Austin Friars Investment Trust Ltd* [1926] Ch. 1.

¹²⁹⁵ This constitutes a credit guarantee under section 4 of Act 1052 and a guarantee under section 14 of Act 25.

¹²⁹⁶ This falls under section 4(1) of Act 1052 as credit agreement or secured loan.

encumbrance over the charged assets in favour of the debenture holder or chargee without transfer of possession. The debenture holder or chargee, therefore, has a security interest in the charged assets without having ownership or possession of the charged assets. The company continues to have ownership, possession and use of the asset. Section 7 of Act 1052 provides that *"A security interest in property shall not operate as a transfer of title in the property from the borrower to the lender."*

The Companies Act, 2019 in subsection (1) of section 89 permits a company to issue secured debentures which are debentures secured by a charge over the assets of the company. The indirect security arrangement described above does not create secured debenture. A secured debenture requires the company to create a charge over the assets of the company to secure the debenture. A charge created over the assets of directors or shareholders of the company for money borrowed by the company does not create a secured debenture in relation to the company since the charge is not over the assets of the company. This may be secured lending in the books of the lender but does not fall into the definition of the section in relation to secured debenture issued by the company. In addition, where a company issued a debenture, and the directors and shareholders provide a guarantee for the repayment of the debt of the company, that is not a secured debenture as no charge is created over the assets of the company.

As indicated, a secured debenture under the Borrowers and Lenders Act, 2020 (Act 1052) constitutes a credit agreement creating a security interest. But not all security interest created under Act 1052 will constitute a charge over the assets of the company. A company is permitted to create a charge over tangible and intangible assets, immovable property receivables and accounts of the company. A credit agreement creating a charge over the assets of a company will constitute a secured debenture. Act 1015 provides that such agreement must be in writing.¹²⁹⁷ Act 1052 provides in relation to all security interest that: *"A credit agreement that creates a security interest in property shall be executed in writing, and the credit agreement shall consist of one or more tangible documents or electronic records which, taken together, establish the intent of the parties."*¹²⁹⁸

The First Schedule of Act 992 provides that *"'charge' includes a security on property or a mortgage whether legal or equitable statement to the effect that it is a true and complete copy of the original or, an accurate translation of the original, under the seal of the company or signed by a director and the Company Secretary"*.¹²⁹⁹ A charge over the assets constitutes a collateral which section 85 of Act

¹²⁹⁷ Section 5 of Act 1052.

¹²⁹⁸ Ibid.

¹²⁹⁹ Section 85 of Act 1052 use the term "security interest" which is defined broadly as *"'security interest' means a proprietary right in a movable or immovable asset that is created by an agreement to secure payment or performance of an obligation, regardless of whether the parties have denominated it as a security interest and regardless of the type of asset, the status of the fixed and floating charge, charge on chattels, mortgage over an immovable property, contractual lien, pledge, outright finance lease, trust for the purpose of security or other encumbrance of any nature*

1052 provides constitutes a security interest in movable or immovable property. Section 85 of Act 1052 provides a comprehensive definition of a “security interest” which is created upon the grant of a charge over the property of the company as follows:

“‘security interest’ means a proprietary right in a movable or immovable asset that is created by an agreement to secure payment or performance of an obligation, regardless of whether the parties have denominated it as a security interest and regardless of the type of asset, the status of the fixed and floating charge, charge on chattels, mortgage over an immovable property, contractual lien, pledge, outright or security assignment of receivables, reservation of title, finance lease, trust for the purposes of security or other encumbrance of any nature created by agreement other than a lien arising by operation of law”.

The above definition cover security interests other than those created by a charge over the assets of a company that is a borrower in favour of a lender. The critical thing to note, however, is that the resulting charge, fixed or floating charge, creates a security interest over the assets of a company. Per the definition in the First Schedule of Act 992, a charge is a security interest on property or a mortgage whether legal or equitable and must be issued under the seal of the company or signed by a director and the Company Secretary. It does not require the transfer of the title or possession of the property in line with section 7 of Act 1052.

In *Re Cosslet (Contractors) Ltd*¹³⁰⁰, Millett Lt provides for classification of securities to secure obligation as follows:

“There are only four kinds of consensual security known in English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge, the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor charge depends on the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.”

Whilst this position by and large reflects the nature of securities that can be granted in Ghana, it draws a distinction between a charge and mortgage that is not applicable in Ghana. Charges in Ghana include mortgages which do not require the transfer of ownership in any form to the chargee but involves the creation of an equitable interest in the charged property.

created by an agreement other than a lien arising by operation of law”. The definition of charge under the Companies Act, 2019 as applicable to issue of debenture is much more narrow and included in the definition of “security interest”..

¹³⁰⁰ [1998] Ch 495

20.14 Type of charges to secured debentures

Act 992 provides for two types of charges over the assets of a company to secure repayment obligations under a secured debenture. Section 83(2) of Act 992 provides that *“(2) Debentures may be secured by a fixed charge on some property of the company or a floating charge over the whole or specified part of the undertaking and assets of the company, or by both a fixed charge on a property and a floating charge.”* A fixed charge is created by creating the charge over specific defined assets. A fixed charge may be in the nature of a mortgage over land or building, a charge over a specific car defined by model and registration number, a charge over a specific machine or asset of the company. A floating charge, on the other hand, is a charge created over all or a group of assets of a company, which assets are non-constant assets. The assets keep changing forms either in terms of value or quantity. Examples include a charge over stock-in-trade of the company or receivables of the company or the general assets of the company which change their form in terms of quantity and value. A company is permitted to issue a fixed charge or a floating charge or both fixed and floating charges to secure repayment obligation under a secured debenture. For both fixed charge and floating, the secured debenture must identify the lender, borrower, secured obligation and the collateral.¹³⁰¹ There must be sufficient description of the collateral¹³⁰² and secured obligation¹³⁰³. Act 1052 provides that a security interest created over assets automatically extends to identifiable proceeds of the collateral whether or not the credit agreement contains description of the proceeds.¹³⁰⁴ Sections 8 and 9 of Act 1052 on description of collateral and secured obligations provide:

“8. (1) A credit agreement shall contain a description of the collateral that reasonably identifies the property to be provided as collateral.

(2) For the purposes of this section, the description of the collateral may be generic or specific.

(3) For the purpose of this section, a description in the form of the expression – “all inventory”, “all receivables” or “all movable property” – of the borrower is sufficient.

(4) Despite anything to the contrary in this section, the description of an immovable property shall

(a) be specific; and

(b) include

(i) the location,

(ii) the size, and

*(iii) the geographical coordinates
of the immovable property.”*

¹³⁰¹ Section 6(2) of Act 1052.

¹³⁰² Section 8 of Act 1052.

¹³⁰³ Section 9 of Act 1052.

¹³⁰⁴ Section 10 of Act 1052.

“9. A credit agreement may describe secured obligations generically, including by a reference to all payment obligations specified under a credit agreement for which the security interest may be enforced.”

An important introduction in relation to the charged assets is that the security interest automatically extends to proceeds of the collateral.¹³⁰⁵ Section 10 of Act 1052 provides:

“10. (1) After a security interest is created and becomes effective between the lender and borrower, it shall automatically extend to any identifiable proceeds of the collateral whether or not the credit agreement contains description of the proceeds as provided in this Act.

(2) Where proceeds in the form of money or funds credited to a bank account are commingled with other assets of the same kind,

- (a) the security interest extends to the commingled assets, notwithstanding that the proceeds have ceased to be identifiable;*
- (b) the security interest in the commingled assets is limited to the amount of the proceeds immediately before they were commingled; and*
- (c) if at any time after the commingling, the amount of the commingled money or of the balance credited to the bank account is less than the amount of the proceeds immediately before they were commingled, the security interest in the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time when the security interest is claimed.”*

Fixed charges are easy to understand and manage in enforcement processes since the charge is created over specific defined asset or assets. Fixed charge may generally have collateral identification. Section 85 of Act 1052 provides that:

““collateral identification” includes:

- (a) in the case of a vehicle, the vehicle identification or chassis number marked or attached to the body frame by the manufacturer;*
- (b) in the case of other movable property, the serial number marked on or attached to the property by the manufacturer; and*
- (c) in the case of immovable property, the plot number, land title registration or deeds registration number or geographical coordinates of the land or building”.*

The asset is identifiable and does not change its form in terms of value or quantify even though it may depreciate or appreciate where it is over fixed assets like building, machinery and equipment.

¹³⁰⁵ This is subject to some contractual limitation in relation to security interest in account receivables under section 11 of Act 1052; security interest in deposit accounts under section 12 of Act 1052; and security interest in intellectual property under section 13 of Act 1052.

However, floating charge is on assets that keep changing form in terms of value and quantity. The law, therefore, provides for additional rules to deal with floating charges.

20.15 Floating charges

Section 90 of Act 992 provides that *“(1) Subject to subsection (2), a floating charge is an equitable charge over the whole or a specified part of the undertaking and assets of the company both present and future.”* This definition is a repetition of section 89(2) of the Act. A floating charge is, therefore, not on any specific defined asset but an equitable charge over all or a group of assets and undertakings of the company. The assets include all the assets or parts of the assets currently held by the company and those assets that are yet to be acquired by the company. That is, the charge is on both current and future assets. This may include descriptions such as “all inventory”, “all receivables”, “all movable assets” or a defined group of any of these. The assets, therefore, changed their form from time to time as some may be disposed of whilst new assets may be added.

The company is permitted to continue to use the assets until events stated under section 90 of the Act occur. Section 90(2) of Act 992 provides that:

“(2) A floating charge does not preclude the company from dealing with the assets of the company until,

- (a) the security becomes enforceable and the holder of the security pursuant to a power in that behalf in the debenture or the deed securing same, appoints a receiver or manager or enters into possession of those assets;*
- (b) the court appoints a receiver or manager of the assets upon the application of the holder; or*
- (c) the company goes into liquidation.”*

The company is permitted under the section to continue to use or deal with the assets notwithstanding the creation of the floating charge over the assets. A company which creates a floating charge over its stock-in-trade is entitled to dispose of the stock and acquire new stock. The company can, however, not use or deal with the assets when three events occur.

- Firstly, the charge becomes enforceable in accordance with the terms of the debenture and the holder takes steps to enforce the charge.
- Secondly, the court appoints a receiver or a manager over the assets.
- Thirdly, the company goes into liquidation.

Upon the occurrence of these events, the floating charge is said to have crystallized into a fixed charge enforceable against the assets falling within the class of the charged assets.

The company cannot then continue to deal with the assets. Section 90(3) of Act 992 provides that “(3) *On the happening of an event specified in subsection (2), the charge crystallizes and becomes a fixed equitable charge on those of the assets of the company that are subject to the charge.*”

For a charge to be a floating charge under the Act it must have at least three features:

- (a) it must not be on a specific defined asset of the company;
- (b) must be on undertakings or assets of the company that keep changing form, that is on present and future assets; and
- (c) the company is not precluded from dealing with the assets including disposing of the assets.

These features of floating charges have been provided in a number of cases which distinguished a floating charge from a fixed charge.

*Governments Stock and Other Securities Investment Co Ltd v. Manila Railway Co Ltd*¹³⁰⁶, Lord Macnaghten described floating charge as:

“A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.”

Further explanation on the above description was provided by Lord Macnaghten in the case of *Illingworth v. Houldsworth*¹³⁰⁷ as follows:

“... what I said [that is in Manila Railway case above] was intended as a description, not as a definition, of a floating security. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. I think, is one that without more fastens on ascertained and definite property capable of being ascertained and defined, a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”

¹³⁰⁶ [1897] AC 8 at 86

¹³⁰⁷ [1904] AC 355 at 358.

In *George Cohen (WA) Ltd, v. Comet Construction Co Ltd; Ghana Commercial Bank (Claimants)*¹³⁰⁸, Edusei J said @ pg. 779 that:

"A floating charge which is quite distinct from a specific charge does not fasten on any definite property but is an equitable charge on property which is constantly changing, for example stock-in-trade. However if the debenture holder, on the happening of some event stated in the debenture takes step to have the floating charge crystallization the charge then becomes specific or fixed charge."

In *Re Spectrum Plus Ltd*¹³⁰⁹, Lord Scott of Foscote stated @ pg. 111 that:

"... the essential feature of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the assets subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime, the charger is left free to use the charged asset and to remove it from the security."

In *Re Yorkshire Woolcombers Association Ltd*¹³¹⁰, Romer LJ stated @ pg. 295:

"[floating charge] is not a legal term. It has recently been used in more than one statute; but when the courts have to consider whether the charge is a floating one within the meaning of the term as used in the Acts of Parliament, and in particular within the meaning of the Companies Act 1900 [which provides for registration of charges], one must, I think deal with the question of substance to be answered according to the circumstance of each particular case. I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time, and (3) if you find that by the charge it is contemplated that, until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

Floating charges are therefore created over assets that change their form from time to time and the company is permitted to continue dealing in the assets until an event occurs to make the charge

¹³⁰⁸ [1966] GLR 777.

¹³⁰⁹ [2005] UKHL 41.

¹³¹⁰ [1903] 2 Ch 284.

enforceable and the holder of the charge takes steps to enforce the charge, or the company goes into liquidation. Given the definition, a floating charge is generally created on stock-in-trade or undertakings of a company or assets that continuously change form from time to time which means the company may dispose of the assets and acquire new additions from time to time. However, it should be noted that assets in the nature of fixed assets may have floating charges created over those assets if those fixed assets are the stock-in-trade of the company. For example, for a real estate company, the buildings of the company are the stock-in-trade of the company and a floating charge may be created over the buildings.

*In Re Panama, New Zealand and Australian Royal Mail Company*¹³¹¹ - a steamship company, having the power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging the "undertaking, and all sums of money arising therefrom," with the repayment at a specified time of the money borrowed, with interest in the meantime. The properties of the company consisted of fifteen steam vessels of 12,500 tons register in the aggregate, and 2600 horsepower nominal, and also of sailing and coal ships, representing a tonnage of 8000 tons. The cost of this fleet amounts to upwards of £525,000, and the company possess other available assets of the value of about £50,000; ample security is therefore offered to the debenture holders. The subsidy receivable by the company for the Panama service is £110,000 per annum, the amount being irrespective of subsidies for local mail services in New Zealand, and between that colony and Australia, which during the past year amounted to £40,000. Before the debentures became due the company was wound up, and the ships and other properties of the company were sold. It was held that the charge was on all the assets of the company. On appeal, it was argued that undertaking relates to only income from the assets of the company and not the assets. It was held that the debenture holders acquired a charge upon all the property of the company, past and future, by the term "undertaking;" and that they were entitled to be paid out of the property of the company in priority to the general creditors. Sir G. M. Giffard, L.J. stated @ pgs. 321 to 323 that:

"What I have to decide in the present case is simply this: What are the rights of the debenture holders, the state of things being that the concern is being wound up, and that the whole of its property is being realised? I confess that I can have no doubt whatever as to what the effect of the debenture is. In the first place, as regards the powers that were given to the company, there was a power given to mortgage, and a power given to raise money by debentures; but, of course, they might include in one and the same instrument a mortgage and a debenture, that is to say, a mortgage and a bond. Accordingly they did issue what they called a mortgage debenture, which was, in substance, a bond, and a charge upon their property for the sum borrowed on bond. The form of the instrument is not an assignment but a charge; the company charge the undertaking, and all sums of money arising therefrom, and all estate, right, title, and interest of the company therein, with payment of the

¹³¹¹ (1870) LR 5 Ch App 318.

principal sum and interest. I asked in the course of the argument what could be the subject matter of that charge, and the answer given was, that there were valuable contracts, and that all that the charge was meant to cover was the income arising from the business being carried on, and that it would not extend to property, such as the ships and other property of that nature, which were absolutely essential to the carrying on of the concern. I cannot accede to any such proposition as that. I have no hesitation in saying that in this particular case, and having regard to the state of this particular company, the word "undertaking" had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word "undertaking" necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not refer to such things as sales or mortgages of property, but to the ordinary application of funds which came into the hands of the company in the usual course of business. I see no difficulty or inconvenience in giving that effect to this instrument. But the moment the company comes to be wound up, and the property has to be realised, that moment the rights of these parties, beyond all question, attach. My opinion is, that even if the company had not stopped the debenture holders might have filed a bill to realise their security. I hold that under these debentures they have a charge upon all property of the company, past and future, by the term "undertaking," and that they stand in a position superior to that of the general creditors, who can touch nothing until they are paid."

20.16 Crystallization of floating charge

A floating charge created over the whole or some assets of a company does not fasten on any specific asset or assets within the class unless some events occur. The company is permitted to continue to deal with the assets and the assets may change their form from time to time. Crystallization refers to the process by which the floating charge fasten on the assets that fall within the class over which the charge is created which prevents the company from dealing with the assets. Once crystallization occurs, the floating charge converts to a fixed equitable charge over the assets forming part of the charged assets. Crystallization is triggered by stated events in the debenture or deed of charge, or the Companies Act, 2019. Section 90(3) of Act 992 provides that:

“(3) On the happening of an event specified in subsection (2), the charge crystallizes and becomes a fixed equitable charge on the assets of the company that are subject to the charge.”

The events stated under subsection (2) of section 90 of the Act are:

- (a) the charge becomes enforceable and the holder, pursuant to powers under the debenture or deed of charge, takes possession of the charged assets;
- (b) the charge becomes enforceable and the holder, pursuant to powers under the debenture or deed of charge, appoints a receiver or manager;
- (c) the debenture holder applies to the court and the court appoints a receiver or manager; and
- (d) the company goes into liquidation.

The four events under subsection (2) of section 90 of the Act are triggers for crystallization. Three of the events relate to enforcement of the charge upon the charge becoming enforceable and the fourth relates to the liquidation of the company. The first and second events relate to the terms of the debenture or the deed of charge. That is, the charge provides for events, the occurrence of which permit the debenture holder or chargee to enforce the charge. Upon the occurrence of the event, the debenture holder or chargee takes step to realise the charged assets either by taking possession or appointing a receiver or manager.

The third event relates to the appointment of a receiver or a manager by the court upon application by the debenture holder or chargee. There are two circumstances under which the court may appoint a receiver or manager on the application of the debenture holder. The court will appoint a receiver or a manager whenever the charge becomes enforceable or in the case of a floating charge, an event occurs to put the assets in jeopardy if no step is taken to protect the charged assets. Section 91 regulates the appointment of a receiver or manager. Section 91 of Act 992 provides that:

- “(1) Where a fixed or floating charge becomes enforceable, the Court may appoint a receiver and, in the case of a floating charge, a receiver and manager of the assets subject to the charge.***
- (2) In the case of a floating charge, the Court may, although the charge has not become enforceable, appoint a receiver or manager if satisfied that the security of the debenture is in jeopardy.***
 - (3) The security of the debenture holder is in jeopardy if the Court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests, of the debenture holder that the company should retain power to dispose of its assets.***
 - (4) A receiver or manager shall not be appointed as a means of enforcing debentures not secured by a charge.”***

The High Court has the power to appoint a receiver or a manager only for enforcing secured debentures. For a fixed charge, only a receiver can be appointed. For a floating charge, a receiver and manager is appointed. A receiver takes possession of the assets to realise the assets to satisfy the debt of the creditor from the assets or receive the receivables due from the assets to satisfy the debt. A receiver and manager in addition to the duties imposed on the receiver is entitled to manage the assets.¹³¹² The management may include refurbishing the assets, improving the nature of the assets or restructuring the assets to improve the use of the assets for the purpose of beneficial realisation of the assets such as increasing the receivables from the assets. A receiver or manager is appointed only in respect of a floating charge.

The High Court will appoint a receiver or a manager upon application by the debenture holder for a secured debenture in two cases. Firstly, where the debenture becomes enforceable in accordance with the terms of the debenture or deed of charge. Secondly, in the case of a floating charge, where the charged assets are in jeopardy. A charged asset, pursuant to a floating charge, is in jeopardy where it is unreasonable in the interest of the chargee for the company to be permitted to be able to deal with the assets or dispose of the assets. In the second instance, the charge has not become enforceable, but circumstances require steps to be taken to protect the interest of the chargee. This is only applicable to floating charges. An example may include where another creditor is seeking to enforce a judgment against the assets or the company manifested an intention to defeat the interest of the chargee.

The third event that triggers crystallization is where the company goes into liquidation. Once a company commences winding up proceedings, the charges created over the assets become enforceable. The chargee may take possession of the assets for the purposes of realisation or may apply to the court to appoint a receiver or manager over the assets.

Where any of the above events occur, the floating charge over the assets of the company will convert to fixed equitable assets through the process of crystallization. However, unlike a fixed charge, section 92 of Act 992 provides that debts that take precedence over floating charge under section 107 of the Corporate Insolvency & Restructuring Act, 2020 (Act 1015) must be satisfied prior to debts secured by the floating charge.

In *George Cohen (WA) Ltd, v. Comet Construction Co Ltd; Ghana Commercial Bank (Claimants)*¹³¹³, Edusei J stated @ pg. 779:

“Crystallization takes place, among other things, when a receiver is appointed and in such circumstances the company, and in this case the judgment debtors, cannot

¹³¹² See section 264 of Act 992.

¹³¹³ [1966] GLR 777.

deal with the property comprised in the security without the consent of the debentureholders."

It is important to clarify that even though a floating charge is enforceable upon crystallization when it becomes a fixed equitable charge, the floating charge without crystallization still confers equitable interest on the chargee which interest the chargee can take legal action to protect. The above position is reflected in section 90(1) of the Act which provides that floating charge is an equitable charge.

The point was pronounced on in the case of *Evans v. River Granite Quarries Ltd*¹³¹⁴. Fletcher Moulton stated @ pg. 994:

"[Floating charge] is an existing charge, and is rightly termed so, but care must be taken to remember that it has not settled down and fastened on the property which is the subject of the charge."

Buckley LJ stated @ pgs. 999 to 1000:

"A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize ... argued that it was competent to the mortgagee to intervene at any moment and to say that he withdrew the license as regards any particular item. That is not in my opinion the nature of the security; it is a mortgage presently affecting all the items expressed to be included in it, but not specifically affecting any item till the happening of the event which causes the security to crystallize as regards all the items."

Since the floating charge is recognised as a current interest and not a future interest, the chargee can take legal action to protect the interest in the form of an injunction¹³¹⁵, realise the assets¹³¹⁶ or appoint a receiver¹³¹⁷. The Companies Act, 2019 dealt with this by permitting a chargee to apply to the court

¹³¹⁴ [1910] 2 KB 979.

¹³¹⁵ *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366 at 378.

¹³¹⁶ *Re Margart Pty Ltd* [1985] BCLC 314.

¹³¹⁷ *Re London Pressed Hinge Co Ltd* [1905] 1 Ch 576.

for the appointment of a receiver and manager even where none of the conditions for enforcement in the debenture or deed of charge occurs, but the charged assets are in jeopardy.¹³¹⁸

20.17 Priority of multiple charges

A company may create two or more charges over the assets of the company in favour of one or different debenture holders. In the event of such multiple charges, an order of priority must be determined for the purpose of payment of the debts from the realisation of the charged assets. All the charges may be fixed charges or may be multiple floating charges or a combination of both fixed charges and floating charges.

The general position of the law is that where the charges are the same charges over the same assets, the order of priority is the order of the times in which the charges are created, that is the order of creation of the charges. The charge first in time created will take priority over a subsequent charge. If there are two fixed charges created over the same assets, the first fixed charge in time takes precedence over the subsequent created fixed charge. The same principle is applicable to multiple floating charges created over assets falling under the same description. This is reflected in section 34 of Act 1052 when it provides that *"Priority between security interests in the same collateral shall be determined by the order of the registration of the security interest unless otherwise provided in sections 35 to 40."* The chargees may among themselves agree to vary the rules applicable to the priority of charges. Section 36 of Act 1052 permits such agreement among the chargees when it provides:

- "36. (1) A lender may, at any time, in writing, subordinate the priority of the lender under this Act in favour of any existing or future lender or other creditor without the need for the borrower to be a party to the subordination.*
(2) The agreement to subordinate the priority of a security interest shall not adversely affect the rights of a person who is not a party to the agreement."

*Cheah Theam Swee v. Equiticorp Finance Group Ltd*¹³¹⁹ - by a mortgage deed ("mortgage I") the defendant covenanted to pay certain sums of money to a company, Equiticorp Securities Ltd., and as security for such payment charged 14 million shares in London Pacific Ltd "by way of first fixed charge." By a further mortgage deed ("mortgage II") the defendant covenanted to pay certain further sums to Capitalcorp Investments U.K. and as security for such payment charged, inter alia, the same 14 million shares in London Pacific Ltd. "by way of second fixed charge." By a series of transactions both the mortgages became vested in the first plaintiff, Equiticorp Finance Group Ltd. In December 1987, the plaintiff obtained a judgment against the defendant for the sum of \$7,556,442.47, being sums of money the payment of which was secured by mortgage I. The plaintiff then exercised its

¹³¹⁸ Section 91(2) and (3) of Act 992.

¹³¹⁹ [1992] 1 AC 472.

power of sale under mortgage II over, inter alia, the 14 million shares in London Pacific Ltd. Apparently, it was overlooked that those shares were subject to a first charge under mortgage I. The shares were not sold subject to mortgage I. The proceeds of the sale of the shares were applied by the plaintiff, not in satisfying the sums of money due under mortgage I (being the judgment debt), but in or towards discharging the debts secured by mortgage II. The defendant applied to the High Court which ruled that the priority of creation of the mortgages must be respected and that the plaintiff must apply the amount to satisfaction of the debt under mortgage 1. The plaintiff appealed to the Court of Appeal which held that mortgagees have the right to vary the order of priority without the consent of the mortgagor. On further appeal, it was held dismissing the appeal, that ordinarily where there were two mortgages of the same property the mortgagees could vary the order of priority of their mortgages without the mortgagor's consent; that although a mortgagor who wished to have the secured debts satisfied in a particular order could require a specific term to be inserted in the mortgage preventing the priorities of the mortgages from being altered, the reference in the first mortgage to the charge being a first charge merely described the nature of the security and conferred no contractual right on the defendant to have that debt satisfied first; that since the defendant could only recover the shares on payment of the debts secured by both mortgages, his right to recover the mortgaged property had not been adversely affected by the variation in priorities; and that, accordingly, the plaintiff was under no obligation to apply the proceeds of the sale of the shares towards the discharge of the debt secured by the first mortgage and the defendant was not entitled to an order that the judgment in respect thereof had been fully satisfied. Lord Browne-Wilkinson stated @ pg. 476 that:

"The question must be approached on the basis that mortgage I and mortgage II had remained vested in two separate mortgagees. The plaintiff, as holder of both mortgages, cannot be in a better position than the original mortgagees. The question therefore is whether two mortgagees can, without the consent of the mortgagor, agree to vary the priority of their mortgages. In the ordinary case, the mortgagor is not affected by the order in which his debts are satisfied. The mortgagor is bound to satisfy all his secured debts before he can recover the mortgaged property. In the ordinary case priority of mortgages affects only the rights of the mortgagees inter se, in particular where the security is inadequate to pay all the secured debts in full. Moreover, the mortgagor has no right to insist on the mortgagee pursuing one of his remedies rather than another. It is for the mortgagee to decide whether to rely on the personal covenant for payment, or to sell the security or to take possession of the mortgaged property. So, in the present case, mortgagee I was fully entitled to sue the debtor on his personal covenant and rely on that alone. Mortgagee I could, if he chose, abandon or waive his security to the benefit of both mortgagee II and the debtor: the debtor had no right to insist that mortgagee I enforce his debt against the security."

Creation of charge entails the execution of the charge or issue of the deed of charge and completion of perfection of the charge.¹³²⁰ Perfection of a charge entails stamping of the charge, registration of the charge with both the Registrar of companies under the Companies Act, 2019 (Act 992) and registration with the Collateral Registry under the Borrowers and Lenders Act, 2020 (Act 1052). Where the charge involved immovable property, registration of the mortgage interest under the Land Act, 2020 (Act 1036) with the relevant division of Lands Commission. The first charge to be created in the above sense takes precedence over future charges if the charges are the same. The sequence of registration generally involves stamping the document creating the charge after execution by the parties; online registration with the Collateral Registry within twenty-eight days of creation; registration with the Companies Registry within forty-five days; and for charges over landed property, registration with Lands Commission.

Notwithstanding the above positions, Act 1052 has given priority to security interest registered under that Act in relation to security interest registered under other enactments. Section 33 of Act 1052 provides that *“A security interest registered under this Act shall, irrespective of the time of registration, have priority over any other security interest registered under any other enactment.”* This means that where all the charges are created, the determination of priority must be with reference to the time of registration with the Collateral Registry under Act 1052.

As between fixed charge and floating charge created over same assets, the general position is that the fixed charge takes precedence over a floating charge. This is notwithstanding the order of creation, fixed charge takes priority over a floating charge. However, a floating charge will take precedence over a fixed charge in one circumstance provided under section 90(5) of Act 992. Section 90(5) of Act 992 provides that:

“(5) A fixed charge on a property has priority over a floating charge affecting that property unless the terms on which the floating charge was granted, prohibited the company from granting a later charge having priority over the floating charge and the person in whose favour that later charge was granted had actual notice of that prohibition at the time when the charge was granted to that person.”

Under subsection (5) of section 90 of the Act, a floating charge will take precedence over a fixed charge only when three conditions are satisfied. That is:

- (a) the floating charge must be created over the assets before the creation of the fixed charge;
- (b) the terms of the floating charge must expressly prohibit the creation of any subsequent charge which will have priority over the floating charge; and

¹³²⁰ The judgment in the case of George Cohen (WA) Ltd v. Comet Construction Co. Ltd: Ghana Commercial Bank (Claimants) [1966] GLR 777 on the order of priority is therefore wrong in law as the charge was not perfected and could not take precedent over the judgment obtain in court.

- (c) the person in whose favour the subsequent fixed charge is created has knowledge not only of the floating charge but the prohibition in (b) at the time of the creation of the fixed charge.

It is only in this circumstance that the floating charge will take priority over the fixed charge over the same charged assets.

In addition to the above, Act 1052 provides for additional provisions on priority of security interests. In relation to charges created of the assets of a company, the following are relevant:

- (a) the priority of a charge over an asset extends to the proceeds from the charged asset;¹³²¹
- (b) the priority of the charge extends to obligations incurred after the creation of the charge against third parties to the extent of the maximum amount stated in the registration;¹³²²
- (c) a security interest in a charged asset transferred take priority over charge created by the transferee after the transfer.¹³²³ However, transfer of money and negotiable instrument does not necessarily subject the right of the transferee or receiver in good faith to the security interest.¹³²⁴

20.18 Hardening period of floating charge

A disadvantage of a floating charge is that, generally, a fixed charge over the same assets takes precedence over a floating charge with the exception of the circumstance described under section 90(5) of Act 992. In addition to that, a floating charge may be clawed back prior to the hardening period in the event of liquidation of a company. A limitation of a floating charge is that the charge only hardens up twelve months after creation where the floating charge cannot be clawed back. The Act permits a floating charge to be clawed back within twelve months of the creation of the floating charge where the winding up of the company commences within that twelve-month period from the creation of the floating charge. Clawback in relation to floating charge means the benefit that is conferred by the floating charge is retrieved from the chargee. Under the Act, the floating charge becomes invalid if the company is winding up within twelve months of the creation of the floating charge. Section 93 of Act 992 provides that:

“Where the winding up of a company commences within twelve months of the creation of a floating charge on the undertaking or property of the company, the charge is invalid, unless it is proved that the company was solvent immediately after the creation of the charge, except to the amount of the cash paid to the company at the time of, or subsequent to, the creation of the charge and in consideration for the charge, together with interest on that amount at the yearly interest rate applicable to the ninety-one day government treasury bill.”

¹³²¹ Section 35 of Act 1052.

¹³²² Section 37 of Act 1052.

¹³²³ Section 40 of Act 1052.

¹³²⁴ Sections 41 to 43 of Act 1052.

Act 992 imposes the limitation on floating charges created in the event of winding up of a company within twelve months of the creation of the floating charge. The charge will be declared invalid in that instance unless it is established that the company is solvent immediately after the creation of the charge. However, the invalidity does not affect cash paid to the company at the time of or subsequent to the creation of the floating charge as consideration. The applicable interest will, in that instance, not be the contractual interest rate but the yearly interest rate of ninety-one day government treasury bill. The reason for the limitation is to avoid the creation of preference for a creditor through the grant of a floating charge prior to the company being put into liquidation. However, even where declared invalid, the invalidity does not affect part of the loan disbursed to the company after the floating charge. The section, therefore, permits clawback of some of the benefits conferred by the floating charge. The period within which the clawback can be effected is twelve months after the creation of the charge. After the twelve months, the floating charge hardened and no clawback of benefit is permitted.

20.19 Enforcement of charges

A charge over the assets of a company in the debenture or deed of charge becomes enforceable upon the occurrence of events of default stated in the debenture or deed of charge. The debenture holder is permitted to take steps to enforce the charge when the event for enforcement indicated in the debenture occurs. Section 89(3) of Act 992 provides that *“(3) A charge securing debentures becomes enforceable on the occurrence of the events specified in the debentures or the deed securing the debentures.”* Under the subsection, the event of enforcement indicated in the debenture must have occurred for the charge to be enforceable. These are general events of default under a loan or facility agreement with the principal event which is a default in repayment of the amount due to the lenders. The Borrowers and Lenders Act, 2020 (Act 1052) provides that the defaulting company, the borrower, must be given a notice to pay the debt within thirty days after it becomes due prior to enforcement by the chargee.¹³²⁵ It is only when the company fails to make the payment within thirty days that the chargee can enforce the charge.¹³²⁶ However, in addition to events of default indicated in the debenture or deed of charge, the Court may enforce a floating charge by appointing a receiver and a manager if the charged assets are in jeopardy notwithstanding the fact that no event of default has occurred.¹³²⁷

If a debenture holder intends to take action to enforce a charge created in a series of debentures of which the debenture holder holds part, the law requires that the action must be taken as a

¹³²⁵ Section 60 of Act 1052 provides *“(1) Where an event of default arises under a credit agreement and the lender decides to realise the security interest of the lender, the lender shall give notice of default to the borrower in writing and request the borrower to pay the amount due within thirty days after the date of receipt of the notice.”* Exception is made for perishable collaterals. The section further provides for how and when the notice should be served.

¹³²⁶ Section 60(8) of Act 1052.

¹³²⁷ Section 91(2) and (3) of Act 992.

representative action in the personal capacity of the debenture holder and on behalf of the other debenture holders.¹³²⁸ Section 205 on representative action is applicable to the action.¹³²⁹

The distinction of the enforcement of charge granted under secured charge as against enforcement action under an unsecured debenture, is that the holder of the secured charge is entitled to take action to realise the secured or charged assets for the satisfaction of the debt or appointment of a receiver or manager. Realisation can be done with or without action. The realisation may be done in a number of ways:

- (a) taking possession of the assets with or without a court intervention
- (b) selling the assets with or without a court action
- (c) receiving the income from the use of the charged assets
- (d) appointing a receiver and a manager with or without court to do (a), (b) and (c) above
- (e) court action for performance

Under the Borrowers and Lenders Act, 2020 (Act 1052) also provides in section 61 that:

“61. (1) Upon the satisfaction of the requirements under section 60, the lender may
(a) sue the borrower on any covenant to perform under the credit
agreement;
(b) where registered under this Act, realise the security interest in the
collateral without initiating proceedings in court; or
(c) appoint a Receiver or Manager under subparagraph (iii) of paragraph
(b) of section 74.”

For both fixed charges and floating charges, the chargee can enforce the charge over the assets by taking possession of the assets. The chargee may be permitted to take the action by powers conferred under the debenture or deed of charge. Where possession can be taken peacefully without the intervention of the court, the chargee can proceed to take possession of the charged assets either in satisfaction of the debt or to sell the assets to recover the debt if permitted under the debenture or deed of charge to do so or received income due from the use of the assets to apply the income in satisfaction of the debt.

Sections 62 to 64 of Act 1052 provides for the right of the chargee to take possession of the charged assets. The sections provide as follows:

“62. (1) Pursuant to paragraph (b) of subsection (1) of section 61, a lender who
intends to realise a security interest registered at the Registry without a court order
shall register a notice of that intention with the Registry.

¹³²⁸ Section 89(4) of Act 992.

¹³²⁹ Ibid.

- (2) *Where all requirements have been met, the Registry shall certify the realisation process by issuing a certificate known as Memorandum of No Objection in a form as specified in the Second Schedule.*
- (3) *A Memorandum of No Objection issued to a lender shall remain valid until a time when*
- (a) the collateral has been sold under section 66,*
 - (b) the collateral has been retained by the lender under section 71, or*
 - (c) the debt has been settled and the collateral has been redeemed in accordance with section 73."*

- "63. (1) Where a lender realises a security interest in accordance with paragraph (b) of subsection (1) of section 61, the lender may take possession of the collateral or render the collateral unusable without approval.*
- (2) Where a lender has a right to take possession of property that is subject to a security interest, that lender may enforce that right without initiating proceedings in court for that purpose.*
- (3) A lender is not required to give notice to the borrower before repossessing or rendering a collateral usable under this section."*

- "64. (1) Where a lender is unable to enforce a right of possession in a peaceable manner, the lender may upon a warrant issued by a court use the services of the police to remove the collateral; or evict the borrower where the collateral is immovable property, subject to the rights of third parties or other persons in possession of the collateral.*
- (2) Where a borrower receives notice of an application made by the lender to a court for a warrant to be issued for the purpose of removing collateral, evicting the borrower or any other person in possession, that borrower may within eight days after receipt of the notice, object to the request by giving evidence to the court that*
- (a) full payment of the amount owed has been made;*
 - (b) the default has been cured; or*
 - (c) the default has not occurred.*
- (3) The court shall issue a warrant, if eight days after the service of the notice of the request for a warrant on the borrower, the borrower does not file an objection to the request for a warrant.*
- (4) A person who*
- (a) fails without reasonable excuse, to vacate premises being foreclosed by a lender under subsection (1) when duly requested to do so; or*

***(b) obstructs a lender in the lawful exercise of a right conferred on the lender by this section
commits an offence and is liable on summary conviction to a fine of not more than five hundred penalty units and in the case of a continuing offence, to a further fine of not more than fifty penalty units for each day the offence continues."***

Act 1052 permits a chargee to take possession of the charged assets and if that cannot be done peacefully, possession can be taken with assistance of the police provided a warrant is issued by the court for such assistance. Rather than take possession, the Act permits the chargee to render the charged unusable.

Upon taking possession, the chargee is permitted to dispose of the charged assets to use the proceed from realisation to satisfy the debt. Alternatively, the chargee can use receivables from the use of the assets to satisfy the debt in accordance with the terms of the debenture. The right of the chargee to sell the charged assets or receive the proceed from the charged assets must be expressly conferred on the chargee under the debenture or deed of charge. For immovable property, the sale of the property by the debenture holder need not be through foreclosure through the court.¹³³⁰ The debenture will confer powers on the chargee including the grant of power of attorney to enable the chargee to take necessary action in disposing of the assets of the company. Act 1052 also permits the chargee to do so without a court action as provided above.

A charge in the form of cash in hand or bank, account receivables or negotiable instruments may also be collected by the chargee. Section 65 of Act 1052 provides that:

***"65. (1) A lender may collect and apply an account receivable, security, moneys in a deposit account, cash in hand or a negotiable instrument taken as collateral to the satisfaction of the obligation secured by the collateral if the borrower default.
(2) Unless otherwise agreed between the lender and the borrower, the lender may notify the account debtor and collect payment even before default by the borrower."***

A charged asset must be realised to satisfy the payment obligation or may be retained by the chargee. A sale must be conducted through a public auction unless otherwise stated in the secured debenture and subject to notice requirements. Section 66 of Act 1052 provides:

***"66. (1) A lender shall realise the collateral by auction, public tender, private sale or any other method provided for in the credit agreement.
(2) The price at which a collateral is sold shall be determined by an independent valuer appointed by the lender.
(3) For the purposes of this Act, where a lender is realising the security interest of the lender in collateral by way of auction in accordance with the Auction Sales Act,***

¹³³⁰ Sections 61 to 64 of Act 1052.

1989 (P.N.D.C.L. 230) the process of realisation by the lender shall be deemed to be an execution of a judgment.

(4) For the purposes of this Act, where a lender realises a security interest in property by auction, public tender, private sale or any other method provided in a credit agreement, a transfer of legal title in the property to a purchaser may be confirmed by a court of competent jurisdiction.

(5) An application under subsection (4) shall be on notice.

(6) Where a lender transfer collateral to a purchaser for value, pursuant to the realisation of a security interest, the purchaser shall acquire the interest of the borrower in the collateral."

Section 67 of Act 1052 requires notice to be given to the borrower and debtor; any person with security interest in the charged assets prior to the lender taken possession; and any other person who claims interest prior to the lender taking possession.¹³³¹ The notice must be given at least seven days before the sale.¹³³² A notice is not required where lender believes the collateral will perish within ten days after possession or the collateral will decline substantially in value if not disposed of immediately, cost of care and storage is disproportionately large in relation to the value of the collateral; the person entitled to the notice consents in writing to the immediate sale; or the court grant leave to sell without notice.¹³³³

The chargee can also make an application to the court for an order to take possession and sell the charged assets. A foreclosure proceeding may be taken in respect of the charged immovable property under the Mortgages Decree, 1972 (NRCD 96).

A sale of the charged assets extinguishes any other security interest in that charged assets and the proceeds realised from the sale.¹³³⁴ After the sale, the chargee must give statement of account within fifteen days to the persons entitled to notice as provided above. The statement of account must show:

- (a) the reasonable cost and expenses of the sale incurred by the chargee;
- (b) reasonable legal expenses; and
- (c) the satisfaction of the debt of any prior interest registered under this Act or lien arising by operation of law.¹³³⁵

Act 1052 indicate the manner in which the amount realised from the proceeds of the sale must be used. Section 70 of Act 1052 provides:

¹³³¹ Section 67(1) of Act 1052.

¹³³² Ibid.

¹³³³ Section 67(2) of Act 1052.

¹³³⁴ Section 68 of Act 1052.

¹³³⁵ Section 69 of Act 1052.

“70. (1) A lender who realises collateral under section 66 shall apply the proceeds of the sale in the following order towards:

- (a) the reasonable costs and expenses of the sale incurred by the lender;*
- (b) reasonable legal expenses; and*
- (c) the satisfaction of the debt of any prior interest registered under this Act or lien arising by operation of law;*

before applying the net proceeds of the sale towards the satisfaction of the debt or other obligation secured by the security interest of the lender.

(2) After applying the proceeds in accordance with subsection (1), any surplus from the proceeds of sale of collateral shall be paid into a designated escrow account agreed by the parties who may have subordinate security interest under this Act.

(3) The surplus from the proceeds of sale of collateral under subsection (2), shall be paid to a person who has a subordinate security interest or any other person that claims an interest in the collateral upon the order of a court in respect of the proceeds.

(4) Any remaining proceeds of sale after the required payments have been made in accordance with subsections (1) and (3) shall be paid to the borrower.”

The order of payment from the proceeds of sale of the charged assets is:

- (a) expenses and cost incurred in the sale of the charged assets
- (b) reasonable legal fees and expenses
- (c) payment of debts secured by priority security interest
- (d) payment of the secured debt
- (e) payment of debts secured by subordinated security interest and claims ordered by the court in relation to the asset
- (f) payment to the borrower

The chargee rather than sell the charged assets may choose to retain the assets. Section 71 of Act 1052 that:

“71. (1) A lender who has priority over all other lenders may, after default of payment by the borrower, propose to retain the collateral in full or partial satisfaction of the obligation secured by the collateral.

(2) The lender shall give to the persons listed in subsection (1) of the section 67, notice of the proposal which shall include the retirement of the secured amount in the respective security agreements.

(3) The lender shall sell the collateral under section 66 if a person who is entitled to a notice under subsection (1) of section 67 and whose interest in the collateral would be adversely affected by the proposal of the lender to retain the collateral gives to

the lender within ten days after receiving the notice referred to in subsection (2), a notice of objection to the proposal, to retain the collateral."

Rather than sell the charged asset, the chargee may opt to keep the charged asset. However, the right to retain the charged asset is given to lender with first priority charge over the charged assets. Therefore, a lender with a subordinated charge cannot choose to keep the charged assets. If such a lender opts to keep the charged assets, the chargee must through an arrangement discharge the charges taken precedent the charge of the lender. The lender must also give notice to the persons entitled to receive notice if the charge asset is to be realised. The notice must be given with proposal to retire secured amount in respective security agreements. If the persons receiving notice and whose interest is charged assets would be adversely affected did object within ten days of receiving the notice through a notice of objection, the lender must sell the charged assets and is not entitled to retain the charged assets. If no objection is received, the lender is entitled to retain the charged assets.

Section 72 of Act 1052 provides:

"72. (1) Where a notice of objection is not received by the lender at the expiration of the ten days period referred to in subsection (3) of section 71, the lender is deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured by the collateral.

(2) A decision by a lender to retain collateral under subsection (1) extinguishes other security interests and claims in that collateral subordinate to the security interest of that lender."

The borrower or person entitled to notice prior to the sale of the charged assets is entitled to redeem the charged asset any time prior to the sale of the asset. Section 73 of Act 1052 provides that:

"73. (1) A person who is entitled to receive a notice under subsection (1) of section 67 may, unless the person otherwise agrees in writing after the borrower defaulted at any time before a lender sells the collateral in accordance with section 66 or is deemed to have retained the collateral in accordance with section 71, settle the debt and redeem the collateral by paying to the lender,
the principal amount owed to the lender,
the accrued interest on the principal amount,
any fee for the prepayment of an obligation, if agreed between the borrower and the lender,
any other fees payable by the borrower to the lender up to the date for settlement,
and
a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, servicing, processing and preparing the collateral for sale, if those expenses have actually been incurred by the lender, and any other reasonable expenses incurred by the lender.

(2) The right of the borrower to redeem the collateral has priority over the right of any other person to redeem that collateral."

The chargee is also permitted to appoint a receiver or manager pursuant to the powers conferred on the chargee under the debenture. Act 992 provides that a receiver or manager can only be appointed to enforce a secured debenture.¹³³⁶ In relation to fixed charges, only a receiver can be appointed whilst in respect of floating charge, a receiver and a manager is appointed. The receiver appointed takes possession of the charged asset to either receive receivables from the assets for the satisfaction of the debt or dispose of the charged assets and use the proceeds to satisfy the debt. For floating charge, a receiver and manager is appointed, the manager is permitted to manage the assets to increase the value of the assets for purposes beneficial to the realisation or to increase the amount generated from the use of the assets for the satisfaction of the debt. The appointment can be done by the chargee when the power is conferred under the debenture. Section 74 of the Borrowers and Lenders Act, 2020 (Act 1052) provides that

"A lender in whose favour a security interest is created may, upon default of the borrower

- (a) appoint a receiver or manager in accordance with the provisions of a credit agreement, or***
- (b) apply to court for the appointment of a receiver or manager to***
 - (i) take possession of and protect the property;***
 - (ii) collect the rents and profits derived from the property, or***
 - (iii) realise the security interest on behalf of the lender."***

In any other instance, the chargee may apply to the court to appoint a receiver or manager pursuant to section 91 of Act 992. Two instances are provided in the section for the court to appoint a receiver. For fixed and floating charge, the appointment of a receiver or a manager is made where the charge becomes enforceable upon the occurrence of the event provided in the debenture or deed of charge. That is generally where the borrower is in default. For a floating charge, the appointment of a receiver and a manager is also done where the charged asset is in jeopardy.¹³³⁷ The receiver or manager appointed by the court is an officer of the court¹³³⁸ but performs similar functions in relation to the charged assets as performed by one appointed by the chargee.

The debenture holder also has the right to apply to the court for the appointment of an administrator to undertake the administration of the company¹³³⁹ or has the right to petition the Registrar or the

¹³³⁶ Section 91(4) of Act 992.

¹³³⁷ Section 91(2) of Act 992.

¹³³⁸ Section 267(1) of Act 992.

¹³³⁹ Section 3 of Act 1015.

Court to order the official liquidation of the company under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015)¹³⁴⁰.

20.20 Registration of particulars of charge

Section 89 of Act 992 which permits a company to issue debentures secured by fixed charge or floating charge requires the registration of the secured debentures. Section 89(5) of Act 992 provides that *“(5) Where debentures are secured by a charge, section 110 to 121 relating to registration of particulars of charges, shall apply.”* Charges created over assets of the company as security for the performance of the obligations of the company under the debenture must be registered with the Registrar of companies. A second parallel registration is required to be done with the Collateral Registry established under the Borrowers and Lenders Act, 2020 (Act 1052).¹³⁴¹

Act 992 provides that failure to register the charge within the time stated renders the charge void. Section 110(1) of Act 992 provides that:

“(1) A charge, other than a charge specified in subsection (5) created by a company after the commencement of this Act is void so far as a security on the property of the company, is conferred by this charge, unless the particulars prescribed in this section together with the original or a certified copy of the instrument by which the charge is created or evidenced, are delivered in the prescribed form to the Registrar for registration within forty-five days after the date of creation of the charge.”

However, the non-registration under Act 1052 does not render the security interest void. Section 6 of Act 1052 provides:

“6. (1) Despite section 22, a security interest created by a credit agreement, is effective between the parties to the agreement without registration under this Act, but the right of the lender to enforce the security interest is subject to the rights of any other lender or person entitled to priority under this Act.”

Act 992 makes it mandatory for the registration of a charge created over the assets of a company as security for repayment of debt to the debenture holder. Act 992 requires registration by delivery to the Registrar, particulars prescribed in the section together with the original or certified copy of the debenture creating the charge or the deed of charge within forty-five days for registration. Even though Act 1052 does not render the security interest void, it mandates registration when it provides in section 22 that:

¹³⁴⁰ Sections 80 and 84 of Act 1015.

¹³⁴¹ Section 22(1) of Act 1052.

- “22. (1) A lender in whose favour a security interest is created shall register the security interest with the Registry within twenty-eight days after the date of creation of that security interest.***
- (2) A lender, under the supervision of the Bank who contravenes subsection (1) is liable to pay to the bank an administrative penalty of ten penalty units for each day that the breach continues.***
- (3) Despite paragraph (b) of subsection (3) of section 1, where the loan amount advanced by the lender under a credit agreement is five hundred Cedis or less or an amount determined by the Bank by notice published in the Gazette and in two daily newspapers of nationwide circulation, that lender may register the security interest under this Act.”***

Even though Act 1052 did not render the charge void, Act 992 renders the charge void if it created over an asset of a company. The charge is ineffective and the debenture will be treated as an unsecured or naked debenture.

Republic v. James Town Circuit Judge; ex parte Annor¹³⁴² - Ghana Commercial Bank held a debenture covering the stock in trade and factory equipment of Kapen Enterprise Ltd as security for overdraft facilities. The debenture was not registered and in July 1973, the company was successfully sued by the landlord of the business premises occupied by the company for arrears of rent, profits and costs. In November 1973, judgment not having been satisfied, the applicant levied execution against the assets of the company. The Bank interpleaded. The applicant, therefore, brought a motion in the circuit court asking that the claim of the bank be dismissed on the ground that the charge was void for non-registration under Act 179, section 107(1). The circuit court judge dismissed the application holding that by virtue of section 6 of Act 179 and section 46 of the Banking Act, 1970, non-registration of a debenture created by a company in favour of a bank did not render the debenture void, citing *George Cohen (W.A.) Ltd. v. Comet Construction Co., Ltd*, [1966] G.L.R. 777 and *Ashanti Curls and Lumber Producers Ltd. v. Committee of Management of Ghana Timber Marketing Board*. High Court, Kumasi, 12 June 1969, unreported; digested in (1969) C.C. 138. He further held that the rights of debenture holders prevailed over those of execution creditors and ordered that the properties should be released from attachment and the landlord-execution creditor should pay the costs of the auctioneer. On an application for certiorari to quash the decision of the circuit court, it was held that the combined effect of Act 179, sections. 107 and 111 was that a duty was mandatorily cast on any company creating a charge to register the charge and failure to register the charge in compliance with this duty rendered the charge void so far as any security on the company's property was concerned. Neither Act 339, section 46 nor Act 179, section 6 could be said to affect in anyway the provisions of Act 179, sections. 107 and 111. The circuit judge erred completely in his choice of cases to support his conclusion that the combined effect of Act 179, section 6 and Act 339, section 46

¹³⁴² [1978] 1 GLR 453.

nullified the effect of the provisions of Act 179 dealing with registration and validated charges made by a company in favour of a bank even where the charge was not registered. One case was decided per incuriam since it ignored the provisions of Act 179, sections 107 and 111. The other case repudiated the circuit judge's conclusion in no uncertain terms. *George Cohen (W.A.) Ltd. v. Comet Construction Co. Ltd.* [1966] G.L.R. 777 disapproved. *Ashanti Curls and Lumber Producers Ltd. v. Committee of Management of Ghana Timber Marketing Board*, High Court, Kumasi, 12 June 1969 unreported; digested in (1969) C.C. 138 followed. Taylor J. stated @ pgs. 463 to 465 that:

"Now to the issue of registration. The charge which was created by the company in 1972 in favour of the bank was not registered and the circuit court judge held in his ruling that Cohen (W.A.) Ltd. v. Comet Construction Ltd. (supra) and the Ashanti Curls & Lumber Producers Ltd. case (supra) are authorities that non-registration does not affect the validity of the charge. Now the provisions of the Companies Code, 1963 (Act 179), dealing with registration or non-registration are sections 107 (1)-(3) and 111 (1)-(2) and they are as follows:

"107. (1) Every charge, other than those specified in subsection (3) of this section, created by a company after the commencement of this Code shall be void so far as any security on the company's property, which expression includes its undertaking and the unpaid liability on its shares, is thereby conferred, unless the particulars hereinafter prescribed, together with the original or a certified copy of the instrument, if any, by which the charge is created or evidenced, are delivered in the prescribed form to the Registrar for registration within twenty-eight days after the date of its creation.

(2) This section shall not prejudice any contract or obligation for repayment of the money thereby secured and when a charge becomes void under this section the money secured thereby shall immediately become payable notwithstanding any provision to the contrary in any contract.

(3) This section shall not apply to any pledge of, or possessory lien on, goods, or to any charge, by way of pledge, deposit, letter of hypothecation or trust receipt, of bills of lading, dock warrants or other documents of title to goods, or of bills of exchange, promissory notes or other negotiable securities for money."

"111. (1) It shall be the duty of the company to send to the Registrar for registration the particulars required to be sent under sections 107 to 110 of this Code, but registration of the particulars of any such charge may be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than their company, that person shall be entitled to recover from the

company the amount of any fees payable to the Registrar on the registration."

The combined effect of the said sections 107 and 111 of the Code, is that a duty is mandatorily cast on any company creating a charge to register the charge and that failure to register the charge in compliance with this duty renders the charge void so far as any security on the company's property is concerned unless any person interested in the charge chooses to register the charge. This is quite clear from a reading of this provision, but the learned circuit court judge held that the combined effect of section 6 of the Companies Code, 1963, and section 46 of the Banking Act, 1970 (Act 339), is to nullify the effect of the provisions of the Code thus dealing with registration and to validate charges made by a company in favour of a bank even if the charge is not registered.

Now section 6 of Act 179 is as follows:

"6. Nothing in this Code shall abrogate or affect any special legislation relating to companies carrying on the business of banking, insurance or any other business from time to time subject to special regulation."

And section 46 of Act 339 provides:

"46. This Act shall be in addition to the Companies Code, 1963 (Act 179) and shall not, except otherwise as expressly provided in this Act, derogate from the provisions of that Code."

Nowhere in the said Act 339 is there any express provision that charges created by companies in favour of banks are exempt from the duty to register cast on the companies and I am therefore unable to see the relevance of section 46 of Act 339 in the interpretation of sections 107 and 111 of Act 179. It is equally difficult to see how section 6 of the Companies Code can be said to affect in any way the provisions of sections 107 and 111 of the Companies Code.

*It is said that Cohen's case supports the proposition that non-registration is not fatal. So indeed it does, and if the decision is right then the circuit court judge is right. But is the decision right? Throughout the judgment in the case there was not a single reference to any of the provisions of section 107 or section 111 of the Companies Code. The judgment did not canvass any legal reasons that can resist the clear and unambiguous effect of these provisions which is that non-registration renders the charge void. Of course the Cohen case does not bind me, being a decision of a court of co-ordinate jurisdiction. Nevertheless it is a decision of a superior court and is entitled to great respect. It ought not however to ignore the provisions of a statute. As Lord Goddard C.J. said in *Moore v. Hewitt* [1947] 2 All E.R. 270 at p. 272 citing the oft quoted case of *Young v. Bristol Aeroplane Co., Ltd.* [1944] K.B. 718,*

C.A. one of the situations in which a judge is not bound by a previous decision of the court is, "where the court gives a decision per incuriam because the provisions of a statute ... have not been brought to their attention." I think in so far as the Cohen case (supra) can be said to have decided without referring to sections 107 and 111 of Act 179 that non-registration does not render a debenture void, it is in conflict with the said sections 107 and 111 of the Companies Code and it is therefore per incuriam.

The circuit court judge also held that the Ashanti Curls and Lumber Producers Ltd. case supported his decision that non-registration does not affect the validity of a debenture issued in favour of a bank or a statutory corporation not subject to the Companies Code. This would seem to be a complete error and it is difficult to surmise as to how this error came about for far from supporting such a proposition, the Ashanti Curls case repudiated it in no uncertain terms. In delivering judgment in that case this is what Annan J., as he then was, said in regard to the effect of non-registration of such securities:

"when a limited liability company creates a charge on its property by any way of legal mortgage the other party to that transaction may be an individual or another limited liability company or a statutory corporation like the defendants or otherwise, and it seems to me that whatever the character of that other party the requirement for registration still stands and is not affected by the kind of person that the limited liability company chooses to transact business with. The duty to register in terms of section 107 is on the company and that requirement is all-embracing and mandatory and does not discriminate as between individuals, statutory corporations or limited liability companies. Section 107 itself speaks of 'every charge ... created by a company,' and section 111 confers the 'right to register on every person interested' in the charge.

It seems to me that the argument put forward by the defendants arose out of a misapprehension of the true meaning of section 107. That section does not place any duty on a statutory corporation to register charges created by it but then it does not exempt from registration charges created by a limited liability company in favour of a statutory corporation. In short the statutory obligation to perform the duty of registration placed on a limited liability company by section 107 of the Companies Code is not nullified merely because the company chooses to transact business with a body not subject to the Code.

I am compelled to come to the conclusion that registration was necessary for the creation of the charge ... and that in the absence of registration

the charge is void `so far as any security on the company's property is thereby conferred'."

In view of the points I have dwelt upon in this judgment, I agree entirely with the views of Annan J., as he then was, expressed above. I think on the face of it by his decision the circuit court judge has stated the reasons for his conclusions and orders and this discloses an error patent on the record and the question this poses is: Is certiorari available to quash it? I think so."

Notwithstanding that Act 992 provides that the charge is void if not registered within the time stated, that does not render the debenture void. The amount due under the debenture, which is secured by the charge that is rendered void, becomes payable immediately irrespective of the payment schedule in the debenture. Act 992 provides in section 110 that:

- "(3) This section shall not affect a contract or an obligation for repayment of the money secured by the contract or obligation.*
- (5) When the charge becomes void under this section, the money secured by the charge shall immediately become payable despite provision to the contrary in the contract."*

A declaration of a charge over the assets of a company as security for repayment of loans contracted under a debenture as void under Act 992 renders the loans immediately payable. That is once the charge is declared void, the loan is accelerated notwithstanding a contrary term in the debenture.

A charge on assets acquired by the company, which charge would be registrable under section 110 if the charge is created by the company, is also required to be registered within twenty-eight days of the date of acquisition of the asset by the company.¹³⁴³ However, failure to register such a charge does not affect the validity of the charge.¹³⁴⁴ In addition, charges created prior to the commencement of Act 992, which would have been registrable if created upon the coming into force of the Act, are required to be registered under the Act within six months of the coming into force of the Act.¹³⁴⁵ Charges that are discharged or where the asset has ceased to be held by the company does not need to be registered.¹³⁴⁶ Failure to register existing charges within the six months does not affect the validity of those charges.¹³⁴⁷

The registration of a charge is primarily the duty of the company on whose assets the charge has been created. The company, whose assets are charge, must submit the particulars required for the

¹³⁴³ Section 112 of Act 992

¹³⁴⁴ Section 112(4) of Act 992.

¹³⁴⁵ Section 113 of Act 992.

¹³⁴⁶ Section 113(1) of Act 992.

¹³⁴⁷ Section 113(3) of Act 992.

registration to the Registrar.¹³⁴⁸ Failure to undertake the registration makes the company and every officer responsible for the default liable to pay the Registrar an administrative penalty.¹³⁴⁹ However, a person interested in the charge, that is the chargee or lender in whose favour the charge is created, can effect the registration.¹³⁵⁰ In that case, the chargee may recover from the company any money paid to the Registrar for registration of the charge.¹³⁵¹ The company and official will not be liable to pay the administrative penalty if the registration was effected by the other interested person.¹³⁵² Even though the company is required to register the charge, it is in the interest of the debenture holder to ensure that the registration is done. The Act, therefore, permits the person interested to register the charge.

Under Act 1052, the lender is responsible for the registration. If the lender is a financial institution regulated by the Bank of Ghana, failure to register within the twenty-eight days under the Act attract an administrative charge of ten penalty units for each day that breach continues. The lender may do the registration through a representative. The registration by the lender or a representative of the lender is subject to consent of the borrower.¹³⁵³ A borrower who enters into a credit agreement is deemed to consent to the lender to register the security interest in the charge.¹³⁵⁴

Charges must be stamped upon the payment of the appropriate stamp duty under the Stamp Duty Act, 2005 (Act 689) prior to the registration.¹³⁵⁵ Act 992 impliedly required that an instrument of charge must be stamped after the payment of stamp duty on the maximum amount secured prior to registration.¹³⁵⁶ In practice, the Registrar of Companies will not register an unstamped instrument of charge. However, Act 1052 provides that a credit agreement creating a security interest may be registered before or after stamping notwithstanding the Stamp Duty Act, 2005 (Act 689).¹³⁵⁷ The security interest will, however, not be enforceable unless stamped in accordance with Act 689.¹³⁵⁸

20.21 Particulars required for registration of a charge

Section 110(1) of Act 992 requires stated particulars together with the original or certified copy of the instrument of the charge to be submitted for registration. Act 1052 per section 23 also requires a

¹³⁴⁸ Section 114(1) of Act 992.

¹³⁴⁹ Section 114(3) of Act 992.

¹³⁵⁰ Section 114(1) of Act 992.

¹³⁵¹ Section 114(2) of Act 992.

¹³⁵² Section 114(3) of Act 992.

¹³⁵³ Section 27(1) of Act 1052.

¹³⁵⁴ Section 27(2) of Act 1052.

¹³⁵⁵ Section 42 of Act 689.

¹³⁵⁶ Section 111(1) of Act 992.

¹³⁵⁷ Section 22(5) of Act 1052.

¹³⁵⁸ Section 22(6) of Act 1052.

registration form to be completed for the registration. The particulars required under Act 992 is provided under section 110(6) as follows:

- “(6) Subject to subsections (7) and (8), the particulars requiring delivery for registration under this section are*
- (a) the date of creation of the charge;*
 - (b) the nature of the charge;*
 - (c) the amount of money secured by the charge, or the maximum sum of money secured by the charge in accordance with section 111;*
 - (d) short particulars of the property charged;*
 - (e) the persons entitled to the charge;*
 - (f) in the case of a floating charge, the nature of a restriction on the power of the company to grant further charge ranking in priority to, or at the same rate with, the charge created by the registration; and*
 - (g) particulars of any variation of the terms and provisions of a charge.”*

The above particulars required under Act 992 are stated on the prescribed form and together with the original or certified copy of the instrument of charge are submitted to the Registrar for registration. The instrument creating the charge must be stamped upon payment of the applicable stamp duty under the Stamp Duty Act, 2005 (Act 689) prior to delivering the original or certified copy to the Registrar of companies for registration. Where the original instrument cannot be submitted, a certified copy is to be submitted. The certification is to be done by endorsing on the copy that it is a true and complete copy of the original under the seal of the company or signed personally by a person interested in the copy otherwise than on behalf of the company.¹³⁵⁹ If the instrument is not in English language, the copy must contain a translation acceptable to the Registry which is certified as an accurate translation of the original.¹³⁶⁰ Subsection (7) of section 110 of the Act modifies slightly the particulars to be submitted where a series of debentures containing a charge is issued by the company. Registration under section 110 of the Act does not affect other enactments on registration of charge.¹³⁶¹

The particulars required for the parallel registration under Act 1052 are provided in section 23 of Act 1052. The particulars are to be entered in the Collateral Register by the Collateral Registrar. Section 23 of Act 1052 provides:

- “23. A registrant shall specify the following on the registration form:*
- (a) the identifier of the borrower in the manner prescribed in the Registry Rules;*

¹³⁵⁹ Section 110(8) of Act 992.

¹³⁶⁰ Section 110(9) of Act 992.

¹³⁶¹ Section 110(10) of Act 992.

- (b) the identifier of the lender in the manner prescribed in the Registry Rules;*
- (c) the maximum amount secured by the security interest;*
- (d) a description of the collateral in the manner prescribed in the Registry Rules;*
- (e) the loan tenure as specified under the credit agreement; and*
- (f) any other information required by the Registry Rules.”*

The registration of the charge at the Collateral Registry is done online. The above information is entered by the person authorised by the Collateral Registrar to effect the registration.¹³⁶² The registration is to be completed within twenty-eight days of the creation of the charge.

In relation to a floating charge, Act 992 requires that any restriction on the right of the company to create any subsequent charge that takes precedence over the floating charge must be stated in the particulars for the registration. This requirement is due to the fact that subsequent fixed charges will take priority over the floating charge unless the floating charge indicates such restriction and the person in whose favour the subsequent fixed charge is created has knowledge of the restriction.¹³⁶³ Under Act 992, where the charge is to secure a fluctuating or uncertain amount, as well as amounts that may be due that is not yet known, the estimated maximum amount upon which stamp duty has been assessed and paid must be stated in the particulars.¹³⁶⁴ Prior to winding up, the amount may be increased subsequently upon payment of additional stamp duty and particulars together with the original instrument creating the charge delivered to the Registrar.¹³⁶⁵ The valid charge shall be valid as to the increased amount except as against a person who has acquired an interest prior to the date of delivery of the particulars to the Registrar.¹³⁶⁶

20.22 Evidence of registration of charge

A number of documentations are associated with the registration of a charge that is to evidence the registration. The documents of evidence are entry in the register of particulars of charges kept by the Registrar, issue of a certificate of registration to the company and endorsement on a debenture in the series of debenture or debenture stock certificate.

The requirements for the Registrar to keep a register of particulars of a charge and to issue a certificate of registration are provided in section 115 of Act 992. Section 115 provides:

¹³⁶² Section 28 of Act 1052.

¹³⁶³ Section 90(5) of Act 992.

¹³⁶⁴ Section 111(1) of Act 992.

¹³⁶⁵ Section 111(2) of Act 992.

¹³⁶⁶ *Ibid.*

- “(1) The Registrar shall keep, with respect to each company, a register of the particulars duly delivered pursuant to section 110 to 113 and shall enter the particulars in the register.*
- (2) The Registrar shall give a certificate signed by the Registrar of the registration of particulars of a charge registered in pursuance of sections 110 to 113, and the certificate is conclusive evidence, except in favour of the company or of any other person who has delivered false or incomplete particulars or an incorrect copy of a document, that the requirements of sections 110 to 113 have been complied with.*
- (3) In the case of a charge of the type referred to in section 111, the certificate shall state the maximum sum of money deemed to be secured by the charge.*
- (4) The original or certified copy of the instrument of the charge delivered with the particulars shall not be registered or retained by the Registrar.”*

The Registrar is mandated as part of the registration process to do two things. First, to enter the particulars required for the registration that are submitted in the register of particulars of charge. Second, the Registrar must issue a certificate of registration signed by the Registrar to the company or person registering the charge. The certificate so issued is conclusive evidence of registration. The certificate does not provide conclusive evidence in favour of the company or person who has given false or incomplete particulars or an incorrect copy of the instrument of a charge to the Registrar.

A company is required to endorse on every debenture, in a series of debentures, or a debenture stock certificate where a charge has been created to secure payment under the series of debentures, a copy of the certificate of registration, a statement that the registration has been done and the date of registration.¹³⁶⁷ This does not apply to debentures or debenture stock certificate issued prior to the creation of the charge.¹³⁶⁸ A person who endorses or causes to be endorsed a copy of the certificate of registration or the required statement which the person knows is false in material particular, or who authorises or permits delivery of debenture or certificate bearing endorsement which the person knows is false in material particulars commits an offence and liable on conviction to fine of five hundred penalty units or term of imprisonment of two to five year, or both fine and term of imprisonment.¹³⁶⁹

The company is also required to keep every instrument of charge of which particulars have been registered in its registered office and any other office in Ghana at which the register of debenture holders are kept.¹³⁷⁰ The copies can be inspected during usual business hours, subject to reasonable

¹³⁶⁷ Section 116(1) of Act 992.

¹³⁶⁸ Section 116(2) of Act 992.

¹³⁶⁹ Section 116(3) of Act 992.

¹³⁷⁰ Section 120(a) of Act 992.

restriction for each day unless a Saturday, a Sunday or a public holder by members or creditors of the company for free, and by other persons on payment of a prescribed fee.¹³⁷¹ Upon default to comply with these requirements, the company and its officers in default are liable on conviction to a fine of two hundred penalty units to five hundred penalty units.¹³⁷² The court may also make an order for immediate inspection of the copies.¹³⁷³

For registration under Act 1052, the Registrar must also provide evidence of registration in the form of an acknowledgement to the lender. Section 24 of Act 1052 provides that:

- “24. (1) The Registrar shall issue and deliver an acknowledgement of a registration to the registrant within three days after the date of registration.*
- (2) The registrant shall, after receipt of the acknowledgement, submit a copy of the acknowledgement to the borrower within fifteen days after receipt of the acknowledgement.*
- (3) The production of an acknowledgement issued under this section in proceedings before a court is a prima facie evidence of effective registration with respect to a security interest in the collateral specified in that acknowledgement in favour of the specified lender.”*

The acknowledgement serves a prima facie evidence of registration. The registration under Act 1052 takes effect from the time the registration is acknowledged by the Registry and entered into the Register.¹³⁷⁴ The registration is effective until discharged by the registrant in accordance with the Act.¹³⁷⁵ The effectiveness of the registration is not affected by any defect, irregularity, omission or error, unless any of those relate to the correct identification of the collateral or borrower.¹³⁷⁶ Even in instances of an error, the effectiveness of the registration is not affected, once the borrower or the collateral is sufficiently identified or described.¹³⁷⁷ A registration can be refused by the Registrar on only two grounds, that the information is not submitted in the required form or the prescribed fee has not been paid.¹³⁷⁸

20.23 Registration of discharge and enforcement of charge

Not only are charges created over assets of a company to secure repayment and other obligations under a debenture required to be registered. The Act also requires registration of discharge upon

¹³⁷¹ Section 120(2) and (3) of Act 992.

¹³⁷² Section 120(4) of Act 992.

¹³⁷³ Ibid.

¹³⁷⁴ Section 25(1) of Act 1052.

¹³⁷⁵ Section 25(2) of Act 1052.

¹³⁷⁶ Section 25(3) of Act 1052.

¹³⁷⁷ Section 25(4) of Act 1052.

¹³⁷⁸ Section 26 of Act 1052.

satisfaction of the obligation or discharge of the charged assets or part of assets. Section 117 of Act 992 provides that:

“The Registrar, upon receipt of an application in the prescribed form and on satisfactory evidence given with respect to a charge of which particulars have been registered,

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part, or

(b) that the whole or part of the property charged has been released from the charge, or has ceased to form part of the property of the company or undertaking,

shall enter on the register a memorandum of satisfaction in whole or in part, or of the fact that the whole or part of the property has been released from the charge or has ceased to be part of the property of the company, and where the Registrar enters a memorandum of satisfaction in whole, the Registrar shall if required, furnish the company with a copy of the memorandum.”

A memorandum of satisfaction is entered when the debt for which the charge is granted has been paid in whole or in part or the chargee has released the property charged in whole or in part from the charge. The Registrar is required to enter the memorandum of satisfaction upon receipt of application in the prescribed form and the evidence of discharge or release, which must be issued or signed by the chargee.

In addition, Act 992 requires the registration of actions taken to enforce a charge. Where a chargee enters into possession of the charged assets or obtains an order appointing a receiver over the assets of the company, a notice must be given to the Registrar within ten days of the appointment or entry into possession to be entered in the register of the particulars of charge relating to the company.¹³⁷⁹ Default in giving notice to the Registrar makes the company, officers of the company in default, receiver or person entering into possession liable to pay the Registrar an administrative penalty of twenty-five penalty units for each day during which the default continues.¹³⁸⁰ Where the receiver ceases to act as a receiver or the person who enters into possession goes out of possession, notice in the prescribed form must also be given to the Registrar which must be entered in the register of particulars of charge.¹³⁸¹ A person who defaults in notifying the Registrar is liable to pay an administrative fee of twenty-five penalty units for each day the default continues.¹³⁸² A copy of the

¹³⁷⁹ Section 119(1) of Act 992.

¹³⁸⁰ Section 119(2) of Act 992.

¹³⁸¹ Section 119(3) and (4) of Act 992.

¹³⁸² Section 119(5) of Act 992.

notice given under this section is required to be published in the Company Bulletin by the Registrar.¹³⁸³

A similar position is provided under Act 1052 in relation to the registration with the Collateral Registrar which requires the registration of discharge upon satisfaction of the secured obligations, lender consent to the release of the whole or part of the security interest, the charged assets has been sold or retained in accordance with the Act, or the debt has been settled and charged assets redeemed, or the registration was effected fraudulently.¹³⁸⁴ The registration of the discharge is to be effected within five days of occurrence of any of these events.¹³⁸⁵ The Registrar is required to issue a Memorandum of Release of Debt upon registration of discharge and the lender must submit a copy to the borrower.¹³⁸⁶ The borrower can apply to the court where the lender fails to discharge the charged asset within five days of occurrence of the events listed.¹³⁸⁷ In addition, Act 1052 required registration of appointment of a receiver or manager for the enforcement of a security interest as well as the removal of receiver or manager.¹³⁸⁸

The requirement under Act 1052 is in addition to the requirements under Act 992 in relation to the registration of enforcement of charge.

20.24 Extension of time for registration and rectification of register

Where a company or a person interested in a charge fails to register a charge within the prescribed period, that is forty-five days in case of charges created by the company on its assets to secure payment of the debt, twenty-eight days for charge property acquired by the company and six months for existing charges, the company or person may apply to the court for an extension of time to register the charge. A company or person interested in charge may apply to the court for rectification of entry in the register of particulars of charge. Section 118 of Act 992 provides that:

“(1) The Court, on being satisfied

(a) that the omission to register particulars of a charge within the time required by this Act, or that the omission or mis-statement of the particulars with respect to a charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or members of the company, or

¹³⁸³ Section 119(6) of Act 992.

¹³⁸⁴ Section 30(2) of Act 1052.

¹³⁸⁵ Section 30(3) of Act 1052.

¹³⁸⁶ Section 30(8) of Act 1052.

¹³⁸⁷ Section 30(6) of Act 1052.

¹³⁸⁸ Section 75 of Act 1052.

(b) that on other grounds it is just and equitable to grant relief, may, on the application of the company or a person interested, and on the terms that the Court considers just and expedient, order that the time for registration shall be extended, or that the omission or mis-statement shall be corrected.

(2) Where the Court grants an extension of time for registration, the charge shall not, unless the Court otherwise orders, adversely affect a person who, before the date of actual registration of particulars of the charge, has acquired proprietary rights in, or a fixed or floating charge on, the property subject to the charge, and shall be ineffective against the liquidator and the creditors of the company if the winding up of the company commences before the date of actual registration."

An application can, therefore, be made to the court either for extension of time for registration or for correction of a mis-statement or omission in the register of particulars of charge or memorandum of satisfaction. The grounds for the grant of the order extending the time or for correction of error include accidental failure or omission, inadvertence, unexpected challenges or inadvertence or other sufficient cause, and the grant of the order does not prejudice the position of creditors or member, or the Court considers just and equitable that the correction or extension be granted. The application is made by originating motion supported by an affidavit which must provide justification for the grant of the application. The grant of an order for extension or correction, unless otherwise stated by the Court, will not prejudice the right of a person who has acquired a proprietary interest or registered charges granted in favour of such persons, prior to the actual registration of the charge pursuant to the extension granted by the Court.¹³⁸⁹ The registration of the charge is also ineffective against liquidators and creditors of the company if the winding up commences prior to the registration.

Re Ghana Timber Marketing Board's Application: Ghana Timber Marketing Board v. Ashanti Curl & Lumber Product Ltd¹³⁹⁰ Annan J. stated the facts and the position of the law as follows:

"This application is brought under section 115 of the Companies Code, 1963 (Act 179), for an extension of time within which to register particulars of a charge in terms of section 107 of the Code. The application is brought by the Ghana Timber Marketing Board, the creditors. The debtors, the Ashanti Curl and Lumber Products Ltd. oppose the application. The duty to effect registration of charges is placed on the debtor company in the first place and the Code provides penalties as against the

¹³⁸⁹ The case of Bank of Africa Ltd v. Gracefield Merchants Ltd & Others Civil Appeal, Suit No. J4/35/2016 in which the Supreme Court gave judgment on 5 February, 2020 illustrate registration does not affect persons who acquired proprietary interest prior to the actual registration of the mortgage.

¹³⁹⁰ [1968] GLR 931.

company for default in sending for registration any particulars which require registration. However section 111 permits "any person interested" in a charge to register it. Clearly the purpose of this provision is to safeguard the interests of such a person in cases where a company deliberately refuses to register. Where, however, there is a failure to register within the statutory period of 28 days, either the company or a person interested in the charge may apply to the court for an extension of time within which to register. The matters relevant for consideration on an application for extension are whether or not the omission to register was accidental or due to inadvertence or to "some other sufficient cause" and also whether there is a likelihood of prejudice to the position of creditors or members of the company. Again the court may grant relief if satisfied that "on other grounds it is just and equitable to grant relief."

Clearly the court has a wide discretion whether or not to grant an extension and the burden put on the applicant does not appear to me to be particularly heavy, and it seems to me that where there has been no deliberate failure on the part of the applicant to register, his application should normally succeed whether the failure to register arises from ignorance of the statutory provision or from ordinary carelessness. A fortiori where the applicant establishes that the failure to register was due to circumstances beyond his control, such as delay in the course of stamping or registration of the document at the appropriate registry, then extension should be granted."

Act 1052 which requires parallel registration under the Collateral Registry within twenty-eight days of the creation of the charge did not provide for extension of time for registration.¹³⁹¹

20.25 Registration constitutes notice

Registration of charges, discharges or enforcement actions constitutes actual notice to the world of the particulars so registered but not the content of documents submitted with the particulars. Section 121 of Act 992 provides that:

"The registration of any particulars under sections 110 to 120 constitutes actual notice of those particulars, but not the contents of a document referred to in, or delivered with, the particulars to all person and for all purposes as from the date of registration."

¹³⁹¹ The repealed Borrowers and Lenders Act, 2008 (Act 773) provides for extension of time by the Registrar. However, the repealed Act did make failure to register a charge void. Perhaps the reason for not providing the power to extend the registration period of twenty-eight days may be due to the fact that stamping is no longer a condition precedent for registration.

The registration of the particulars of charge, discharge or enforcement constitutes actual notice to the whole world. It is, therefore, no excuse that a person is not aware of the charge. Everyone is deemed to have actual notice of the particulars registered. A person who, for example, acquired a charged property without notice, will be deemed to have acquired subject to the charge, as actual notice is imputed to that person. However, the registration does not constitute notice of the content of the debenture or deed of charge submitted with the particulars.

Registration under Act 1052 provides records of registration. Any person can conduct a search on the Register and obtain results of the search without having to give reason for the search.¹³⁹² A search result issued by the Registry is evidence of the existence or absence on the Register at the date and time the result is issued and is admissible as evidence in court proceedings.¹³⁹³

20.26 Receiver and manager

One way of enforcing fixed and floating charges is by appointing receivers or managers.¹³⁹⁴ The receiver or manager can be appointed by the debenture holders upon the occurrence of the event of enforcement under the debenture or deed of charge and the debenture holder appoints a receiver or manager in accordance with the terms. A receiver or manager can also be appointed by the court upon application by the debenture holder when the charge becomes enforceable or, in the case of a floating charge, the charged assets are in jeopardy. In any of the appointments, section 94 of Act 992 provides that *“The appointment of a receiver or a manager on behalf of debenture holder shall be in accordance with sections 261 to 263.”* Sections 261 to 273 of Act 992 which regulate the appointment, duties, powers and related matters in relation to receivers and managers are examined.

The First Schedule of Act 992 defines a “receiver” to include a manager and “manager” is also defined to include a receiver, both of which are to undertake duties stated in section 266 of Act 992. A receiver in a broad sense refers to a person put in a custodian position over the assets of a company when the company is unable to settle its liability. Under Act 992, a receiver is only appointed for the enforcement of secured debentures.¹³⁹⁵ That is in the event a fixed or floating charge is created over the assets of a company as security for repayment of debt under a secured debenture. For the enforcement of a fixed charge, only a receiver can be appointed but for enforcement of a floating charge, a receiver and a manager can be appointed.¹³⁹⁶ A receiver generally takes possession of charged assets to receive the rents and income due from the assets to satisfy the liability of the secured creditor or to realise the charged asset to use the proceed from the realisation to settle the

¹³⁹² Section 32(1) of Act 1052.

¹³⁹³ Section 32(3) of Act 1052.

¹³⁹⁴ Sections 90(2) and 91 of Act 992.

¹³⁹⁵ Section 91(4) of Act 992.

¹³⁹⁶ Section 91(1) of Act 992.

liabilities.¹³⁹⁷ A manager is appointed to manage the whole or part of the charged assets or undertakings of the company for the purpose of beneficial realisation of the secured assets and undertakings of the company for the benefit of the secured creditors including carrying on the business relating to the undertaking.¹³⁹⁸

20.26.1 Appointment of a receiver or manager

A receiver and manager may be appointed in three ways. A receiver and manager may be appointed by:

- (a) the Registrar,
- (b) the court upon application by a chargee or secured debenture holder, or
- (c) a chargee pursuant to power conferred on the chargee in a secured debenture.

(a) Appointment by Registrar

Whilst Act 992 in section 261(1) and (2) provides for the powers of the Registrar to appoint receivers and managers, it did not provide for the circumstances under which the Registrar must exercise the powers of appointment. Section 261 of Act 992 provides as follows:

“(1) The Registrar may appoint a receiver or manager.

(2) The Registrar shall, in appointing a receiver or a manager take into account the following:

- (a) professional competence;*
- (b) relevant experience in insolvency proceedings; and*
- (c) ability to manage the case load and ensure quality and timely execution.”*

It is suspected that the Registrar may act under this section where a court upon application by a chargee request the Registrar to appoint a receiver and manager over the assets and undertaking of a company. It also relates to the designation of the office of the Registrar as a body corporate that can act as a receiver or manager. In addition, the qualification requirements give the Registrar the power to certify a person as having the requisite expertise, skills and experience to act as a receiver or manager. The Registrar, as Official Trustee, may also be appointed by the Court on an application of a secured creditor or debenture holder to appoint a receiver or manager over assets of a company in official liquidation.¹³⁹⁹

¹³⁹⁷ Section 266 of Act 992.

¹³⁹⁸ Sections 264 and 266(1) of Act 992.

¹³⁹⁹ Section 261 of Act 992.

(b) Appointment by the Court

The court has the power to appoint a receiver or a manager in the enforcement of a charge over the assets of a company. Section 91 of Act 992 confers this power on a High Court to appoint a receiver or manager when a fixed or floating charge becomes enforceable or, in the case of a floating charge, the charged assets are in jeopardy. Act 1052 also permits the appointment of a receiver or a manager over charged assets.¹⁴⁰⁰ Section 74 of Act 1052 provides a lender in whose favour a charge is created may apply to the court for the appointment of a receiver or a manager.

A receiver or manager appointed by the court is an officer of the court. Section 267(1) of Act 992 provides *“(1) A receiver or manager of a property or an undertaking of a company appointed by the Court is, for the purposes of this Act, an officer of the Court and not of the company and shall act in accordance with the directions and instructions of the Court.”* A receiver or manager appointed by the court is thus not an officer of the company but an officer of the court. This takes the receiver or manager out of the scope of the definition in the First Schedule of Act 992 which defines “officer” in relation to a body corporate to include *“a receiver and manager of a part of the undertaking of that body corporate, appointed under a power contained in an instrument”*. The definition under the First Schedule of Act 992 is thus limited to only a receiver or manager appointed by the chargee pursuant to right conferred under the secured debenture or deed of charge.

The Act also provides that in place of a receiver or manager, the Court may appoint an Official Trustee where there is an application for appointment of a receiver or manager over assets of a company in official liquidation. Section 262 of Act 992 provides *“Where an application is made to the Court to appoint a receiver or manager on behalf of secured creditors or debenture holders of a company which is being wound up under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015), the Official Trustee may be appointed.”* The provision implied that the court may not appoint a receiver or manager over assets of a company in official liquidation. An Official Trustee may be appointed to perform the functions of a receiver or manager. The Official Trustee is the Registrar of Companies.¹⁴⁰¹

(c) Appointment by secured debenture holder or chargee

A receiver or manager may also be appointed by a chargee pursuant to powers conferred on the chargee in the instrument of charge, which is the secured debenture or deed of charge. Section 90(2)(a) of Act 992 which relates to a floating charge impliedly confirms the powers of the holder of the security to appoint a receiver or manager pursuant to a power in the debenture or the deed

¹⁴⁰⁰ Section 74 of Act 1052 provides: *“A lender in whose favour a security interest is created may (b) apply to court for the appointment of a receiver or manager”*.

¹⁴⁰¹ First Schedule of Act 992.

securing the debenture when the security becomes enforceable. Similarly, section 74(a) of Act 1052 permits a lender in whose favour a charge is created to appoint a receiver or manager.

A receiver appointed by a chargee pursuant to powers conferred in the instrument of charge plays the dual role of being an agent of the chargee and an officer of the company. The First Schedule of Act 992 defines “officer” in relation to a body corporate to include *“a receiver and manager of a part of the undertaking of that body corporate, appointed under a power contained in an instrument”*. In addition, section 268 of Act 992 which provides for the appointment of a receiver out of court provides that:

- “(1) A receiver or manager of a property or an undertaking of a company appointed out of Court is, for the purposes of this Act and subject to section 269, an agent of the person or persons on whose behalf the appointment is made.*
- (2) A receiver or manager who is appointed manager for the whole or a part of the undertaking of a company is, for the purposes of this Act, an officer of that company and stands in a fiduciary relationship to the company, and section 190 shall apply to the manager as if the manager were a director of the company.”*

A chargee, pursuant to the power expressly granted in the instrument of a charge, may appoint a receiver or manager without an application to the court. This is also supported by the First Schedule of Act 992 which defines “officer” in relation to a body corporate to include *“a receiver and manager of a part of the undertaking of that body corporate, appointed under a power contained in an instrument”*. That receiver or manager is an agent of the chargee but with the statutory powers under the Act. The receiver or manager is at the same time an officer of the company and stands in a fiduciary relationship with the company. Whilst acting as a manager over part or the whole undertaking of the company, the manager is deemed to be a director of the company and must observe the duties imposed on directors including the duty to act in the best interest of the company. However, the receiver or manager so appointed may apply to the court for direction.¹⁴⁰² The company or a liquidator may also apply to the court to fix the remuneration of the receiver or manager so appointed.¹⁴⁰³

Once a receiver or manager is appointed, notice must be given to the Registrar for entry in the register of particulars of charges in accordance with section 119 of Act 992, and any invoice, order or business letter from the company, receiver or manager, or the liquidator of the company must contain a statement that a receiver or manager has been appointed.¹⁴⁰⁴ Default in giving the notice to the Registrar or having the statement of appointment on the invoices, business letters or orders is an offence and the company and any officer, liquidator, receiver or manager of the company in default

¹⁴⁰² Section 268(3) of Act 992.

¹⁴⁰³ Section 268(4), (5) and (6) of Act 992.

¹⁴⁰⁴ Section 270(1) of Act 992.

is liable on summary conviction to a fine of five hundred penalty units to one thousand penalty units.¹⁴⁰⁵

20.26.2 Qualification of a receiver or manager

Section 261 of Act 992 provides for qualification of a receiver or manager by disqualifying some category of persons from being eligible to be appointed a receiver or manager. The section has now been supplanted by section 154(1) of the Corporate Insolvency & Restructuring Act, 2020 (Act 1015) which provides that a receiver and manager must be qualified as an insolvency practitioner under Act 1015. Section 155 of Act 1015 provides a person qualifies as an insolvency practitioner if:

- (a) the person is a chartered accountant, lawyer or banker in good standing with the Institute of Chartered Accountant, Ghana Bar Association or Chartered Institute of Banker respectively
- (b) that person is certified as a restructuring and insolvency practitioner; and
- (c) has professional indemnity insurance to indemnify for act or omission in the performance of duties of an administrator

A qualified person, based on the criteria provided above, is incapable of being appointed an administrator if the person:

- (a) is a minor,
- (b) is a body corporate,
- (c) has been declared an undischarged bankrupt,
- (d) is declared by a court of competent jurisdiction to be of unsound mind,
- (e) is a subject of disqualification under the Companies Act on grounds of fraudulent trading,
- (f) is disqualified under the Companies Act from holding an office,
- (g) has been convicted within the last five years of an offence under this Act or a crime involving moral turpitude,
- (h) is disqualified from acting as a liquidator, administrator, receiver, trustee or supervisor under Act 1015 or any other enactment,
- (i) is subject to a disciplinary proceeding or punishment under any law, or
- (j) is a director or auditor of the company.

A receiver must have the above qualification and not also be disqualified under section 155 of Act 1015 to be appointed as a receiver or manager of a company or over the assets of the company. A person who is not qualified as indicated above but who acts as a receiver or manager (that is an insolvency practitioner) commits an offence and is liable on summary conviction to a fine of between five hundred and thousand penalty units or terms of imprisonment of between two and five years, or both.¹⁴⁰⁶

¹⁴⁰⁵ Section 270(2) of Act 992.

¹⁴⁰⁶ Section 156 of Act 1015.

20.26.3 Duties of a receiver or manager

Once a person is appointed a receiver or manager, the law confers duties on the receiver or manager that must be observed in the exercise of the powers conferred on the receiver or manager. The duties must be observed in the discharge of the activities of the receiver or manager. The nature of the duties also relates to whether the person is appointed as only a receiver or appointed as a receiver and a manager, and secondly whether the receiver or manager is appointed by the court or the chargee. A receiver or manager appointed by the court is an officer of the court and is required to act in accordance with the directions and instructions of a court.¹⁴⁰⁷ Whilst a receiver or manager appointed by a debenture holder or chargee is an agent of the debenture holder or chargee, and a manager appointed over the whole or part of the undertakings of the company is in addition an officer of the company.¹⁴⁰⁸

A manager is subject to additional duties under Act 992. Under section 264 of Act 992 *“A person appointed a manager of the whole or part of the undertaking of a company shall manage the undertaking with a view to the beneficial realisation of the security of those on whose behalf the appointment is made.”* Pursuant to section 264 of the Act, even where a court appoints a manager, the manager must perform the duty stated in section 264, notwithstanding that the manager is acting under the direction or instruction of the court, as section 267(2) of Act 992 which deals with appointment by the court repeats section 264 when it provides that *“(2) A person appointed manager of the whole or a part of the undertaking of a company shall manage the undertaking with a view to the beneficial realisation of the security of those on whose behalf the appointment is made.”*

Section 268 of Act 992 in relation to a receiver or manager appointed by the chargee also reflects the same scope of duties on a manager but expands duties to be observed by the receiver or manager. Whilst the receiver or manager is an agent of the chargee, the manager appointed over the whole or part of the undertakings of the company is, in addition to being an agent, an officer of the company and stands in a fiduciary relationship to the company, and the duties imposed on directors under section 190 of Act 992 is applicable to the manager as if the manager were a director of the company.¹⁴⁰⁹ A manager appointed by the chargee over undertakings of a company thus plays the dual role of being an agent of the chargee and an officer of the company, and as a manager, is under the same duties imposed on a director of a company. Such dual responsibilities may lead to conflict. In view of that, the Act permits the manager in such conflict situations to apply to the court for direction in the performance of the duties.¹⁴¹⁰ The dual capacity is applicable only where a receiver

¹⁴⁰⁷ Section 267(1) of Act 992.

¹⁴⁰⁸ Section 268 of Act 992.

¹⁴⁰⁹ Section 268(2) of Act 992.

¹⁴¹⁰ Section 268 of Act 992 provides *“(3) The receiver or manager may apply to the Court for directions in relation to a matter arising in connection with the performance of functions under this section; and on that application the Court may give the directions, or make an order declaring the rights of persons before the Court or otherwise, that the Court considers fit.”*

or manager is appointed a manager over the whole or part of the undertakings of the company, and not when appointed just a receiver over the assets of the company.

Section 263 of Act 992 expressly spell out the duties of a receiver or manager. Even though the section mentions only “receiver”, the First Schedule of Act 992 defines “receiver” to include “manager” and vice versa. The duties are thus imposed on both a receiver and a manager. The following duties are the duties imposed under Act 992.

(a) Duty to act in good faith

The general duty under which a receiver operates is the duty to act in good faith. That is, to act honestly, fairly and sincerely. A receiver who acts in bad faith will be in breach of this duty. Section 263 of Act 992 provides *“(1) A receiver shall exercise the powers of that receiver in good faith and for proper purpose.”* Not only is the receiver required to exercise good faith in the exercise of the powers conferred on the receiver, but the powers must be exercised for the purpose for which the powers are given, which relates to satisfaction of the debt from the charged assets, and not for the benefit of the receiver or any other purpose. A receiver appointed by the secured debenture holder or chargee, who acts or refrains from acting on the instruction or direction of the secured debenture holder or chargee, will still be in breach of this duty when acting or refraining from acting on the instruction or direction of the secured debenture holder or chargee amounts to acting in bad faith or use of the power for an improper purpose.¹⁴¹¹

(b) Duty to act in the interest of chargee or debenture holders

A receiver is appointed by a debenture holder or chargee as a means of enforcing a secured debenture. The primary interest, but not exclusive, to be protected is, therefore, the interest of the chargee or debenture holder who appointed the receiver or on whose behalf the court appointed the receiver. Section 263 of Act 992 provides:

“(2) In the exercise of the powers conferred under subsection (1), and section 266, the receiver or manager in the case of a receiver appointed out of Court may give special, but not exclusive consideration to the interests of those on whose behalf the appointment is made.

(3) Pursuant to subsections (1) and (2), a receiver shall exercise the powers of that receiver with reasonable regard, to the interests of:

- (a) secured creditors,*
- (b) the company,*
- (c) any person claiming through the company, an interest in the property in receivership,*

¹⁴¹¹ Section 263(3) of Act 992.

- (d) *unsecured creditors of the company, and*
- (e) *any surety that may be called on to fulfil obligations of the company."*

A receiver must act in good faith towards all persons whose interest are affected by the exercise of the powers of the receiver over the charged assets. In so doing, the receiver appointed by the secured debenture holder or chargee is permitted to give special consideration to the interest of the debenture holder or chargee. That special interest does not entitle the receiver to act in total disregard to the interest of other affected persons including the company, unsecured creditors, other persons claiming through the company an interest in the charged assets and person from whom obligations are due to the company.

A receiver, appointed by or behalf of the chargee out of court, who acts or refrains from acting on the instruction or direction of the chargee is not deemed to be in breach of the duty under subsection (3) but may be liable for breach of the duty to act in good faith.¹⁴¹²

(c) Duty to obtain best price for assets

One of the powers of a receiver is to sell the charged assets and use the proceeds from the sale to satisfy liabilities to the secured debenture holder in whose favour the enforced charge is created. In the exercise of the power of sale, the receiver is to receive the best price for the charged assets. Section 263(4) of Act 992 provides that *"(4) A receiver that exercises a power of sale of property in receivership shall obtain the best price reasonably obtainable as at the time of sale."* The duty is for the receiver in selling the charged assets to obtain the best price that can reasonably be obtained at the time of the sale.

(d) Duty to keep proceeds or income from charged assets separate

A receiver is under a duty to keep moneys received in relation to the charged assets separate from all other moneys that the receiver may have received but which does not relate to the charged assets. Section 263(6) of Act 992 provides that *"(6) A receiver shall keep money relating to the property in receivership separate from other moneys received in the course of, but not relating to, the receivership and from other moneys held by or under the control of the receiver."* The receiver is, therefore, not to commingle the funds. This is to avoid disputes as to which funds must be used to satisfy the debt of a secured debenture holder or chargee. This is important where separate charged assets are charged to separate debenture holders or chargees or secure separate fixed amounts under the debenture. The moneys received relating to a specific charged asset must be used to satisfy the

¹⁴¹² Section 263(5) of Act 992.

repayment obligation of the specific debt for which that specific asset was charged, and not otherwise.

(e) Duty to keep account

The receiver must keep proper records of accounts relating to receipts and expenditure relating to the charged assets. Section 263(7) of Act 992 states that *“(7) A receiver shall at all times keep accounting records and explain the receipts, expenditure and other transactions relating to the property in receivership.”* The account is to be kept at all times and that must be records of receipts, expenditures and transactions relating to the charged assets. The section also requires the receiver or manager to explain the receipts, expenditure and transactions relating to the assets in receivership. That account is required to be kept for a period of at least six years after the termination of the receivership.¹⁴¹³

20.26.4 Powers of a receiver or manager

Section 266 of Act 992 confers powers that a receiver or manager can exercise when appointed a receiver or a manager over a charged asset. Section 266 of Act 992 provides that:

- “(1) A person appointed receiver of a property of a company shall, subject to the rights of any prior incumbrances*
- (a) take possession of and protect the property,*
 - (b) receive the rents and profits,*
 - (c) discharge the outgoings in respect of the property, and*
 - (d) realise the security of those on whose behalf that person is appointed, but unless also appointed a manager, that person shall not carry on a business or undertaking.*
- (2) From the date of appointment of a receiver or manager, the powers of the directors or liquidators in the voluntary liquidation of a member to deal with the property or undertaking over which the receiver or manager is appointed shall cease until the receiver or manager is discharged.*
- (3) Where, on the appointment of a receiver or manager, the company is being wound up under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015), or the property concerned is in the hands of any officer of the Court, the liquidator or officer is not bound to relinquish control of the property to the receiver or manager except under an order of the Court.”*

¹⁴¹³ Section 263(8) of Act 992.

This position on the powers conferred on a receiver or manager is reflected in the Borrowers and Lenders Act, 2020 (Act 1052) when it provides in section 74, the purpose of appointment of a receiver or manager as to:

- “(i) take possession of and protect the property;*
- (ii) collect the rents and profits derived from the property, or*
- (iii) realise the security interest on behalf of the lender.”*

The purpose of the appointment of a receiver or manager is to enforce the charge created over the assets of a company in favour of the secured debenture holder or chargee so as to satisfy the debt owed to the secured debenture holder or chargee under the secured debenture. Once the charge becomes enforceable or, or in case of a floating charge, is in jeopardy, the appointment of a receiver or manager is for the ultimate purpose of realizing the charged assets or obtaining proceeds or income from the charged assets to settle the repayment obligation under the secured debenture. The powers conferred on the receiver or manager are therefore to ensure the receiver or manager is able to realise the charged assets or obtain proceeds or incomes from the charged assets, without interference from others, and to settle the indebtedness to the secured debenture holders. The powers of the receiver or manager are subject to the rights of persons who have an interest that takes precedence over the interest created by the charge. The receiver thus has the power to:

- (a) Take possession of the charged assets. This may be to protect the charged assets or to compel the company to repay the debt or failing which the receiver may proceed to realise the charged assets or use the charged assets to obtain income to settle the debt.
- (b) Receive the income, rents and profits, from the charged assets, either after taking possession of the charged assets or when the charged assets are still in possession of the company.
- (c) Discharge the outgoings in respect of the charged assets. In order to maintain the status of the charged assets, the receiver may pay any amount due to third parties on the charged assets so as to maintain the status of the charged assets. For example, the receiver may continue to pay rent on leased assets, insurance premium or other charges due on the assets.
- (d) Sell the charged assets to obtain proceeds to pay off the indebtedness to the debenture holder in whose favour the charge was created.
- (e) Where the receiver is also a manager, to manage or carry on the business relating to the charged assets or undertakings.

To avoid interference with the exercise of the above powers, the powers of directors or liquidators in voluntary liquidation in relation to the charged assets ceases upon the appointment of the receiver or manager over the charged assets. Whilst in official liquidation, the charged assets may only be released to the receiver upon a court order.

20.26.5 Liabilities of a receiver or manager

A receiver or manager appointed by a chargee is an agent of the debenture holder or chargee and will be liable to the debenture holder or chargee for breach of the agency relationship if the receiver or manager acts contrary to the duties imposed on the receiver or manager as an agent.¹⁴¹⁴ In addition, Act 992 imposes a number of duties on the receiver or manager and the breach of such duties will impose liabilities on the receiver or manager. Further, the Act also provides that there is a fiduciary relationship imposed between the manager and the company where the manager is appointed over the whole or part of the undertakings of the company.¹⁴¹⁵ A breach of the fiduciary duty will impose liability on the receiver or manager. The company may proceed against the manager for compensation for loss suffered as a result of the breach of the fiduciary duties and the manager must account for benefit retained in breach of the fiduciary duties imposed on the manager. All these are in relation to breach of duties imposed on the receiver or manager on the one hand and the chargee or company and others on the other hand.

With specific reference to a breach of duty in the sale of property, section 265 of Act 992 provides that it is no defence that the receiver was acting as an agent of the company or under a power of attorney and is not entitled to compensation or indemnity from the charged assets or the company. Section 265 of Act 992 provides:

“Despite a provision of any enactment, rule of law or any provision contained in the deed or agreement by or under which a receiver is appointed

- (a) it is not a defence to proceedings against a receiver for a breach of duty in connection with the sale of property that, the receiver was acting as an agent of the company or under a power of attorney from the company; and*
- (b) a receiver is not entitled to compensation or indemnity from the property in receivership or the company in respect of any liability incurred by the receiver arising from a breach of the duty in connection with the sale of the property.”*

In relation to a transaction entered into by a receiver or manager, section 269 of Act 992 provides for liabilities of a receiver or manager appointed over a charged asset in relation to contracts entered into by the receiver or manager pursuant to the exercise of the powers of the receiver. Subsection (1) of section 269 of the Act provides that *“(1) A receiver or manager of a property or an undertaking of a company is personally liable on a contract entered into by the receiver or manager except as the contract otherwise expressly provides.”* That is, notwithstanding the agency relationship between the receiver or manager and the chargee, or the fiduciary relationship imposed on the receiver or

¹⁴¹⁴ Section 268(1) of Act 992.

¹⁴¹⁵ Section 268(2) of Act 992.

manager, the receiver or manager is personally liable on contracts entered into unless otherwise expressly stated in the contract. However, the receiver or manager is entitled to indemnity from the charged assets provided the contract is entered into in the proper performance of the functions of the receiver or manager, subject to the rights of prior encumbrance on the charged assets.¹⁴¹⁶ A receiver or manager appointed out of court who entered into a contract with the express or implied authority of the chargee is entitled to indemnity in respect of liability on the contracts from the chargee to the extent the receiver or manager is unable to recover from the charged assets.¹⁴¹⁷

20.26.6 Accounts prepared by a receiver or manager

A receiver or manager is under a duty to keep books of account or details of receipts and expenditures relating to the assets in receivership.¹⁴¹⁸ Section 271 of Act 992 deals with the nature of the account to be kept by a manager appointed over undertakings of a company on behalf of a holder of debenture secured by a floating charge. The account and records to be kept are the same account and records required under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015) in the event a company is being wound up.¹⁴¹⁹ A default by the manager to keep the required account is an offence and on summary conviction, a person in default is liable to a fine of ten penalty units to twenty-five penalty units for each day of the default.¹⁴²⁰

A receiver or manager, in other cases other than as required from a manager as indicated above, is to deliver to the Registrar, within one month after every twelve months, a statement of account showing receipts and payment of the receiver or manager.¹⁴²¹ The required statement of account must also be submitted to the Registrar within one month after ceasing to be a receiver or manager. The Registrar may permit a longer period than one month for delivery of the account.¹⁴²² A default is an offence and a receiver or manager will be liable on summary conviction to a fine of twenty-five penalty units for each day of the default.¹⁴²³

A receiver who failed to deliver accounts or documents required to be filed or to actually account may be compelled to do so by the Court.¹⁴²⁴ Application to the Court may be made by the company, a member, creditor or liquidator of the company or the Registrar.¹⁴²⁵

¹⁴¹⁶ Section 269(2) of Act 992.

¹⁴¹⁷ Section 269(3) of Act 992.

¹⁴¹⁸ Section 263(7) of Act 992.

¹⁴¹⁹ Section 271(1) of Act 992.

¹⁴²⁰ Section 271(2) of Act 992.

¹⁴²¹ Section 272(1) of Act 992.

¹⁴²² *Ibid.*

¹⁴²³ Section 272(2) of Act 992.

¹⁴²⁴ Section 273(1) of Act 992.

¹⁴²⁵ Section 273(2) of Act 992.

20.26.7 Remuneration of a receiver or manager

The remuneration payable to a receiver or manager is directly linked to who appoints the receiver or manager. The remuneration payable to a receiver or manager appointed by the court will be determined by the court. The same position is applicable to a receiver or manager appointed by the Registrar or the secured debenture holder or chargee. In respect of the receiver appointed by the secured debenture holder or chargee, the remuneration is determined and stated in the letter of appointment or agreement executed between the debenture holder or chargee and the receiver or manager. However, the court is given power even in instances of appointment of receiver or manager by the chargee to determine the remuneration payable to the receiver or manager on application by the company or the chargee. Section 268(4) of Act 992 provides that:

“(4) The Court may, on the application of the company or a liquidator of the company, by order fix the amount to be paid by way of remuneration to the receiver or manager; and may on an application made by the company or liquidator or by the receiver or manager, vary or amend the order.”

Generally, the remuneration determined above is paid to the receiver or manager out of moneys realised or received from the charged assets. Since the charged asset is an asset of the company which is realised for the payment of the debt owed by the company to chargee or secured debenture holder, it is in the interest of the company to ensure that the amount determined as remuneration payable to the company is reasonable. In view of this, the power to make an application to the court for an order fixing the remuneration of a receiver or manager is given to the company or liquidator of a company where the receiver is appointed by the chargee or secured debenture holder. As such, where the secured debenture holder appoints a receiver or manager and both agreed on remuneration, the company or liquidator still retains the right to apply to the court for an order to fix the remuneration of the receiver or manager.

20.26.8 Termination of appointment of a receiver or manager

The appointment of receiver or manager terminates upon completion of the full payment of the debt owed to the secured debenture holder or upon completion of realisation of the charged assets and payment of the proceeds to the secured debenture holder. In the second instance, the amount realised from the sale of the charged assets may not be enough to fully satisfy the debt of the secured debenture holder. A receiver or manager will also cease to be receiver or manager where the appointing authority, the court, Registrar of companies or the secured debenture holder, terminates the appointment. The Court also has an overriding power to terminate the appointment of a receiver or manager on application by an interested person in the following circumstances:

- (a) where the receiver or manager breaches duties imposed on the receiver or manager,
- (b) where the person appointed receiver or manager is not so qualified to be appointed,

- (c) where the conditions for the appointment of a receiver or manager have not arisen prior to the appointment, or
- (d) in circumstances where it is just and equitable for the court to terminate the appointment.

21.0 RESTRUCTURING OR REORGANISATION OF COMPANIES

21.1 Introduction

As a company engages in business, there comes a time when it becomes relevant for the company to restructure or reorganise its business either to take advantage of business opportunities, to enable the company to survive, to be more efficient in its operations or for any other reasons. A company may restructure or reorganise its business and undertakings, debt or ownership structure. The restructuring or reorganisation may involve the company and its owners or creditors in the form of arrangement or compromise. The restructuring or reorganization may also involve the company, owners, creditor and other companies in the form of merger, division, acquisition or takeover. Restructuring or reorganization here is used to include any number of situations covered under the Companies Act, 2019 (Act 992) as an arrangement, merger, compromise, division and acquisition. Reorganisation or restructuring has been used interchangeably in this chapter.

As a company has a number of stakeholders whose rights may be affected by the restructuring, it is important that restructuring which is invariably agreements intensive complies with the requirements of the law which are to ensure the various interests of stakeholders are protected. This section explains the restructuring options and the applicable provisions of Act 992. It should, however, be noted that restructuring involving companies operating within a specific sector also needs to be done in compliance with the sector specific legislation and antitrust or competition legislations. Again, for public companies, especially listed companies, there are specific legislations that affect such restructuring, given the public nature of such companies.

21.2 Definition of restructuring options

As indicated, restructuring covers a number of arrangements undertaken by a company or companies. Part T of the Companies Act, 2019 (Act 992) provides for five of such arrangements –

- (a) arrangement,
- (b) merger,
- (c) compromise,
- (d) division, and
- (e) acquisition.

Other than acquisition, the Act defines the other types of restructuring. In addition, the types of restructuring are not mutually exclusive but can include a combination of a number of options in one restructuring. A brief explanation of the definition of the concept is provided below.

(a) Arrangement

Act 992, in the First Schedule, provides that *“arrangement” includes a reorganization of the authorised shares of a company by the*

- (a) consolidation of shares of different classes;*
- (b) division of shares of different classes; or*
- (c) combination of the methods referred to in paragraph (a) and (b).”*

Restructuring by arrangement relates to restructuring the shares of the company either by consolidation of shares of different classes or division of the shares of different classes, or both consolidation and division. Consolidation of shares of different classes relates to merging or combining shares of different classes. This is done by varying the rights of a class of shares either to be the same as another class or varying the rights of two more classes of shares to become the same. Division relates to varying a right attached to some shares in a class so as to create different classes of shares. As previously indicated, shares must rank at the same rate for such shares to belong to the same class.¹⁴²⁶ Consolidation of shares will require amending the rights, interests and liabilities attached to different classes of shares so all the shares rank at the same rate for all purposes. Division of classes of shares refers to amending rights of some shares in a class of shares so the shares do not rank at the same rate for all purposes and thereby creating different classes.

The alteration of the constitution of a company under section 30 of Act 992 may alter the rights and liabilities attached to shares or may impose restrictions on the shares. The alteration is to be effected by a special resolution.¹⁴²⁷ However, the shareholders are not bound by any adverse changes on the shares held unless expressly agreed to by the shareholders.¹⁴²⁸ An arrangement permits variation of rights of a class of shares without necessarily requiring the consent of all shareholders of such class or classes. The broad definition of arrangement also covers variation of class right under section 50 of Act 992. However, there is a difference between variation of class right as provided under section 50 of the Act and an arrangement under Part T of the Act. Variation of class rights under section 50 is limited to only two instances. Where the implementation of resolution diminishes the proportion of total votes of a class or reduces the proportion of dividends or distribution payable to a class. An arrangement covers a variation of rights, liabilities or interest of or within a class or classes of shareholders. Arrangement thus covers a broader change in rights, interest or liabilities attached to shares than variation of class rights. The arrangement which falls into the category of variation of class right is implemented in accordance with section 50 of Act 992 and does not require unanimous approval of all shareholders but a special resolution of the class affected once the constitution permits variations of class right. Where the requirements set out in section 50 of the Act cannot be

¹⁴²⁶ Section 49(2) of Act 992.

¹⁴²⁷ Section 30(1) of Act 992.

¹⁴²⁸ Section 30(2)(h) of Act 992.

complied with for a variation, the variation may be implemented under a scheme of arrangement subject to the approval of the Court under section 239, which is under Part T of the Act.¹⁴²⁹ Further, any other arrangement must be done with the approval of the affected shareholders or in accordance with Part T of Act 992 which requires approval of the court.

The definition of 'arrangement' under the First Schedule indicated that the two options – reorganization by consolidation and reorganisation division – do not close the manner in which an arrangement can be done. The definition provides that 'arrangement includes'. It, therefore, means arrangement can be done in other manners than the reorganization of the authorised shares by consolidation or division of shares of different classes. In a much broad sense, arrangement will encompass all changes that affect the shares of the company and not only reorganisation of shares of a company other than consolidation or division.

(b) Merger

Act 992, in the First Schedule, provides that:

“merger” includes merger by;

- (a) absorption by which the undertaking, property and liabilities of one or more companies, including the company in respect of which a scheme is proposed, are to be transferred to another existing company;*
- or*
- (b) formation of a new company by which the undertaking, property and liabilities of two or more companies, including the company in respect of which the scheme is proposed, are to be transferred to a new company*

and the consideration envisaged for the transfer is shares in the transferred company receivable by a member of the transferor company with or without any cash payment to that member”.

Merger covers the combination of the undertakings or assets or both undertakings and assets of two or more companies. Unlike arrangements that can be done by one company, a merger involves a minimum of two companies. The two companies may be merged by one company (the transferee company) absorbing the assets and undertakings of the other company (the transferor company); or by two or more companies (transferor companies) transferring their assets and undertakings to another company which may be an existing company or a new company (the transferee company). The consideration for the transfer of the assets and undertakings of the transferor company or companies is wholly or partly shares in the transferee company issued to shareholder of the transferor company or companies. Where the consideration is partly shares of the transferee

¹⁴²⁹ Section 50(2) of Act 992.

company, the remaining part may be cash, debenture or other valuable considerations other than cash.

From the above, where there is no issue of shares by the transferee company to shareholders of the transferor company upon the absorption of the assets and undertakings of the transferor company by the transferee company, that will not amount to a merger but an acquisition. In the event the consideration is partly shares and partly cash, debenture or other consideration, and the dissolution of the transferor company, that will amount to a merger and acquisition in one transaction. An acquisition may be done by one company acquiring the shares of another company resulting in the target company becoming a subsidiary of the acquiring company. This is done by agreement between the acquiring company and the shareholders of the target company. The subsidiary may subsequently be merged with the acquiring parent company or remain a subsidiary company. Alternatively, the acquisition may be done by the purchase of the assets and undertaking of the target company. This is done by a sale and purchase agreement between the acquiring company and the target company. However, such an acquisition will require the approval of the directors and shareholders of the target company. A merger which involves acquisition is done in accordance with Part T of the Act.

(c) Compromise

Act 99, in the First Schedule, provides that:

““compromise” means an agreement between a company and its creditors including

(a) cancelling all or part of a debt of the company;

(b) varying the

(i) rights of creditors; or

(ii) terms of a debt of the company; and

(c) relating to an alteration of the constitution of the company, that affects the ability of the company to pay a debt of the company.”

Whilst arrangement relates to a reorganization of shares either by consolidation or division of classes of shares, compromise relate to debts either by cancellation or variation of rights of creditors or terms of debt, and alteration of the constitution of the company in a manner that affect debt repayment. Compromise generally refers to the reorganization of the debts of the company by agreement between the company and its creditors, or through amendment of the constitution to affect the company's ability to pay its debt. For a company to undertake a compromise, there must be an agreement between the company and its creditors. The agreement must relate to cancellation of the whole or part of the debt of the company, varying the rights of creditors or terms of the debt of the company, or alteration of the constitution of the company to affect the ability of the company to pay the debt of the company.

(d) Division

Act 992, in the First Schedule, provides that:

“division” means a scheme by which the undertaking, property and liabilities of a company, in respect of which a compromise or an arrangement is proposed, are to be divided among and transferred to two or more companies which are either

- (a) existing companies; or*
- (b) new companies”.*

Division relates to the transfer or division of the undertaking, property and liability of the company to other two or more companies, whether existing or new companies. The division of the undertaking, property and liability to two or more company must be pursuant to an arrangement or compromise proposed in relation to the company whose undertakings, property and liabilities will be transferred.

Act 992, as indicated above, provides for the above four types of restructuring under Part T of the Act. The Act also provides for the framework of other restructuring options which include acquisitions or takeover. As indicated, acquisition can be done as part of a merger or can stand alone. In either event, it must comply with requirements of the Act and any other applicable sector specific legislation. Takeover refers generally to an acquisition of one company by another resulting in the acquirer having a controlling interest in the target. However, in a more technical sense, it refers to an acquisition of a public company especially one listed on the stock exchange where the acquirer has a controlling interest in the target public company. A takeover of a public company will be subject to the applicable provisions of Act 992 and the securities and exchange laws, particularly the Code of Takeovers and Mergers, as well as applicable takeover rules of the stock exchange.

21.3 Requirements for restructuring

Act 992 provides for the requirements for undertaking any of the above types of restructuring. Generally, the restructuring can be done without court approval or with the approval of the court.

21.3.1 Merger by sale of undertaking¹⁴³⁰

Merger as defined above refers to combining or merging the assets or undertakings of two or more companies. This may be done by one or more companies transferring assets and undertakings to an existing company or a new company for consideration wholly or partly in shares of the transferee

¹⁴³⁰ Even though section 238 of Act 992 which deals with this mentions ‘arrangement’, the reading of the section does not regulate arrangement in the sense described above. Arrangement which relates to reorganization of shares must be implemented either as variation of class right or in accordance with section 239 of the Act.

company. Under Part T of Act 992, an arrangement can be done with or without court approval. Section 238 of Act 992 deals with the situation where the implementation of a merger involves the liquidation of the transferor company or companies, and the sale of its undertaking or assets to the transferee company in return for shares wholly or partly as consideration. The merger under section 238 of the Act results in shareholders of the transferor company ceasing to have the shares in the company as the company is put in liquidation and the shareholders obtain shares, debentures or other like interest in the transferor company with different rights and liabilities. The merger pursuant to the section results in one or more transferor companies ceasing to exist. This essentially is a merger by absorption where the transferor company or companies are voluntarily liquidated.

Section 238 of Act 992 provides that:

- “(1) Despite any other provisions on arrangements or mergers in this Act, a company may, with a view to effecting an arrangement or merger, resolve by special resolution,*
- (a) the company be put into a voluntary liquidation of members, and*
 - (b) the liquidator be authorised,*
 - (i) to sell the whole or part of the undertaking or assets of a company to another body corporate, whether a company within the meaning of this Act or not, in this Part called the transferee company, in consideration or part consideration of fully paid shares, debentures or other like interest in the transferee company, and*
 - (ii) to distribute the shares, debentures or other like interests in specie among the members of the company in accordance with their rights in the liquidation.*
- (2) A sale and distribution in pursuance of a special resolution is binding on the company and the members of the company, and each member shall be deemed to have agreed with the transferee company to accept the fully paid shares, debentures or other like interests to which that member is entitled under the distribution.”*

The section provides for the implementation of a merger where the undertaking or assets of a company is sold to another company and the shareholders receive payment in the form of shares, debentures or other like interest in the transferee company. For the purposes of merger under this section, the following conditions must be satisfied:

- (a) there must be a special resolution by the members;
- (b) the special resolution must authorise the voluntary liquidation of the transferor company;
- (c) the special resolution must appoint a liquidator; the special resolution must authorise the liquidator to sell the undertaking and assets of the transferor company to the transferee

- company;
- (d) the special resolution must authorise the liquidator to receive consideration in the nature of fully paid shares, debentures or other like interest in the transferee company;
- (e) the transferee company must likewise pass a special resolution which requires the transferee company to take the undertaking and assets of the transferor company, and make payment in the form of shares, debentures or like instruments; and
- (f) the shares, debentures or like instrument is distributed among the members on the liquidation of the transferor company in accordance with the rights of shareholders in liquidation.

Even though the approval of the transferor company is done by a special resolution, it is deemed that all the members have agreed to accept the fully paid shares, debentures or like instrument in the transferor company.

The distinction between this process and direct sale of the assets of the company is that while in the direct sale of the assets or undertaking of the company, the consideration is paid to the company, a merger involving the sale of undertaking or assets requires putting the transferor company into voluntary liquidation and the consideration goes directly to the shareholders.

Since the special resolution must put the transferor company into voluntary liquidation, it must satisfy the requirements of private liquidation under sections 276 and 278 of Act 992. It must, therefore, be passed after an affidavit of solvency issued by directors and a letter of consent received from the liquidator.

Even though the sale is not approved by all the shareholders but a seventy-five percent majority, it is binding on all the shareholders of the company. Each shareholder is deemed to have agreed to receive the fully paid shares, debentures or the like interest from the transferee company as the shareholder is entitled to as distribution in the liquidation of the transferor company. The dissenting shareholders are entitled to the remedies provided in the Act. Particularly, the Act permits a dissenting shareholder to serve a notice on a company or liquidator to buy-out the shares of that shareholder.¹⁴³¹ Alternatively, the dissenting shareholder may serve a notice on the liquidator of his dissent. The liquidator is then required to buy the shares of the dissenting shareholder in accordance with the procedure stated in section 238 of the Act. In addition, where an order is made within a year to wind up the company or a remedy against oppression under section 219 of the Act is granted, the Act requires the approval of the court for the arrangement or merger by the sale of the undertaking to proceed.

Section 238 of Act 992 provides that:

¹⁴³¹ Section 220 of Act 992.

“(3) For the purposes of subsection (2), if

- (a) within one year from the date of the passage of the special resolution, an order is made under section 219 or for winding up of the company under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015), the arrangement or merger and the sale and distribution shall not be valid unless sanctioned by the Court; or*
- (b) a member of the company, by notice in writing addressed to the liquidator and left at the registered office of the company within twenty-eight days after the passage of the resolution, dissents from the arrangement or merger in respect of all of the shares held by that member, the liquidator shall abstain from carrying the resolution into effect or shall purchase the shares at a price to be determined in a manner provided by subsection (4), (5) and (6) of this section.*
- (4) Where the liquidator elects to purchase the shares of a member who has expressed dissent in accordance with subsections (2) and (3) of this section, the price payable for the shares shall be determined by agreement or, in default of agreement, by a single arbitrator appointed by the Institute of Chartered Accountants in the country in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).*
- (5) The price shall be determined by estimating what the member concerned would have received had the whole of the undertaking of the company been sold as a going concern for cash to a willing buyer and the proceeds, less the cost of liquidation, been divided amongst the members in accordance with their rights.*
- (6) The purchase money shall be paid before the company is dissolved and raised by the liquidator in the manner that may be determined by the special resolution or, in default of a direction in the special resolution, in the manner that the liquidator thinks fit as part of the expenses of the winding up.”*

Even though the approval of the court is not required for a merger involving the sale of the undertaking to be implemented under this section, the court approval may be required if two circumstances arise during the implementation. Where the company is put into official liquidation within one year of passing the special resolution, or a shareholder, debenture holder or Registrar institutes an action under section 219 of the Act and obtains a remedy under that section. In those two instances, the arrangement or merger involving the sale of undertaking under the section will not be valid unless approved by the court.

A dissenting member has the right to object within twenty-eight days of passage of the special resolution. The objection must be in relation to all the shares of the shareholder. The notice of objection must be given to the liquidator. The liquidator upon receipt of the notice must suspend the

implementation of the resolution or buy-out the shares of the shareholder objecting to the arrangement or merger involving the sale of the undertaking. The price at which shares are bought is determined by agreement, failing which it must be determined by a single arbitrator. The arbitrator determines the price by estimating the amount the member would have received if the whole of the undertaking of the company is sold as a going concern and the proceeds, less cost of liquidation, is divided among the shareholder in accordance with their rights. The amount is to be paid prior to the dissolution of the company. The liquidator can raise the amount required in the manner directed in a special resolution passed by the members or as determined by the liquidator if no direction is provided in the special resolution.

A shareholder may also resort to section 220 of the Act which permit the shareholder to require the company to buy-out the shares of the shareholder. The buy-out is implemented in accordance with section 222 of the Act.¹⁴³²

Section 238 of the Act also permit a member to serve a notice on the company where the company sells or resolves to sell the whole or part of the undertaking or assets of the company to another body corporate for consideration in shares, debentures or any like interest and further resolves to distribute the proceeds to member.¹⁴³³ The scope of subsection (8) of section 238 of the Act, is wider than the merger by absorption described above. The subsection does not refer to the company implementing arrangement or merger which involves the sale of the undertaking or assets. It simply refers to the sale or resolution to sell the whole or part of the undertaking or assets, and a resolution to distribute the proceeds of the sale to the shareholders. In addition, the company engaging in the sale need not be put in liquidation. The focus is on the right of the shareholder to resolve to sell the undertaking or assets of the company and have consideration received from the sale directly distributed to the shareholders than being consideration of the company. The company does not need to be wound up under this option and may continue in existence.

Where the notice is served, the company must suspend the implementation of the resolutions and proceed to buy-out the shares of the shareholder in accordance with section 238.¹⁴³⁴ The purchase of the shares is subject to the limitation in sections 61 to 66 of the Act.¹⁴³⁵ The distribution must also be in accordance with section 72 and sections 75 to 85 of the Act or done as if the company is in liquidation.¹⁴³⁶

As indicated, a merger relates to the absorption of the transferor company by the transferee

¹⁴³² Refer to the remedy of buy-out under the chapter on Remedies for Corporate Maladministration.

¹⁴³³ Section 238(9) of Act 992.

¹⁴³⁴ *Ibid.*

¹⁴³⁵ Section 238(9)(a) of Act 992.

¹⁴³⁶ Section 238(9)(b) of Act 992.

company. Under the section, the transferor company is liquidated by private liquidation. The rights of creditors are, therefore, not to be affected. Section 238 of Act 992 expressly provides that “(7) *This section does not authorise variation or an abrogation of the rights of the creditors.*” Since the transferor company is put in private liquidation, it must satisfy the liabilities within the time indicated in the affidavit of solvency. As part of the winding up of the transferor company, the liquidator must discharge all the debts and liabilities of the company. The transferee company continues as a going concern without altering the right of creditors. Any such alteration must be with an agreement of creditors, or through a restructuring undertaken as a compromise.

21.3.2 Arrangement or compromise with Court approval

Amendment of the rights attached to a class of shares may be implemented as an alteration of the constitution by special resolution of shareholders with the consent of affected shareholders if it adversely affects the right attached to shares held, or as a variation of class right. Failing those two instances, an arrangement must be implemented under a scheme subject to court approval. Compromise, which is a cancellation of debt or variation of debt or terms of debt by the company, cannot be done without the agreement of the creditors of the company. A company may restructure its debt through a compromise by agreement with each creditor. A creditor is bound by the cancellation of debt or variation of the debt or terms of the debt or the amendment of the constitution which affect payment of the debt if expressly agreed to by the creditor. Where a company cannot obtain the consent of all creditors to be bound by a compromise, the company may implement a restructuring of debt under a scheme approved by the Court.

A restructuring by a company through arrangement or compromise can, therefore, be implemented under a scheme subject to the approval of the Court. This will be required, in the case of an arrangement, where the consent of shareholders cannot be obtained or the arrangement cannot be implemented as a variation of class right under section 50. In the case of compromise, if the consent of all creditors cannot be obtained by the company, compromise is implemented with the approval of the court. Section 239 of Act 992 provides for arrangement or compromise with court approval. Section 239 of Act 992 provides that:

- “(1) Where an arrangement or compromise is proposed between a company and the creditors, or any class of the creditors, or members or any class of the members of the company, the Court, on application of*
- (a) the company or a member or creditor of the company,*
 - (b) the liquidator in the case of a company being wound up,*
 - (c) the administrator where an administration order in relation to the company is still in force, or*
 - (d) any other person interested in the matter may order that meetings of the various classes of members and creditors be summoned in the*

- manner that the Court directs.*
- (2) Where a majority in number, representing, seventy-five percent in value, of each class of members concerned and a majority in number representing seventy-five percent in value of each class of creditors concerned approve the arrangement or compromise, the approval shall be referred to the Registrar by the person concerned.*
 - (3) The Registrar shall recommend to the Court, the appointment of a reporter who shall be a qualified insolvency practitioner, to investigate the fairness of the arrangement or compromise.*
 - (4) The remuneration of the reporter shall be fixed by the Registrar and the proper expenses of the investigation shall be borne by the company or any other party to the application that the Court orders.*
 - (5) Where the Court, after considering the report, makes an order confirming the arrangement or compromise, with or without modifications, the arrangement or compromise as confirmed is binding on the company and on all members and creditors of the company and its validity shall not subsequently be impeachable in any proceedings.*
 - (6) On the hearing by the Court of the application to confirm the arrangement or compromise, a member or creditor of the company claiming to be affected by the arrangement or compromise is entitled to be represented and to object.*
 - (7) The Court may prescribe the terms that the Court considers fit as a condition of its confirmation including a condition that any member shall be given rights to require the company to purchase the share of the company at the price fixed by the Court or to be determined in a manner provided in the order."*

The section provides for a scheme in the event of a proposed arrangement or compromise or both arrangement and compromise that requires the approval of both members and creditors of the company, which must be approved by the Court after an investigation by a reporter. Arrangement or compromise requiring a court approval first requires an arrangement to be proposed between the company and its members or class of member, or a compromise proposed between the company and its creditors or class of creditors. Once such arrangement or compromise is proposed, the company, a creditor, member, liquidator when the company is in liquidation, an administrator when the company is in administration or any interested person may apply to the Court for the confirmation of the arrangement or compromise. The Court is required to order a meeting of the various classes of members and creditors. The purpose of such meetings is for the members and creditors to approve the proposed arrangement or compromise. The meetings are to be held as directed by the Court. Approval of the proposed arrangement or compromise must be by seventy-five person majority of each class of members concerned and seventy-five percent majority in value of each class of creditors concerned. The approval of members and creditors is required

notwithstanding the arrangement is only in relation to a reorganization of shares or cancellation or variation of debt, or both.

Upon approval, the Court is to appoint a reporter, nominated by the Registrar, to investigate the fairness of the arrangement or compromise approved by the members and creditors. The reporter must be a qualified insolvency practitioner.¹⁴³⁷ The reporter investigates the fairness of the arrangement or compromise, and report to the Court. The remuneration of the reporter is fixed by the Registrar. The remuneration and expenses incurred by the reporter are borne by the company and any other person so ordered by the Court. The Court after receipt of the report on the fairness or otherwise of the arrangement or compromise may approve the arrangement or compromise with or without modification. Prior to approving the arrangement or compromise with or without modification, or rejecting the arrangement or compromise, the Court must hear any member or creditor who claimed to be affected. Such a member or creditor is entitled to be represented at the hearing and object to the arrangement or compromise. The Court in making the order confirming the arrangement or compromise may order the shares of the shareholder objecting to the arrangement or compromise be purchased by the company at a price determined as ordered by the Court.

The section generally seeks to govern all forms of arrangement or compromise that cannot be done by consensus of all the affected parties or under any other section of the Act. Particularly, the section applies to instances of arrangement or compromise where there is an objection from a minority of members or creditors holding twenty-five percent or less in value of issued shares of each class or value of the total debt respectively. The section also requires that even if a company proposes to undertake an arrangement that affects shares, the approval of both shareholders and creditors are required. Alternatively, where a compromise is proposed that relates to debt, members and creditors approval are required as well. A company can also implement an arrangement and compromise together under the section.

Section 239 of Act 992 further provides that:

- “(8) Where the Court is satisfied that the arrangement or compromise involves transfer of the whole or part of the undertaking or assets of the company to another, the Court may,*
 - (a) exercise its powers under section 240 or 255, or*
 - (b) order the transfer in accordance with this Part.*
- (9) An arrangement or compromise may be carried out in accordance with this section although it could have been accomplished under section 238 or any other provision of this Act.*

¹⁴³⁷ Section 155 of Corporate Insolvency & Restructuring Act, 2020 (Act 1015) provides for the qualification of an insolvency practitioner.

(10) Despite subsection (9), sections 78 to 82 shall not be complied with if the arrangement or compromise is one which, by virtue section 78, requires the confirmation of the Court in accordance with those sections."

In recognition of the fact that the arrangement or compromise proposed impacts other sections of the Act, subsections (8), (9) and (10) of section 239 of the Act synchronized the implementation of the arrangement or compromise. The subsections achieved this by requiring that the arrangement or compromise order by the Court under the section need not be implemented in compliance with other applicable sections. In addition, the Court is given permission to exercise powers in other sections of the Act in making orders under section 239 if the implementation affects other sections.

The effectiveness of the order confirming the arrangement or compromise depends on the submission of a certified true copy of the Court order to the Registrar for registration and publication in the Companies Bulletin. Section 239(11) of Act 992 provides that: ***"(11) An order made under subsection (5) of this section shall not have effect until a certified true copy of the order has been delivered to the Registrar who shall register the order and publish it in the Companies Bulletin."***

Section 239(12) of Act 992 further provides that ***"(12) A copy of the order shall be annexed to every copy of the constitution of the company issued by the company after the order has been made."*** This is to ensure the persons dealing with the company are made aware of the restructuring and possible effect on the constitution of the company. Failure to comply with the requirement attracts a penalty imposed on the company and every officer in default. Section 239(13) of Act 992 provides ***"(13) If a company defaults in complying with subsection (12), the company and every officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units in respect of each copy issued contrary to subsection (12)."***

The Court has the power to facilitate a merger being undertaken as part of an arrangement or compromise where an application is made to the Court. Section 240 of Act 992 provides:

"(1) Where an application is made to the Court under section 239 and the Court is satisfied that under the arrangement or compromise, the whole or a part of the undertaking or assets of a company, in this section referred to as a transferor company, is to be transferred to another company, in this section referred to as the transferee company, the Court may, by the order sanctioning the arrangement or compromise or by a subsequent order, make provision for all or any of the following matters:

- (a) the transfer to the transferee company of the whole or a part of the undertaking, assets and liabilities of the transferor company;***
- (b) the allotting or appropriation by the transferee company of shares, debentures or other like interests in that company which, under the***

- arrangement or compromise, are to be allotted or appropriated by that company to or for a person;*
- (c) the continuation by or against the transferee company of legal proceedings pending by or against a transferor company;*
 - (d) the dissolution, without winding up, of a transferor company;*
 - (e) the provision to be made for any person who, within the time and in the manner that the Court directs, dissents from the arrangement or compromise; or*
 - (f) the incidental, consequential and supplemental matters that are necessary to secure that the arrangement or compromise is fully and effectively carried out.*
- (2) Where an order under subsection (1) provides for the transfer of property or liabilities*
- (a) that property shall, by virtue of the order, be transferred to and vest in, and*
 - (b) those liabilities shall, by virtue of the order, be transferred to and become liabilities of, transferee company, and in the case of a property, if the order so directs, shall be freed from a charge which, by virtue of the arrangement or compromise, is to cease to have effect.*
- (3) Where an order is made under subsection (1), a company in relation to which the order is made shall deliver a certified true copy of the order to the Registrar for registration within twenty-eight days after the making of the order.*
- (4) Where the company defaults in complying with subsection (3), the company and every officer of the company that is in default is liable to pay to the Registrar, an administrative penalty of twenty-five penalty units for each day during which the default continues.*
- (5) In this section,*
- “property” includes property, rights and powers of every description; and*
 - “liabilities” includes duties of every description although the rights, powers and duties are of a personal character which could not under the general law be assigned or performed vicariously.”*

The section is applicable where as part of the arrangement or compromise, a merger is to be undertaken. That is, where as part of the arrangement or compromise, it is proposed to transfer the undertaking or assets of the transferor company to the transferee company for consideration in the nature of shares, debentures or any like interest in the transferee company. A court approval is required for the proposed merger. The Court, therefore, has the power to facilitate the

implementation of the merger through orders under the section. Where the Court, in the application for confirmation of arrangement or compromise, determined that a merger is to be implemented, the Court may by same order confirming the arrangement or compromise, or subsequent order make provision for:

- (a) transfer the whole or part of the undertaking, assets and liabilities of the transferor company to the transferee company;
- (b) the transferee company allotting or appropriating its shares, debentures or other similar interests which under the arrangement or compromise are to be allotted or appropriated by the company, or for a person;
- (c) substitute the transferee company for the transferor company in legal actions;
- (d) dissolution of the transferor company without winding up
- (e) provision for persons who dissents from the arrangement or compromise; or
- (f) other incidental, consequential or supplementary matters to fully give effect to the arrangement or compromise.

Where the order made requires the vesting of property, the property is deemed to vest pursuant to the order, and where liabilities are to be transferred, the liabilities transfer pursuant to the order. The property is transferred free of a charge created over the property if the Court so orders. Property means the property or any right related to the property. Liabilities include duties of every description.

A company must deliver a certified true copy of the order made by the Court in facilitating the arrangement or compromise to the Registrar for registration within twenty-eight days of the making of the order. The default of the company to do so attracts an administrative penalty payable by the company and every officer in default for each day of the default.

21.3.3 Mergers

As indicated above, mergers refer to the combination of the undertakings or assets of two or more companies. Two companies may merge by one company (the transferee company) absorbing the assets and undertakings of the other company (the transferor company). A merger may also occur by two or more companies (transferor companies) transferring their assets and undertakings to another company which may be an existing company or a new company (the transferee company). The consideration for the transfer of the assets and undertakings of the transferor company or companies is wholly or partly shares in the transferee company being issued to shareholder of the transferor company or companies. Where the consideration is partly shares of the transferee company, the remaining part may be cash, debenture or other valuable considerations other than cash.

There are three ways by which a merger may occur. First is the merger by the sale of the undertaking as provided in section 238 of the Act as described above. Second, is where the Court in the exercise of its powers to facilitate arrangement or compromise makes provision for the transfer of the whole undertaking or assets of a transferor company to a transferee company, with or without an order of dissolution of the transferor company without winding up, as well as other incidental, supplementary and consequential orders. The third option is the implementation of a merger proposal as set out under the Act. The third option is explained in this part.

The merger is implemented where the merger proposal approved by the directors of the companies is approved by the members and creditors of the companies involved. The merger becomes effective upon the issue of a certificate of merger by the Registrar upon receipt of documents indicated in the Act. There are five main steps to implement a merger commenced by a merger proposal. These are:

- (a) preparation of the merger proposal by directors;
- (b) approval of the merger proposal by directors, members and creditors as well as others that may be required to approve the merger under the merger proposal or constitution of the company. A short form merger proposal is approved by only directors of the company;
- (c) registration of the merger proposal or deemed merger proposal by the Registrar;
- (d) approval of the constitution of the transferee company by the transferor company; and
- (e) issue of a certificate of merger

Where merger relates to a public company, the Securities & Exchange Commission Code on Takeovers is applicable.

21.3.3.1 Merger proposal

Section 242 of the Act provides for a merger proposal. Section 242 of Act 992 provides:

“(1) A merger proposal shall set out the terms of the scheme and provide at least for the following:

- (a) in respect of each transferor company and the transferee company,
 - (i) the name of the company,*
 - (ii) the address of the registered office of the company, and*
 - (iii) the type of company;**
- (b) the number of shares in the transferee company to be allotted to members of a transferor company for a given number of their shares referred to as the “share exchange ratio”;*
- (c) the amount of any cash payment;*
- (d) the terms relating to the allotment of shares in the transferee company;*
- (e) the date from which the holding of shares in the transferee*

- company will entitle the holders to participate in profits, and any special conditions affecting that entitlement;*
- (f) the date from which the transactions of a transferor company are to be treated for accounting purposes as being those of the transferee company;*
 - (g) any rights or restrictions attaching to shares or other securities in the transferee company to be allotted under the scheme to the holders of shares or other securities in the transferor company to which any special rights or restrictions attach, or the measures proposed concerning them;*
 - (h) the name of the transferee company where it is the same as the name of one of the merging companies;*
 - (i) the full name and residential address of each director and the secretary of the transferee company;*
 - (j) the address for service of the transferee company;*
 - (k) the shareholding structure of the transferee company, specifying the
 - (i) number of authorised shares of the company; and*
 - (ii) rights, privileges, limitations, and conditions attached to each share of the company;**
 - (l) the manner in which the shares of each transferor company are to be converted into shares of the transferee company;*
 - (m) where the shares of a transferor company are not to be converted into shares of the transferee company, the consideration that the holders of those shares are to receive instead of shares of the transferee company;*
 - (n) any payment to be made to a member or director of the transferor company, other than a payment of the kind described in paragraph (m);*
 - (o) details of any arrangement necessary to complete the merger and to provide for the subsequent management and operation of the transferee company; and*
 - (p) a copy of the proposed constitution of the transferee company, if any.*
- (2) A merger proposal may specify the date on which the merger is intended to become effective.*
- (3) Where the shares of one of the merging companies are held by or on behalf of another merging company, the merger proposal shall*
- (a) provide for the cancellation of those shares without payment or for any other consideration when the merger becomes effective; and*

(b) not provide for the conversion of those shares into shares of the transferee company."

The merger proposal is to be prepared by the directors of the merging companies. The merging companies in relation to a merger by absorption refer to the transferor and transferee companies, and in relation to a merger by formation of a new company, to the transferor company or companies. The merger proposal must set out the terms of the scheme which must contain, at the least, the information stated above.

21.3.3.2 Approval of the merger proposal

Section 243 of Act 992 provides for the approvals required to give effect to the merger proposal. The first approval required is that of directors of each of the merging companies. Section 243 of Act 992 provides that:

- "(1) The directors of each of the merging companies shall resolve that*
- (a) in their opinion, the merger is in the best interest of the company; and*
 - (b) the directors are satisfied on reasonable grounds that the transferee company shall be solvent immediately after the merger becomes effective.*
- (2) The directors who vote in favour of the resolution under subsection (1) shall sign a certificate stating*
- (a) that, in their opinion, the conditions set out in that subsection have been satisfied; and*
 - (b) the grounds for the opinion of the directors."*

The approval by the directors of each of the merging companies must be by a resolution of the directors. The resolution is approved by a majority of the directors present and voting at a board meeting or written resolution approved by all directors of each of the merging companies. The resolution must indicate that the merger, in the opinion of the directors, is in the best interest of the company and that the transferee company shall be solvent immediately after the merger. The opinion on the solvency of the transferee company must be made only where the directors are satisfied based on reasonable grounds. The directors must state the reasonable grounds on a certificate signed by the directors approving the resolution indicating the satisfaction of the conditions in subsection (1) of section 243 of the Act.

The directors are to submit a copy of the merger proposal and the certificate as well as other documents to the members of the merging companies and secured creditors of the company for approval. Section 243 of Act 992 provides:

- "(3) The directors of each of the merging companies shall send to each member of the*

- transferor company, not less than twenty-eight days before the merger is proposed to take effect,*
- (a) a copy of the merger proposal;*
 - (b) copies of the certificates given by the directors of each transferor company;*
 - (c) a summary of the principal provisions of the constitution of the transferee company, if any;*
 - (d) a statement that a copy of the constitution of the transferee company shall be supplied to any member of the company upon request;*
 - (e) a statement setting out the rights of members pursuant to the merger including the number of shares in the transferee company to be allotted to members of the transferor company for a given number of their shares and the amount of any cash payment;*
 - (f) a statement of any material interest of the directors in the proposal, whether in that capacity or otherwise; and*
 - (g) any other information and explanation that may be necessary to enable a member of the company to understand the nature and implications for the transferor company and its members of the proposed merger.*
- (4) The directors of each transferor company shall, not less than twenty-eight days before the merger is proposed to take effect,*
- (a) send a copy of the merger proposal to every secured creditor of the company; and*
 - (b) give public notice of the proposed merger, including a statement that:*
 - (i) copies of the merger proposal are available, at the registered offices of the merging companies and at any other place as may be specified during normal business hours, for inspection by a member or creditor of the merging company or any other person whom a merging company owes that obligation; and*
 - (ii) a member or creditor of the transferor company or any other person to whom a merging company owes an obligation to supply a copy of the merger proposal, is entitled to be supplied, free of charge, with a copy of the merger proposal upon request to a merging company.*
- (5) The merger proposal shall be approved by a majority in number, representing seventy-five percent in value, or each class of*
- (a) members of each of the merging companies, present and voting either in person or by proxy at a meeting;*

- (b) creditors of each of the merging companies; and*
(c) members or an interest group where the merger proposal or the constitution of the transferor company, requires the approval of that class of members or interest group."

The merging proposal must be approved by the members of each of the merging companies. The Act, therefore, requires directors of each of the merging companies to deliver, at least twenty-eight days to the date the merger is to take effect, the documents listed in subsection (3) of section 243 of the Act as stated above.

The directors of each transferor company must also, not less than twenty-eight days to the proposed effective date of the merger proposal, send a copy of the merger proposal to the secured creditors of the transferor company. In addition, the directors must make public notice of the merger proposal. The public notice must indicate that copy of the merger proposal is available at the registered office of the company or any other place specified within normal business hours for inspection by members and creditors of a merging company or any person to whom the merging company owes an obligation to give the merger proposal. It must also indicate, a member or creditor of the transferor company or any other person the company owes obligation may be supplied a copy of the merger proposal on request free of charge.

Upon receipt of the information by the members and secured creditors, as well as the giving of the public notice, members and creditors of each of the merging companies are required to approve the merger proposal. The members must approve the merger proposal by a majority of members representing seventy-five percent of the majority of members of each class of the merging companies voting in person or by proxy at a meeting. For the creditors, the merger proposal is approved by seventy-five percent majority in value of the creditors of the merging companies. In addition, the merger proposal must be approved by seventy-five percent of members or an interest group required under the merging proposal or constitution of the transferor company to approve the merger proposal.

21.3.3.3 Short form of merger

A short form of merger can be implemented in relation to a company that is directly or indirectly wholly owned by the companies involved in the merger to merge to become one company, or two or more companies wholly owned directly or indirectly by the same company. For such a company, the requirements of sections 242 of the Act on merger proposal and section 243 on approval of the merger proposal are not applicable. Section 244 of Act 992 provides that:

- "(1) A company and one or more other companies that are directly or indirectly wholly owned by the company may merge and continue as one company*

- without complying with section 242 or 243 where*
- (a) the merger is approved by a resolution of the directors of each of the merging companies; and*
 - (b) each resolution provides that the*
 - (i) shares of each merging company, other than the transferee company, shall be cancelled without payment or other consideration;*
 - (ii) constitution of the transferee company, shall be the same as the constitution of the transferor company; and*
 - (iii) directors of each of the merging companies are satisfied on reasonable grounds that the transferee company shall be solvent, immediately after the merger becomes effective.*
- (2) Two or more companies, each of which is directly or indirectly wholly owned by the same company, may merge and continue as one company without complying with section 242 or 243 where*
- (a) the merger is approved by a resolution of the directors of each of the merging companies; and*
 - (b) each resolution provides that*
 - (i) the shares of all but one of the merging companies shall be cancelled without payment or other consideration;*
 - (ii) the constitution of the transferee company, shall be same as the constitution of the merging company whose shares are not cancelled; and*
 - (iii) the directors are satisfied on reasonable grounds that the transferee company shall, immediately after the merger becomes effective, satisfy the solvency test.*
- (3) The directors of each of the merging companies shall, not less than twenty-eight days before the merger is proposed to take effect, give written notice of the proposed merger to every secured creditor of the company.*
- (4) The resolutions approving a merger under this section, taken together, shall be deemed to constitute a merger proposal that has been approved.*
- (5) The directors who vote in favour of a resolution under subsection (1) or (2), as the case may be, shall sign a certificate stating*
- (a) that, in their opinion, the conditions set out in subsection (1) or (2) are satisfied; and*
 - (b) the grounds for the opinion of the directors.*
- (6) A director who fails to comply with subsection (5) is liable to pay to the Registrar an administrative penalty of three hundred and fifty penalty units."*

The short form of merger under the section is applicable in two instances. Company A directly or indirectly owned by Company B. The merger of Company A and Company B can be done under subsection (1) of the section. Second, Companies A and B are directly or indirectly wholly owned by Company C. The merger of Companies A and B can be done under subsection (2) of the section. The section will be applicable if the companies involved are more than two, once wholly owned directly or indirectly by one company which is either involved in the merger or who is the parent company but not involved in the merger. The short form of merger does not require the preparation of the merger proposal or the approval of members and creditors of the merging companies. Under both subsections, the following requirements must be satisfied:

- (a) directors of each of the merging companies must approve the merger by resolution;
- (b) the resolution must state the shares of the merging companies except the transferee company shall be cancelled without payment of consideration;
- (c) that directors are of the opinion that the merger is in the best interest of the merging companies;
- (d) the directors of each of the merging companies have reasonable ground to believe the transferee company will be solvent after the merger;
- (e) the directors sign a certificate indicating that the conditions for the short form of merger have been satisfied and state the grounds on which the directors believe the transferee company shall be solvent in the certificate; and
- (f) the directors of each of the merging companies give written notice of the proposed merger to every secured creditor of the company not less than twenty-eight days to the proposed date for the effectiveness of the merger.

The resolutions approving the merger taken together are deemed to constitute a merger proposal that has been approved.

21.3.3.4 Registration of merger proposal

The next stage of the merger process is for an approved merger proposal or deemed merger proposal to be submitted to the Registrar together with other documents. This is applicable to a full merger process under sections 242 and 243 of Act 992, as well as a short form of merger under section 244 of Act 992. Section 245 of Act 992 provides that:

“For the purpose of effecting a merger, the following documents shall be delivered to the Registrar for registration

- (a) the approved merger proposal;*
- (b) any certificate required under subsection (2) of section 243 or subsection (5) of section 244;*
- (c) a certificate signed by the directors of each of the transferor company stating that the merger has been approved in accordance with this Act*

- and the constitution of the company, if any;*
- (d) where the transferee company is a new company or the merger proposal provides for a change of the name of the transferee company, a copy of the notice reserving the name, if any, of the company;*
 - (e) a certificate signed by the directors, or proposed directors of the transferee company stating that, where the proportion of the claims of creditors of the transferee company in relation to the value of the assets of the company is greater than the proportion of the claims of creditors of a transferor company in relation to the value of the assets of that transferor, no creditor shall be prejudiced by that fact;*
 - (f) a document in the prescribed form signed by each of the persons named in the merger proposal as a director or secretary of the transferee company consenting to act as a director or secretary of the company, as the case may be; and*
 - (g) a report regarding the fairness of the merger and issued by an insolvency practitioner appointed by each company unless dispensed with under section 247."*

The above documents are to be delivered to the Registrar for registration. Prior to the registration, each of the merging companies is to appoint an insolvency practitioner to prepare a report on the fairness of the merger. The report is to be submitted to the Registrar together with the above documents. The report of the insolvency practitioner may be dispensed with under section 247 of the Act. The section subjects dispensing with the reporting requirement to an order from the Court or agreement by the merging company. Section 247 of Act 992 provides that:

- "(1) The Court may, on the application of a merging company, a member of a merging company or a creditor of a merging company exempt that merging company from the publication of the report, issued by an insolvency practitioner pursuant to paragraph (g) of section 245, or any other requirement under this Act if the Court considers it appropriate.*
- (2) Despite subsection (1), the requirement for a report issued by an insolvency practitioner may be dispensed with only if the merging companies agree in writing to the dispensation."*

The application to the court for exemption may be made by the company, a member or creditor of the merging company. The merging companies also have the discretion by a written agreement to dispense with the requirement of a report issued by an insolvency practitioner.

21.3.3.5 Approval of constitution of transferee company

The constitution of the transferee company must be approved by the transferor company. Section

246 of Act 992 provides that *“A transferor company shall approve by ordinary resolution, the constitution or draft constitution of a transferee company that is a new company.”* The approval requirement by ordinary resolution of the constitution or draft constitution of the transferee company is only required in the instance of a new company. Where there is an existing company, no approval is required.

21.3.3.6 Certificate of merger

A certificate of merger is to be issued by the Registrar upon receipt of the documents delivered for registration. Section 248 of Act 992 provides that:

- “(1) The Registrar shall, within seven days from the date of receipt of the documents referred to under section 245*
(a) in the case of a merger by absorption, issue a certificate of merger; or
(b) in the case of a merger by formation of a new company,
(i) enter the particulars of the transferee company in register;
and
(ii) issue a certificate of merger together with a certificate of incorporation.
- (2) Where a merger proposal specifies a date on which the merger is intended to become effective, and that date is the same as or later than the date on which the Registrar receives the documents, the certificate of merger and certificate of incorporation issued under subsection (1) shall be expressed to have effect on the date specified in the merger proposal.”*

The certificate is to be issued within seven days of receipt of the documents required to be delivered to the Registrar. In the event of a merger by absorption, only the certificate of merger is required. In the event of a merger by formation of a new company, the Registrar is required to enter the particulars of the transferee company in the register and issue a certificate of merger together with a certificate of incorporation. In the event a merger proposal states the date on which the merger is to be effective, and the documents are delivered to the Registrar before the date, the certificate of merger and certificate of incorporation shall have effect on the date stated in the merger proposal.

The certificate of merger evidences the merger. The merger becomes effective on the date indicated in the certificate of merger. Section 249 of Act 992 provides that:

- “(1) A merger shall be effective on the date shown in the certificate of merger.*
(2) Where the name of the transferee company is the same as one of the merging companies, the transferee company shall have the name specified in the merger proposal.
(3) Subject to subsections (4) and (5), the Registrar shall dissolve, without winding

- up, the merging companies other than the transferee company retained under subsection (2).*
- (4) The property, rights, powers, and privileges of each of the merging companies which have been dissolved under subsection (3) shall continue to be the property, rights, powers and privileges of the transferee company.*
 - (5) The transferee company shall continue to be liable for the liabilities and obligations of each of the merging companies and a proceeding instituted by or against a transferor company shall be continued by or against the transferee company.*
 - (6) A conviction, ruling, order, or judgement in favour or against the transferor company may be enforced by or against the transferee company.*
 - (7) A provision of the merger proposal that provides for conversion of the shares or rights of members in the merging companies shall have effect in accordance with the tenor of the merger proposal."*

The merger takes effect from the date stated in the certificate of merger. The Act requires the name of the transferee company to be stated in the certificate of merger if the name is the same as the name of the merging companies. The Registrar is required to dissolve the merging companies other than the transferee company. The transferee company assumes the property, rights, powers, privileges and liabilities of the transferor company. The transferee company steps into the shoes of the transferor companies in any legal proceedings by or against the transferor company and can thus enforce a judgment given in favour of the transferor company. Similarly, judgment or convictions against the transferor company can be enforced against the transferee company. In sum, the transferee company assumes all rights, obligations, powers, privileges, liabilities and assets of the transferor company. A provision in the merger proposal providing for the conversion of shares or rights of the members in the merging company takes effect in accordance with the terms of the merger proposal.

It should be noted that where the merger involves a public company, whether listed or not listed, the Securities & Exchange Commission Code on Takeovers and Mergers shall be applicable. The applicable rules are explained under Takeover below.

21.3.3.7 Power of the Court relating to merger proposal

In the implementation of a merger proposal, the Court has the power to make appropriate orders where the implementation of the merger proposal would unfairly prejudice a member or creditor of the transferor company or any person the transferor company owes an obligation to. Section 251 of Act 992 provides that:

"(1) Where the Court is satisfied that giving effect to a merger proposal would

- unfairly prejudice a member or creditor of a transferor company or any other person to whom a transferor company owes an obligation, the Court may, on the application of that person, make an order*
- (a) directing that effect shall not be given to the proposal,*
 - (b) modifying the proposal in a manner as may be specified in the order,*
 - (c) directing the company or the directors of the company to reconsider the proposal or any part of it, and*
 - (d) in relation to the proposal that the Court considers fit, at any time before the date on which the merger becomes effective.*
- (2) The Court may make an order under subsection (1) on the conditions that the Court considers appropriate."*

The Court, therefore, has the power to provide remedy upon application by a member or creditor of a transferor company or person owed obligation by the transferor company, that the merger proposal will be unfairly prejudicial to that person. The Court may direct the proposal not to be given effect to, modify the proposal, direct the company to reconsider the proposal or any part, or make any order in relation to the proposal as the court considers fit, any time before it becomes effective. The order may be made on terms that the Court considers appropriate.

21.3.4 Division

Whilst merger relates to joining or consolidating the undertakings and assets of two companies, division relates to the opposite, transfer or division of the undertaking, assets and liability of a company to two or more companies. Division refers to the transfer or division of the undertaking, property and liability of the company in a scheme of arrangement or compromise to two or more companies, whether existing or new companies. The division of the undertaking, property and liability to two or more company must be pursuant to an arrangement or compromise being undertaken by a company. The company may resort to division to separate its businesses for more efficiency. A company that has different products may choose to have separate companies for the different products. This may be achieved through division under the Act.

Act 992 provides that the reference to a company involved in division is reference to the transferor company and any existing transferee company.¹⁴³⁸ Since division is implemented in relation to arrangement or compromise, the Act provides that the power of the Court to facilitate arrangement or compromise is applicable to division, and provisions on mergers pursuant to merger proposal also apply. Division will arise in a merger or arrangement or compromise where the undertaking, property and liability of the company are divided among two or more transferee companies.

¹⁴³⁸ Section 252 of Act 992.

The liabilities of the transferee companies in a division are provided under section 254 of the Act. Section 254 of Act 992 provides that:

- “(1) Subject to this section, where a company is involved in a division, each transferee company is jointly and severally liable for any liability transferred to any other transferee company under the scheme to the extent that the other company has defaulted in satisfying that liability.*
- (2) If a majority in number representing seventy-five percent in value of the creditors or any class of creditors of the transferor company, present and voting either in person or by proxy, at a meeting summoned for the purposes of agreeing to the scheme, agrees to the scheme, subsection (1) does not apply in relation to the liabilities owed to the creditors or class of that creditors.*
- (3) A transferee company is not liable under this section for an amount greater than the net value transferred to that transferee company under the scheme.*
- (4) For the purposes of this section, “net value transferred” means the value at the time of the transfer of the property transferred to a transferee company under the scheme less the amount at the date of transfer of the liabilities.”*

The transferee companies in a scheme of arrangement, merger or compromise involving division are jointly and severally liable for liabilities transferred to each transferee company provided the other company has defaulted. Where a majority of seventy-five percent in value of creditors of the transferor company voted in favour of the scheme, the joint and several liabilities will not be applicable to liabilities owed to creditors. Each company will thus be liable for the amount of liability transferred to the company. A transferee company is not liable for an amount greater than the net value transferred to the transferee company under the scheme. The net value transferred refers to the value of the assets transferred less the liability transferred. Both values are assessed at the date of transfer.

Power of the Court to facilitate a restructuring

The Court is given extensive powers under sections 255 and 256 of Act 992 to facilitate restructuring through arrangement, merger, compromise and division. Section 255 of the Act gives general powers to the Court to order, on application by the company or with leave of the Court, a member or creditor, the restructuring as binding on the company or any person or classes of persons.¹⁴³⁹ The order the court can make include:

- (a) an order to give notice of an application to any person;¹⁴⁴⁰
- (b) an order to hold a general meeting of members or creditors, or a class of members or

¹⁴³⁹ Section 255(1) of Act 992.

¹⁴⁴⁰ Section 255(3) of Act 992.

creditors;¹⁴⁴¹

- (c) an order that a report be prepared on the proposed restructuring;¹⁴⁴²
- (d) an order for payment of the cost of preparing the report;¹⁴⁴³
- (e) an order as to persons to appear to be examined.¹⁴⁴⁴
- (f) an order prescribing terms under which to vest property, rights, powers, privileges, liabilities, duties, as well as issue shares and other securities for the purposes of giving effect to a restructuring.¹⁴⁴⁵
- (g) an order dissolution of a company with or without winding up of the transferor company, make arrangement for persons who are to vote on any matter for the restructuring.¹⁴⁴⁶

Directors must, within fourteen days of the making of the order, submit the order made the court to the Registrar to be registered.¹⁴⁴⁷

Related to the powers of the court, the Act states information that must be provided to members and creditors upon notice of a resolution for arrangement or compromise under section 239 of Act 992 including a statement on the interest of directors in the arrangement or compromise.¹⁴⁴⁸ The statement must also indicate the effect of restructuring on the interest of debenture holders.¹⁴⁴⁹

21.3.5 Acquisition

Acquisition is used in a general and loose sense to mean acquiring an existing business or an asset from an existing business. That covers two broad situations – the purchase of assets and undertaking of an existing business entity or to indicate the purchase of shares of an existing company. The acquisition may be done by a company for any number of reasons including to take advantage of a business opportunity, control supply chain, expand the business reach in terms of geographical location or increase production, or avoid competition. In some instances, an acquisition is done as part of a merger. This will cover both merger by absorption and merger by formation of a new company. The transferee company acquires the assets of the transferor company or companies, and provide considerations partly in shares and partly cash. The transferee company may defer the payment of cash in a manner amounting to debenture, which is distributed among the shareholders

¹⁴⁴¹ Ibid.

¹⁴⁴² Ibid.

¹⁴⁴³ Ibid.

¹⁴⁴⁴ Ibid.

¹⁴⁴⁵ Section 256 of the Act.

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ Sections 255(5) and 256(2) of Act 992.

¹⁴⁴⁸ Section 258 of Act 992.

¹⁴⁴⁹ Section 258(5) of Act 992.

of the transferor company. It is in this sense that merger and acquisition go hand-in-hand. An illustration of the two senses in which acquisition is used will be helpful at this stage.

21.3.5.1 Asset purchase arrangement

The first illustration covers a situation where Company A purchases the whole or part of the assets and undertaking of Company B. In this instance, asset sale and purchase or assets purchase agreement would be entered into between the two companies. The assets and undertaking are transferred from Company B to Company A. The transfer may be done under the asset purchase agreement, or where specific properties require a specific mode of transfer, the assets must be transferred individually. Lands and buildings will have to be transferred through specific land transfer documents. In practice, there will be due diligence conducted on the major assets including verification of title prior to the transfer of the assets. The transaction is dependent on disclosures and representations that are usually made by Company B which are relied on by Company A. In some instances, the assets and undertaking are transferred together with liabilities. In other instances, the liabilities will remain with the seller – Company B.

Consideration is paid by Company A to Company B for the transfer. The consideration may be cash or other securities of Company A. The consideration may be held by Company B or may be distributed among the shareholders of Company B. In this instance, the shareholding of both Company A and Company B remain the same as before the transaction. Both companies, other than entering into the assets purchase agreement, may have no relationship as associated or related companies if none exist prior to the transaction. Depending on the value of the assets and undertaking being acquired by Company A in relation to the total value of the assets and undertaking of Company B prior to the transaction, the transaction may amount to a major transaction that requires approval of the shareholders by special resolution.¹⁴⁵⁰ The power to make a proposal to undertake assets sale or purchase, however, is management decision vested in the board of directors. Where the total value of the assets being sold or purchased in comparison to the total value of the assets of the company is seventy-five percent or more, that will amount to a major transaction.¹⁴⁵¹ In that case, the decision of the board of directors is subject to approval by a special resolution of the shareholders.¹⁴⁵²

Company B may continue to exist and carry on business after the close of the transaction. However, Company B can also be liquidated by the voluntary liquidation by the shareholders under the Companies Act, 2019 or official liquidation under the Corporate Insolvency & Restructuring Act, 2020 (Act 1015). The undertaking and assets are added to the assets and undertaking of Company

¹⁴⁵⁰ Section 145 of Act 992.

¹⁴⁵¹ *Ibid.*

¹⁴⁵² *Ibid.*

A. Company A may be a new company incorporated specifically to acquire and carry on the business.

21.3.5.2 Share purchase arrangement

The second illustration covers a situation where Company A seeks to acquire the whole or part of the issued shares of Company B. This is done by a share purchase agreement between Company A and the shareholders of Company B. The share purchase agreement will provide for the terms of the purchase of the shares including disclosure and representation in relation to Company B by the shareholders. Company A will also conduct due diligence on the assets, undertaking and liabilities of Company B as that informs the value or price placed on the issued shares held by the shareholders.

There may not be any direct agreement between Company A and Company B. The agreement is between Company A and shareholders of Company B. Pursuant to the share purchase agreement, the shareholders transfer their shares to Company A under a share transfer instrument.¹⁴⁵³ In that instance, unless Company B is a private company with a particular restriction that require consent or the exercise of some rights by Company B, the transaction will not be subject to any notice or approval of Company B.¹⁴⁵⁴ Upon the transfer of shares under the share transfer instrument, the instrument is stamped and together with the share certificates, are lodged with Company B for registration.¹⁴⁵⁵ Company A becomes a shareholder of Company B. Depending on whether the whole or part of the issued shares is acquired, Company B may become the subsidiary of Company A.

Consideration is paid to the shareholders which does not go to Company B. The consideration paid to the shareholders is the income or property of the shareholders that they can be used in any manner they deem fit. The consideration may be cash or other securities in Company A.

There may also be an acquisition through the purchase of shares which is done by agreement with the target company.¹⁴⁵⁶ That is the shares are issued by Company B and not the acquisition of the issued shares held by shareholders. The consideration goes to Company B and not the shareholders. The shareholders continue to hold the number of shares they have even though the shareholdings in terms of percentages are diluted. Company A becomes an additional shareholder of Company B. This is the preferred option where the purpose of share sale is to raise money for the business of Company B as the consideration provided by Company A for the shares go directly to Company B and add to the stated capital of Company B. In this arrangement, the requirement of section 189(1)(a) of Act 992 must be complied with. This will require the existing shareholders to waive their right of

¹⁴⁵³ Section 98 of Act 992.

¹⁴⁵⁴ *Ibid.*

¹⁴⁵⁵ Section 101 of Act 992.

¹⁴⁵⁶ Section 33(2) of Act 992.

first refusal prior to the issue of the shares directly to Company A.

In an acquisition of the shares of Company B from the shareholders by Company B, Company A may acquire all or part of the issued shares of Company B. As already indicated, the acquisition may be part of a merger. Company A may intend to acquire all the issued shares of Company B in a transaction where all the issued shares are directly or indirectly held by Company A. In such an instance, all the shareholders of Company B must agree to sell all their issued shares to Company A. If some of the shareholders refused to sell their shares and those shareholders are in the minority holding ten percent or less of the shares, Company A may compulsorily acquire such shares under Act 992.¹⁴⁵⁷ Such compulsory purchase may also be done where the constitution of the company or shareholders' agreement between or among the shareholders contain a drag-along right conferred on the majority shareholder. That is, where the majority shareholder intends to sell its shares, the majority shareholder has the right to force the minority shareholder to also sell its shares.

21.3.5.3 Compulsory acquisition of shares of minority

Act 992 provides for the compulsory acquisition of shares of a minority shareholder or shareholders on the acquisition of shares of a majority shareholder or shareholders of a company, where the minority shareholder or shareholders holding the ten percent or less refused to voluntarily sell the shares. Section 259 of Act 992 provides for conditions that must be satisfied for the transferee company to be able to compulsorily acquire the shares of the minority shareholder or shareholders. The right of compulsory acquisition can, therefore, only be triggered when a number of specific conditions are satisfied. The main condition is that the offer of the transferee company is accepted by at least ninety percent of the shareholders of the target company. This is in addition to other conditions stated in section 259. Section 295 of Act 992 provides that:

“(1) Where a body corporate, whether a company within the meaning of this Act or not, in this section referred to as the “transferee company”, has made an offer to the holders of shares in a company, in this section referred to as the “transferor company”, if the conditions specified in subsection (2) are duly fulfilled, the transferee company may compulsorily acquire the shares in the transferor company in the manner specified in this section.

(2) This section applies if,

(a) the offer by the transferee company is made to the holders of the whole of the shares in the transferor company, other than those already held by the transferee company or any of the associated companies of the transferee company or by nominees for the transferee company or any of the associated companies of the transferee company;

¹⁴⁵⁷ Section 259 of Act 992.

- (b) the consideration for the acquisition is*
 - (i) the allotment of shares in the transferee company, or*
 - (ii) at the option of the holders, a payment of cash;*
- (c) the same terms are offered to the holders of the shares to whom the offer is made or, where there are different classes of shares, to the holders of shares of the same class;*
- (d) within four months after the making of the offer, it has been accepted in respect of not less than nine-tenths of the whole of the shares and of not less than nine-tenths of the shares of each class, other than shares already held by the transferee company or any of the associated companies of the transferee company or by nominees of the transferee company or any of the associated companies of the transferee company and the holders of those shares are not less than three-fourths in number of the holders of those shares and of each class of those shares.*
- (3) Where the conditions specified in subsection (2) are fulfilled, the transferee company may, within two months after the conditions are fulfilled, give notice in the prescribed form to a member who has not accepted the offer in respect of the shares of that member that the transferee company desires to acquire those shares.*
- (4) When the notice under subsection (3) is given, the transferee company is entitled and bound to acquire those shares on the terms of the offer, unless on an application made by the member in accordance with subsection (5), the Court orders otherwise."*

The section permits the transferee company to compulsorily acquire the shares of the transferor company from the shareholders when the conditions indicated are satisfied. There are six conditions that must be satisfied:

- (a) the offer is made to acquire the whole of the shares of the transferor company. That is the total issued shares of the transferor company. The exception is created for shares already held by the transferee company or its nominee or associated company.
- (b) the offeror must be a body corporate, which does not necessarily need to be a company within the meaning of the Act. An offer from an individual, notwithstanding the other conditions are satisfied, will not trigger compulsory acquisition.
- (c) the same term of offer has been made to the holder of the shares from whom the transferee company intends to compulsorily acquire the shares or on the same terms of an offer to the class of shareholders that the person is a shareholder.
- (d) the consideration for the acquisition of the shares is shares in the transferee company, or at the option of the shareholders, the payment of cash. This means the consideration may be

cash or shares of the transferee company.

- (e) the offer must be accepted within four months of the date of the offer by at least ninety percent of the holder of the issued shares of the transferor company and where there are different classes of shares, ninety percent of the shares of each class.
- (f) The shareholders holding at least ninety percent of the shares of the transferor company and accepting the offer must constitute at least seventy-five percent in number of shareholders of the transferor company or in the event of transferor company with different classes, seventy-five percent in number of shareholders of each class. In this case, if there are five shareholders of the transferee company, one shareholder holds ninety percent of the shares with the other holding two point five percent each, the acceptance by the ninety percent shareholder will not satisfy this requirement. The acceptance must be by at least four of the shareholders which must amount to at least ninety percent of the total issued shares of the transferor company. The four shareholders out of the five will satisfy the requirement of seventy-five percent of the number of shareholders. Their aggregate of the shares held will be more than ninety percent.

Where the above conditions are met, the transferee company by notice to the shareholders who did not accept the offer, whose shareholding is ten percent or less of the total issued shares of the company and of each class, to acquire the shares. The notice must be given within two months of the satisfaction of the conditions. Upon given the notice, the transferee company is entitled to acquire the shares of the shareholders after two months unless the shareholder or shareholders apply to the Court and the Court otherwise orders. Section 259 of the Act permits the minority shareholder to apply to the Court to vary the terms of the offer or restrains the acquisition. Section 259 of Act 992 provides as follows:

- “(5) At any time within a period of two months from the service of the notice referred to in subsection (3), a member to whom the notice has been given in accordance with subsection (3), may apply to the Court and the Court may order that the transferee company not be entitled to acquire the share of that holder or that the transferee company shall be bound to acquire those shares on any other terms that the Court may order.*
- (6) On an application to the Court under subsection (5) the Court, before making an order, may on the recommendation of the Registrar appoint one or more reporters to investigate the fairness of the offer and to report on the fairness to the Court.*
- (7) The remuneration of the reporters shall be fixed by the Registrar and the remuneration and the proper expenses of the investigation shall be borne by the transferee company or by the applicant or both as the Court shall order.*
- (8) Where the Court makes an order under subsection (5) that the transferee company shall be bound to acquire the shares concerned on terms different from*

those of the original offer, the transferee company shall give notice in the prescribed form, of the amended terms to the other holders of shares of the same class and to the former holders of shares of the same class who accepted the original offer unless the Court otherwise orders.

- (9) *At any time within two months of the giving of the notice,*
- (a) a member is entitled to require the transferee company to acquire the shares on the same terms as those ordered by the Court, and*
 - (b) a former member is entitled to require the transferee company to pay or transfer to that former member the additional consideration to which the former member would have been entitled had the shares been acquired on the terms ordered by the Court.*
- (10) *Where notice is given by the transferee company under subsection (3) and the Court has not, on an application by the member under subsection (5), ordered to the contrary, the transferee company shall,*
- (a) on the expiration of two months from the date on which notice is given, or*
 - (b) if an application by the member under subsection (5) is then pending after that application has been disposed of,*
- transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the member by a person appointed by the transferee company and on its own behalf by the transferee company, and the transfer to the transferor company the shares, or if the member has exercised the cash option, pay to the transferor company the cash, representing the consideration payable by the transferee company for the shares which by virtue of this section the transferee company is entitled to acquire.*
- (11) *After receipt of the payment under subsection (10), the transferor company shall register the transferee company as the holder of those shares.*
- (12) *The sums of money received by the transferor company under subsection (10) shall be paid into a separate bank account and the sum of money and the shares so received shall be held by the transferor company in trust for the several persons entitled to the shares in respect of which the sums of money and shares were received."*

The shareholders may apply to the Court to vary the terms of the offer or restrain the acquisition. Where the application is made to the Court, before making the order, the Court may appoint a reporter, on the recommendation of the Registrar, who investigates the fairness of the offer and report to the Court. Where the Court restrains the acquisition, the transferee company cannot proceed with the acquisition. Alternatively, the Court may order the acquisition on different terms than that proposed by the transferee company. Where so ordered, the transferee company is bound

by the order and is required to give the order to all shareholders including the former shareholders who accepted the original offer. The minority shareholders are entitled to give notice to require the transferee company to acquire the shares on the terms proposed by the Court. The majority shareholders who have already accepted the offer and may have already transfer their shares are also entitled to give notice to require the transferee company to provide any additional consideration based on the terms proposed by the Court.

The transferee company acquires the shares by submitting the notice to the transferor company together with a share transfer instrument signed on behalf of the minority shareholder by a person appointed by the transferee company and signed on behalf of the transferee company. The notice and the executed share transfer company must be accompanied by the transfer of the shares of the transferee company or cash payment, if opted for by the minority shareholders, to the transferor company. Upon receipt of the payment, the transferor company must register the transferee company as the holder of those shares. The transferor company must open an account to keep the money received or hold the shares in trust for the minority shareholder.

Whilst section 259 of Act 992 permit compulsory acquisition of the shares of a minority shareholder or shareholders holding less than ten percent of the shares of the company, section 260 of the Act reverse the position in favour of the minority shareholder. Act 992 confers on the minority shareholders the right to force a purchaser or transferee company to acquire its minority interest even if the transferee company does not intend to acquire such shares. Section 260 of Act 992 provides that:

- “(1) Where, as a result of an offer to the members of a company or any member, shares in that company are transferred to another body corporate, whether a company within the meaning of this Act, in this section called the transferee company, or a nominee of the transferee company and those shares, together with any other shares of the first mentioned company held by the company or a nominee for the transferee company, or by a nominee for, any of the associated companies at the date of the transfer, comprise or include three-fourths of the shares in the first named company or any class of those shares,*
- (a) the transferee company shall within one month from the date of the transfer, unless on a previous transfer has already complied with this requirement, give notice of the fact in the prescribed form to the holders of the remaining shares of the class; and*
 - (b) any of those holders may within three months from the giving of the notice to the holder require the transferee company to acquire all or any of the shares of that holder.*
- (2) Where a member under subsection (1) requires the transferee company to acquire shares, the transferee company is entitled and bound to acquire those shares on*

the terms of the offer or on other terms that may be agreed or as the Court, on the application of the transferee company or the member, may order.

- (3) *On an application to the Court under subsection (2), the Court may on the recommendation of the Registrar appoint one or more reporters to investigate the fairness of the offer and in that event subsection (6) and (7) of section 259 shall apply."*

This is a reversal of the right of compulsory acquisition. As the transferee company has the right to compulsorily acquire the shares of minority shareholders on the satisfaction of conditions in subsection (2) of section 259 of the Act, section 260 of the Act confer rights on the minority shareholders to require the compulsory purchase of their shares by a transferee company. The exercise of the right of the minority shareholders of a company is dependent on a number of conditions. The transferee company must, as a result of the offer made to shareholders of the company, have directly or indirectly acquired seventy-five percent of the shares of the company. The seventy-five percent threshold may be held by the transferee company or refers to the shares held by the transferee company together with shares held by its nominee or associated companies. Upon achieving the seventy-five threshold, the transferee company must give notice to the minority shareholders, that is the shareholders holding twenty-five percent or less of the shares of the company. Upon receipt of the notice, the minority shareholders or any number of them may, within three months of the notice, require the transferee company to acquire the shares of the minority shareholder. The transferee company is entitled and bound to acquire the shares upon receipt of the notice on terms of the offer made by the minority shareholders. It should be recognised that the section is applicable only where the acquiring shareholder is a body corporate. Acquisition of seventy-five percent shares by an individual will not trigger the right of the minority shareholders holding twenty-five percent or less of the shares.

The transferee company or minority shareholder may apply to Court for the variation of the terms of the offer. Where an application is made to the Court, the Court is required to appoint, on the recommendation of Registrar, reporters to investigate the fairness of the offer and report to the Court. Unless the Court restrains the acquisition, the transferee company must acquire the shares on the terms of the offer or terms made by the Court. The process of the acquisition follows the same process as compulsory acquisition by the transferee company under section 259 as explained above.

Section 259 of Act 992 is a statutory drag-along right given to the majority shareholders whilst section 260 is the statutory tag-along right. Drag-along clause entitles a majority shareholder disposing of its shares to force the sale of the shares of the minority. Under section 259 of the Act, the acceptance of the offer by at least ninety percent of issued shares or shares of a particular class forces the holders of ten percent or less of the shares to sell the shares. Under section 260 of the Act, the acquisition of shares of at least seventy-five percent of the issued shares of the company or of

particular class gives the minority shareholders the right to demand their shares be purchased by the person acquiring the shares at least seventy-five percent of the shares. The only difference in the contractual drag-along clause and the right under section 259 of the Act is that in the case of section 259, it is the purchaser given the right to compulsorily acquire the shares. In a contractual drag-along right, it is the existing shareholder who has the contractual right that forces the minority to sell the shares.

The difference in the contractual tag along right and section 260 is that section 260 gives the minority shareholders the right to request the purchaser to acquire their shares. In exercise of the contractual tag-along right, the obligation is on the majority to ensure the buyer purchases the shares of the minority shareholder. In both cases, the transferee company is not a party to the contract containing the drag-along right and tag-along right. In view of privity of contract, the transferee company cannot be forced to purchase under a drag-along or tag-along right. In both cases, the offer made by the purchaser is not an offer to acquire shares of the stated percentage, but the shares acquired add to existing shares of the transferee company or shares held by its nominee or associated company which take the shareholding to at least ninety percent for compulsory acquisition or seventy-five percent for the demand of minority shareholders to the purchaser. In contractual drag-along or tag-along right, the percentages are determined by the shareholders. They are not bound to peg the trigger to that indicated under sections 259 and 260 of the Act.

In addition, the exercise of a contractual drag-along or tag along right does not need to be limited to acquisition of the stated percent by a body corporate. The right can be contractually conferred on an individual shareholder, that is a shareholder who is a natural person.

21.3.6 Takeover

Takeover refers generally to the acquisition of one company by another resulting in the acquirer having a controlling interest in the target. However, in a more technical sense, it refers to acquisition of a public company, whether listed or not listed on the stock exchange, where the acquirer has or will have a controlling interest in the target public company. The takeover will be subject to the applicable provisions of the Companies Act, 2019 and the Securities & Exchange Commission laws, particularly the Code on Takeovers and Mergers, as well as applicable rules of the stock exchange if the company is a listed company on the exchange. In addition, sector specific legislations and general laws may be applicable. The focus here is on providing an overview of the process and requirements under the Security & Exchange Commission Code on Takeovers and Mergers (the Takeover Code or the Code).

The Code provides that it is applicable in three instances:¹⁴⁵⁸

- (a) to all takeovers and mergers where the target is a public company, whether listed or unlisted

¹⁴⁵⁸ Rule 2.0 of SEC Code on Takeovers & Mergers.

- (b) to all takeovers and mergers between or among public companies, whether listed or unlisted, and
- (c) to consolidation, where two companies merged to form a new company

Takeover is defined broadly to cover two situations. First, direct acquisition of the shares carrying voting rights in a target, with no new company being formed. Secondly, indirect acquisition of the shares carrying voting rights or control of shares of a target company through the acquisition of holding companies. It does not matter the holding companies are in Ghana or not, whether they are listed or unlisted.

The Code requires that where a person acquires or intends to acquire a controlling interest in a public company, that person must make a mandatory offer to acquire all the shares of the company to all the shareholders of the company.¹⁴⁵⁹ The acquirer may not end up acquiring all the shares as the other shareholders are free not to accept the offer. The rationale of the Code is to avoid putting the other shareholders at a disadvantage where the controlling shareholder takes control of the company without an option to the other shareholders to exit, or where after taking control, the controlling shareholders adopt measures to buy the shares of the other shareholders at a reduced price. The Code thus provides under Rule 4 that:

“4.1. No person shall make an offer to acquire shares or voting rights of a public company which together with shares or voting rights if any held by such person or by persons acting in concert entitle such person to exercise effective control in the Target Company without complying with the takeover procedures provided for under Rule 5.

4.2. Where a person or persons acting in concert:

- (a) acquires or intends to acquire more than thirty percent (30%) but less than fifty percent (50%) of the voting shares of a public company in 12-month period; or*
- (b) acquires or intends to acquire fifty percent (50%) or more of the voting shares of the public company; or*
- (c) acquires a company that holds effective control in the public company or together with the shares already held, will result in acquiring effective control of the public company,*

the person shall be obliged to make a takeover offer of such public company and shall be required to comply with the takeover procedures set out under Rule 5.

4.3 Without prejudice to Rules 4.1 and 4.2 above, no person shall acquire effective control over a target company unless such person makes the same offer to all shareholders of the same class of such company in accordance with these Rules.”

¹⁴⁵⁹ Rule 4.1 of SEC Code on Takeovers & Mergers.

Acquisition of controlling interest or acquisition of shares that will place a person in effective control of a public company triggers the requirement of a takeover bid under the Code. *“Control”* is defined under the Code as *“the right or entitlement to exercise or control the exercise of thirty percent (30%) or more of the voting shares at the general meetings of a company or the ability to control the composition of the Board of Directors of a company”*.¹⁴⁶⁰ *“Effective control”* is defined to mean *“where a person makes an offer for the acquisition of effective control of an Offeree which holds shares which together with shares, if any, already held by such person or an associate person or a company or by any other company that is deemed by virtue of being a related company or by persons acting in concert with such person carry the right to exercise or control the exercise of not less than thirty percent (30%) of the votes attached to the ordinary shares of an Offeree which shall be deemed to be a takeover and provisions of these Rules shall apply”*.¹⁴⁶¹

It is, therefore, not all acquisition of shares in a public company that require the application of the Takeover Code. The acquisition must result in the acquirer either alone or in association with an associated person or having an interest in a related company or acting in concert with another person acquire a controlling interest. The Code requires that the acquirer makes a takeover bid or mandatory offer in such instances in accordance with the Code. The Code also provides a number of exceptions where even though the acquisition will give a person effective control, no mandatory offer or takeover bid is required. These include:¹⁴⁶²

- (a) any purchase of shares from the unissued shares of the company provided the purchase will not result in a fifty percent or more ownership of the shares of the purchaser;
- (b) any purchase of shares from an increase in authorised share capital;
- (c) acquisition of shares through inheritance;
- (d) purchase in connection with foreclosure proceedings involving a duly constituted pledge or security arrangement where the acquisition is made by the debtor or creditor;
- (e) purchase in connection with privatization undertaken by the Government of Ghana; and
- (f) purchase in connection with liquidation or insolvency under court supervision.

In any of the above cases, the acquirer is not required to make a mandatory offer. The Security and Exchange Commission also has the power under Rule 4.5 to grant exemption from the requirement of mandatory offer where the acquirer acquires or intends to acquire effective control.

The Code provides for the procedure for such takeover bid, the notification requirement, the content of notice and documentation required, the obligations of the Offeror and Offeree and the powers of the Commission. It also deals with issues relating to competing offers received and acquisition of the shares of the minority where ninety percent of the shareholders accepts the offer of the Offeror.

¹⁴⁶⁰ Rule 3.8 of SEC Code on Takeovers & Mergers.

¹⁴⁶¹ Rule 3.13 of SEC Code on Takeovers & Mergers.

¹⁴⁶² Rule 4.4 of SEC Code on Takeovers & Mergers.

21.3.6.1 Procedure of takeover under the Code

The steps, procedure and requirements for takeover offer under the Code are provided below:

1. Decision is made by the person or board of directors to acquire effective control of the target company.¹⁴⁶³
2. Press announcement of the takeover offer in the electronic media and at least two daily newspaper of national circulation. The press announcement must be made within twenty-four hours of the decision of the person or the board of directors of the offeror to acquire effective control of the target.¹⁴⁶⁴
3. Press announcement on the floor of the stock exchange if the target company is a listed company. The press announcement must be made within twenty-four hours of the decision by the person or the board of directors of the offeror to acquire effective control of the target.¹⁴⁶⁵
4. The offeror submits a written notice of intent to make a takeover offer to the board of directors of the target, stock exchange and Commission. The notice is to contain information in Schedule I of the Code. The notice must be submitted twenty-four hours of the decision of the person or board of directors of the offeror to acquire effective control of the target.¹⁴⁶⁶
5. The offeror must submit within ten days of the announcement, a statement detailing the terms of the offer as prescribed in Schedule II of the Code to the Commission and the target.¹⁴⁶⁷
6. The board of directors of the target is required to inform the stock exchange and the Commission of receipt of the statement and make an announcement by press notice of the proposed takeover offer within twenty-four hours of receipt of the statement detailing the offer.¹⁴⁶⁸
7. The offeror must submit within ten days of submitting the statement a Takeover Offer Document which must include information in Schedule III to the Commission for approval.¹⁴⁶⁹
8. The Commission has thirty days to approve the Takeover Offer Document if the document complies with the requirement of the Code.¹⁴⁷⁰
9. The approved Takeover Offer Document must be submitted to the target within five days of the approval of the Commission.¹⁴⁷¹
10. The offeree must, within fifteen days of receipt of the approved Takeover Offer Document, circulate it to its shareholders to whom the Takeover offer relates and the Independent

¹⁴⁶³ Rule 5.2 of SEC Code on Takeovers & Mergers.

¹⁴⁶⁴ Rule 5.1 of SEC Code on Takeovers & Mergers.

¹⁴⁶⁵ Ibid.

¹⁴⁶⁶ Ibid.

¹⁴⁶⁷ Rule 5.4 of SEC Code on Takeovers & Mergers.

¹⁴⁶⁸ Rule 6.1 of SEC Code on Takeovers & Mergers.

¹⁴⁶⁹ Rule 7.1 of SEC Code on Takeovers & Mergers.

¹⁴⁷⁰ Rule 7.3 of SEC Code on Takeovers & Mergers.

¹⁴⁷¹ Rule 7.5 of SEC Code on Takeovers & Mergers.

Adviser.¹⁴⁷²

11. The takeover offer is to remain open for acceptance by the offeree for thirty days from the date of submission of the Takeover Offer Document to the Offeree by the Offeror.¹⁴⁷³
12. The board of directors of the target company must appoint, within five days of receipt of the Takeover Offer Document, an independent adviser, who is qualified in accordance with the requirement of the Code, to advise on the Takeover Offer Document.¹⁴⁷⁴
13. The board of directors of the target must issue a statement, after receipt of the Independent Adviser's statement¹⁴⁷⁵ from the appointed Independent Advisor, to the shareholders of the target within fifteen days of receipt of the offer.¹⁴⁷⁶ The statement must include information required in Schedule IV of the Code.¹⁴⁷⁷ The statement must indicate whether the board of directors recommend the acceptance of the takeover offer by the offeror.¹⁴⁷⁸
14. The takeover offer remains open for thirty days after submission of the Takeover Offer Document to the offeree. The offer closes at the expiration of thirty days.¹⁴⁷⁹ A shareholder can reject the offer any time before the closing of the offer.¹⁴⁸⁰ A shareholder who also intends to accept the offer must do so prior to the closing of the offer.
15. Where a takeover offer results in the offeror acquiring ninety percent or more of the shares of the target, the offeror must make another offer to the remaining shareholders to acquire their shares.¹⁴⁸¹ The offer price must be the higher of the prevailing market price of the shares or the price offered to the other shareholders.¹⁴⁸² The remaining shareholders can accept or reject the offer.¹⁴⁸³
16. Where the offeror receives acceptance from shareholders of the offeree in excess of the total number of shares the offeror intends to take, the offeror is to undertake a pro-rata acceptance.¹⁴⁸⁴ That is allocation of acceptance by the offeror in proportion to the total number of shares accepted by each offeree in relation to the percentage upon which the offer is conditional.¹⁴⁸⁵
17. The offeror must inform the Commission and the stock exchange within ten days of the

¹⁴⁷² Rule 7.6 of SEC Code on Takeovers & Mergers.

¹⁴⁷³ Rule 8.1 of SEC Code on Takeovers & Mergers.

¹⁴⁷⁴ Rule 9.1 of SEC Code on Takeovers & Mergers. Rule 10.0 of SEC Code on Takeovers & Mergers deals with the Independent Adviser of the Offeree.

¹⁴⁷⁵ Rule 12.0 of SEC Code on Takeovers & Mergers.

¹⁴⁷⁶ Rule 9.1 of SEC Code on Takeovers & Mergers.

¹⁴⁷⁷ *Ibid.*

¹⁴⁷⁸ *Ibid.*

¹⁴⁷⁹ Rule 20.1 of SEC Code on Takeovers & Mergers.

¹⁴⁸⁰ Rule 20.2 of SEC Code on Takeovers & Mergers.

¹⁴⁸¹ Rule 14.1 of SEC Code on Takeovers & Mergers.

¹⁴⁸² Rule 14.2 of SEC Code on Takeovers & Mergers.

¹⁴⁸³ *Ibid.*

¹⁴⁸⁴ Rule 21.1 of SEC Code on Takeovers & Mergers.

¹⁴⁸⁵ Rule 21.2 of SEC Code on Takeovers & Mergers.

closure of the offer by a press notice.¹⁴⁸⁶

18. The press notice must also be published in at least two daily newspapers of national circulation.¹⁴⁸⁷

19. The offeree is required to complete the takeover by transferring the accepted shares to the offeror within three business days and enter same in the register of members or complete the electronic transfer in accordance with the Central Securities Depository Act, 2008 (Act 733).¹⁴⁸⁸

There are a number of obligations imposed on the offeror in the takeover process. These include:

- (a) The offeror must disclose the identity of the offeror and any person acting in concert with the offeror prior to and during the takeover offer process.¹⁴⁸⁹
- (b) The offeror must ensure that it has the required financial capacity to undertake the takeover and all shareholders who accepted the offer will be paid on completion of the takeover.¹⁴⁹⁰
- (c) The offeror shall not during or when within the reasonable contemplation of the takeover offer, enter into arrangement or understanding to purchase shares of the offeree in such a manner to give some shareholders favourable conditions.¹⁴⁹¹ The offeror must treat fairly and equally the shareholders of the offeree.¹⁴⁹²
- (d) The minimum offer price must be the highest of:
 - (i) highest price paid by the offeror or any person acting in concert for acquisition during the last twenty-six weeks of the announcement of the offer; or
 - (ii) price paid by the offeror under a preferential allotment to the offeror or persons acting in concert, within the last twelve months to the date of the closure of the offer; or
 - (iii) the average of the highest weekly prices of the shares of the target in the past six months of the public announcement of the offer.
- (e) Where the offeror or any person acting in concert purchase shares of the target after the announcement of the offer and prior to the closing of the offer at a price exceeding the offer price, the offeror must increase the offer price to that price and give notice to the effect to Commission and all the shareholders.¹⁴⁹³
- (f) The offeror cannot sell any shares to which the takeover offer relates during the offer period.¹⁴⁹⁴ Related companies or person acting in concert with the offeror cannot also sell any

¹⁴⁸⁶ Rule 22.1 of SEC Code on Takeovers & Mergers.

¹⁴⁸⁷ Rule 22.2 of SEC Code on Takeovers & Mergers.

¹⁴⁸⁸ Rule 32.1 of SEC Code on Takeovers & Mergers.

¹⁴⁸⁹ Rule 23.1 of SEC Code on Takeovers & Mergers.

¹⁴⁹⁰ Rule 24.0 of SEC Code on Takeovers & Mergers.

¹⁴⁹¹ Rule 25.0 of SEC Code on Takeovers & Mergers.

¹⁴⁹² *Ibid.*

¹⁴⁹³ Rule 26.2 of SEC Code on Takeovers & Mergers.

¹⁴⁹⁴ Rule 28.1 of SEC Code on Takeovers & Mergers.

shares to which the takeover offer relates except to the offeror.¹⁴⁹⁵

- (g) The following persons are required to disclose the total number of shares and price of the offeror and the offeree which are dealt in for their own account:
- (i) the offeror and all related companies or persons acting in concert with the offeror;
 - (ii) the chief executive, a director, or an officer of the offeror who occupies or acts in a senior managerial position;
 - (iii) a person who is an associated person in relation to the person referred to in (i) and (ii) above; and
 - (iv) a person who is accustomed to act on the direction and instruction of the person referred to in (i) and (ii) above.¹⁴⁹⁶

The disclosure must be made within twenty-four hours of the transaction.¹⁴⁹⁷

A number of obligations are also imposed on the offeree as a result of the takeover offer. These include:

- (a) disclosure of information to the offeror including:
 - (i) list of shareholders to which the takeover offer relates;
 - (ii) published annual reports and financial statements including the latest half-yearly results of the offeree and subsidiaries; and
 - (iii) a copy of a competing offer, if any.
- (b) Restriction on the following activities of the offeree after contact from the offeror or its agent, or on receipt of the announcement of the intention of the takeover offer:
 - (i) issue of authorised shares of the target company;
 - (ii) issue or grant of options in respect of unissued shares of the target company;
 - (iii) create or permit the creation or subscription of any shares of the offeree;
 - (iv) sell, dispose of or acquire or agree to sell, dispose of or acquire assets of the offeree or any of its subsidiaries; or
 - (v) enter into or allow contracts for or on behalf of the offeree to be entered into otherwise than in the ordinary course of business of the offeree.¹⁴⁹⁸
- (c) The following persons are required to disclose the total number of shares and price of the offeror and the offeree which are dealt in for their own account:
 - (i) the offeree;
 - (ii) substantial shareholders of the offeree;
 - (iii) chief executive and directors of the offeree;
 - (iv) officers of the offeree who occupy or act in senior managerial positions;
 - (v) a person who is an associated person in relation to the person referred to in (i) and

¹⁴⁹⁵ Rule 28.2 of SEC Code on Takeovers & Mergers.

¹⁴⁹⁶ Rule 28.3 of SEC Code on Takeovers & Mergers.

¹⁴⁹⁷ Rule 28.4 of SEC Code on Takeovers & Mergers.

¹⁴⁹⁸ Rule 30.1 of SEC Code on Takeovers & Mergers.

- (ii) above; and
- (vi) a person who is accustomed to act on the direction and instruction of the person referred to in (i) and (ii) above.¹⁴⁹⁹

The disclosure must be made within twenty-four hours of the transaction.¹⁵⁰⁰

The Code prohibits a number of conducts in relation to takeover offer including:

- (a) prohibition against any person who prevents or attempts to prevent the Board of Directors from making required disclosure under the Code or requesting suspension of trading in its shares on a stock exchange;¹⁵⁰¹
- (b) prohibition against what will amount to fraudulent, deceptive or manipulative act or practice, in connection with any takeover offer;¹⁵⁰² and
- (c) prohibition against providing false and misleading information.¹⁵⁰³

¹⁴⁹⁹ Rule 31.1 of SEC Code on Takeovers & Mergers.

¹⁵⁰⁰ Rule 32.2 of SEC Code on Takeovers & Mergers.

¹⁵⁰¹ Rule 33.0 of SEC Code on Takeovers & Mergers.

¹⁵⁰² Rule 34.0 of SEC Code on Takeovers & Mergers.

¹⁵⁰³ Rule 35.0 of SEC Code on Takeovers & Mergers.

22.0 PUBLIC COMPANIES

22.1 Introduction

A public company is a company that is not a private company.¹⁵⁰⁴ For a company to be a public company, the restrictions and limitations imposed on a private company under section 7(5) of the Companies Act, 2019 (Act 992) must not be applicable to that company. That is, none of such restrictions or limitations must be in the constitution of the company. A public company thus is a company that by its constitution:

- (a) has no restriction on the right to transfer shares;
- (b) does not limit the total number of its members and debenture holders to fifty persons;
- (c) does not prohibit invitation to the public to acquire the shares and debentures of the company; and
- (d) does not prohibit invitation to the public to deposit money with the company for fixed periods or payable at call, whether with or without interest.¹⁵⁰⁵

A public company may be a company with shares, limited or unlimited, or may be a company limited by guarantee where there are more than fifty members. A public company does not necessarily have to invite the public to acquire the shares or debentures of the company, or to deposit money with the company. Once the constitution of the company has none of the above restrictions or prohibitions, that company is a public company. However, there are statutory requirements for the incorporation of a public company or the conversion of an existing private company into a public company.

A major advantage of a public company is its ability to make an invitation to the public to acquire the shares and debentures of the company or invite the public to deposit money with the company. That is, a public company is able to raise capital from the public by making an invitation to the public. In addition and related to that is the fact that there is no limitation on the total number of persons that can be members of a public company. Act 992 regulates what amounts to an invitation to the public and the requirements to satisfy prior to making public invitations and the conduct of public invitations.

22.2 Invitation to the public

Given the public nature of public companies, there are some specific provisions that are applicable to public companies particularly due to the fact that they can make invitations to the public to

¹⁵⁰⁴ Section 7(7) of Act 992.

¹⁵⁰⁵ Section 7(5) of Act 992.

acquire the shares or debentures of the company or deposit money with the company¹⁵⁰⁶. The Act provides for rules on what amount to a public invitation. The Act provides that a person must not make a public invitation for the acquisition of the shares or debentures of a company unless the person has complied with the requirements of a statement in lieu of prospectus and a prospectus.¹⁵⁰⁷ The requirement of a prospectus is applicable to only public companies. It is only a public company that can make a public invitation to acquire its shares or debentures. Private companies are prohibited from making a public invitation. Even where a company is a public company, it must satisfy the requirements relating to the submission of statement in lieu of prospectus and prospectus prior to making a public invitation.

Where an invitation is made to the public in breach of the above requirements, the person and the officer of a body corporate that made the invitation is liable to a fine or term of imprisonment or both.¹⁵⁰⁸ In addition, the person who acquires or disposes of shares or debentures, or deposit money with the company is entitled to rescind the transaction and obtain compensation from the person who made the invitation in breach of the requirements.¹⁵⁰⁹ The person who seeks to rescind must do so with reasonable promptitude and is not entitled to rescind and seek compensation from the company when the company is winding up.¹⁵¹⁰

Sections 295 and 296 of Act 992 provides for the scope of what amount to an invitation to the public. Section 295 of Act 992 provides that:

“(1) For the purposes of this Act, an invitation is made to the public if an offer or invitation to make an offer is

- (a) advertised or disseminated in the Republic by a newspaper, broadcasting, cinematograph, electronic communication or any other means;*
- (b) made to or circulated among persons whether selected as members or debenture holders of the company concerned or as clients of the persons making or circulating the invitation or in any other manner;*
- (c) made to one or more persons on the terms that the person or persons to whom it is made may renounce or assign the benefit of the invitation or of the shares or debentures to be obtained under the invitation in favour of any other person; or*

¹⁵⁰⁶ This is subject to section 316 of Act 992. Not all public companies can invite members to deposit money with the company unless registered and license as such under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) or Non-Banking Financial Institutions Act, 2008 (Act 774) or so permitted by the Securities & Exchange Commission.

¹⁵⁰⁷ Section 294(1) of Act 992.

¹⁵⁰⁸ Section 294(3) of Act 992.

¹⁵⁰⁹ Section 294(4) of Act 992.

¹⁵¹⁰ Section 294(5) of Act 992.

(d) made to one or more persons to acquire shares or debentures dealt in on a stock exchange or in respect of which the invitation states that application has been or will be made for permission to deal in those shares or debentures on a stock exchange subject to subsection (5)."

Per the subsection, there is a public invitation where a person makes an offer to the public or invites the public to make an offer if the communication is advertised through any means in Ghana; or is made or circulated among persons or a group of persons belonging to a class; or made to one or more person who can renounce or assign the benefit of the invitation or shares or debentures to be acquired; or made to persons to acquire shares on a stock exchange or that application is made to trade on a stock exchange. Public invitation thus covers direct invitations to the public, invitation through intermediaries or renounceable right offers. Invitations through intermediaries include where a licensed dealer either purchased all the securities with the intent of selling to the public or makes an invitation on behalf of the public company. Right offers cover situations where the shares or debentures are first offered to existing shareholders or debenture holders. This is also referred to as pre-emption right or right of first refusal. The right offer may be a renounceable or non-renounceable right offer. A renounceable right offer refers to a right offer where the existing shareholder to whom the offer is made can take up the offer or, assign or sell the right to another person who accepts the offer and takes the shares. The existing shareholder can also choose not to accept the offer or transfer it to another person. In a non-renounceable right offer or issue, the existing shareholder can only accept the invitation or decline but cannot transfer or assign it to another person.

The use of public invitations, therefore, covers public offers and public invitations. Public offers cover situations where the company intends to be bound the moment the offer is accepted by any member of the public. Public invitations cover situations where what is done by the company is an invitation to treat, with the intention that any member of the public can make an offer to the company. In effect, public invitations cover offers and invitations to make offer made directly to the public to acquire the shares or debentures of the company, or which even though not made directly to the public have the potential of being acquired by the public. In order for a company to retain control over the process, the preferred position is to invite the public to make the offer to acquire the shares or debentures of the public company. This enables the company to retain the discretion to decide on whether to accept the offer for the shares or debentures. Usually, this is done by requiring the interested members of the public to fill and submit applications forms provided by the company.

The law seeks to avoid the circumvention of the requirement for a public invitation by the issue of shares through intermediaries. It thus brings the issue by intermediaries under the scope of public invitation. The law provides that an allotment of shares or agreement to allot shares of a company to a person on the understanding that the person will invite the public to acquire any of the shares

or debentures is an invitation to the public made not only by the person but also the company.¹⁵¹¹ For the purposes of determining whether the shares are allotted to the person, who is the allottee, with the understanding that the allottee will make an invitation to the public, the law presumes such understanding from two situations:

- (a) where the allottee made an invitation to the public in respect of the shares within six months after the allotment or agreement to allot; or
- (b) where the allottee has not provided consideration to the company for the shares at the time of the invitation is made to the public.¹⁵¹²

The presumption is applicable unless the contrary is proven.¹⁵¹³

Section 295 of Act 992 provides for situations that must not be deemed to be an invitation to the public. These cover situations where the invitation can be treated as being a domestic concern of the persons making and receiving the invitation.¹⁵¹⁴ Domestic concerns covers, generally, offers by the company or persons making the offer or invitation to employees, existing members, family members or relatives. Also not amounting to public offers or invitations is the invitation by a private company exclusively to existing members and debenture holders which does not increase the number of members and debenture holders above fifty.¹⁵¹⁵ However, such an invitation to employees and existing members in accordance with section 295(1)(c) and (d) above will amount to a public invitation.¹⁵¹⁶ The same position is applicable to invitations made to existing shareholders and debenture holders of an external or non-Ghanaian company. These are not be considered as public invitations once the number of members and debenture holders does not exceed fifty unless the invitations are in accordance with paragraph (c) and (d) of section 295(1) of Act 992.¹⁵¹⁷

22.3 Right to make public invitation

Under the Act, the issue of shares of a company or borrowing money to raise capital for the company is the duty of the directors of the company. Section 144(3) of Act 992 provides for the default position that unless otherwise stated in the constitution of the company, the power to administer the business of the company is vested in the board of directors. As part of this management function, the board can issue shares or borrow money in the name of the company. It is, therefore, the board of directors who may decide to issue shares or debentures of a public company through public invitation.

¹⁵¹¹ Section 296(1) of Act 992.

¹⁵¹² Section 296(3) of Act 992.

¹⁵¹³ *Ibid.*

¹⁵¹⁴ Section 295(2) of Act 992.

¹⁵¹⁵ Section 295(3) of Act 992.

¹⁵¹⁶ *Ibid.*

¹⁵¹⁷ Section 295(5) of Act 992.

However, the Act in section 189 limits the power of the directors in issuing shares and borrowing money. In relation to the power of the board of directors to issue shares, the Act provides that the new or unissued shares cannot be issued to third parties unless the shares are first offered on the same terms and conditions to all the existing shareholders or to all the holders of shares of that class or classes in proportion to their current shareholding.¹⁵¹⁸ Shareholders, therefore, have the right of first refusal or pre-emptive rights in relation to shares to be issued by the company. The directors can only issue the shares to third parties when shareholders fail to exercise the pre-emptive right. Directors may, however, issue the shares directly to third parties including through a public invitation to acquire the shares if approved by an ordinary resolution of the shareholders.¹⁵¹⁹ The shareholders' pre-emptive rights are thus waived where the shareholders by ordinary resolution approve the issue of shares through public invitation.

From the above, directors of a company can issue shares of the company through public invitation either if the directors first offer the shares to the existing shareholders who fail to acquire the shares, or the shareholders by ordinary resolution approve the issue of shares through public invitation without first offering it to the existing shareholders.

In relation to debentures, section 189(9) of Act 992 provides that where the amount of money to be borrowed, together with the existing indebtedness of the company, will exceed the stated capital, the directors require approval by ordinary resolution of the shareholders to do so. Therefore, the issue of debentures by public invitation will require the approval of shareholders where the amount to be borrowed together with the existing indebtedness of the public company will exceed the stated capital. If the issue of such debentures will increase the total indebtedness of the company above the stated capital, the directors can issue such debentures by public invitation without the approval of the shareholders unless otherwise stated in the constitution of the company.

Public invitation or public offer to acquire the shares or debentures, or to deposit money with the company¹⁵²⁰, as earlier indicated is also subject to compliance with the requirements of statement in lieu of prospectus and prospectus as provided in the Act.¹⁵²¹

22.4 Prospectus and statements in lieu of prospectus

In view of the public nature of a public company in terms of the fact that members of the public may be enticed to become shareholders or debenture holders, Act 992 imposes additional documentation requirements on such companies. A public company is required at the time of incorporation or

¹⁵¹⁸ Section 189(1)(a)(i) of Act 992.

¹⁵¹⁹ *Supra*.

¹⁵²⁰ See Section 316 of Act 992.

¹⁵²¹ Section 294(1) of Act 992.

within twenty-eight days after its incorporation to submit to the Registrar of companies, a statement in lieu of prospectus for registration, with a copy to the Securities & Exchange Commission.¹⁵²² In addition, where a public company intends to make a public offer or invitation of its shares or debentures, the public company must submit a prospectus to both the Securities & Exchange Commission and the Registrar of companies.¹⁵²³

The statement in lieu of prospectus and the prospectus are, therefore, required from a public company in addition to the constitution of the company (registered or default constitution). The statement in lieu of prospectus is required from all public companies. The prospectus is required from public companies that intend to make public offers or invitation to acquire the shares or debentures of the company or deposit money with the company.

It must be stated that in relation to a public invitation to acquire shares of a public company, no invitation can be made which violates voting rights attached to those shares contrary to sections 52 and 53 of the Act.¹⁵²⁴ Section 52 of the Act deals with the suspension of voting right of preference shareholders and specifically indicated when even provided in the constitution of the company or the terms of issue, such rights are not suspended. Section 53 of the Act provides that equity shares on voting by poll at a general meeting have one vote per share. Any invitation to the public to acquire shares on terms contrary to the sections is an offence and requires payment of an administrative penalty.¹⁵²⁵

22.4.1 Statement in lieu of prospectus

A public company is required to submit a prospectus to the Securities & Exchange Commission for approval prior to making a public offer or invitation for the acquisition of the shares or debentures of the company. The prospectus is the document that provides details on the company and the offerings, shares or debentures, to enable investors make informed decisions on whether to acquire the shares or debentures of the company. However, not all public companies are interested in making public offers or invitations. Since not all public companies may make public offers or invitations, the Act requires that at the time of registration or within a stated period after incorporation or conversion of a private company to a public company, the public company must deliver a statement in lieu of prospectus to the Registrar with a copy to the Commission.

Section 303 of Act 992 which deals with statement in lieu of prospectus provides as follows:

¹⁵²² Section 303(1) and (2) of Act 992.

¹⁵²³ Section 304(1) of Act 992.

¹⁵²⁴ Section 315(1) of Act 992.

¹⁵²⁵ Section 315(2) of Act 992.

- “(1) A public company shall, within twenty-eight days after incorporation, or after its conversion from a private company in accordance with section 302, deliver to the Registrar for registration a statement in lieu of prospectus, signed by every person who is named in the statement as a director or a proposed director of the company or by the agent of that person authorised in writing, in the form and containing the particulars set out in Part One of the Ninth Schedule and, in the cases mentioned in Part Two of that Schedule, accompanied by the financial statements and reports specified in the Schedule.*
- (2) A copy of the statement in lieu of prospectus shall be delivered to the Commission.*
- (3) A statement in lieu of prospectus delivered under subsection (1) shall, where the persons making the report specified in Part Two of the Ninth Schedule have made any adjustments as are mentioned in paragraph 27 of that Schedule, have endorsed on the statement or attached to the statement a written statement signed by those persons setting out the adjustments and giving reason for the adjustments.*
- (4) Where a company contravenes subsection (1) or (3), the company and an officer of the company who is in default is liable to pay to the Registrar, an administrative penalty of five hundred penalty units.”*

The statement in lieu of prospectus delivered to the Registrar is to provide additional information on the public company than in the application for registration under section 13 of the Act and the registered constitution, if any. The statement in lieu of prospectus can be submitted at the time of incorporation with the incorporation documents or within twenty-eight days of incorporation. In the event that a private company is converted to a public company in accordance with section 302 of Act 992, the statement in lieu of prospectus must be delivered either at the time of conversion or within twenty-eight days of the conversion. The statement must be signed by all the directors or proposed directors of the company or duly appointed agents of the directors or proposed directors.

The statement in lieu of prospectus must provide information in part one of the Ninth Schedule of Act 992. The particulars required under the Ninth Schedule of the Act include the following:

- information on the promoters, consideration paid or to be paid to the promoters and all incorporation expenses. This is not required if the company has been incorporated for more than two years
- nature and interest of directors and proposed directors in the promotion of the company
- particulars of the auditors
- particulars of the bankers and legal practitioners of the company
- information on the subsidiaries and any other body corporate that the company intends to hold equity of twenty-five percent or more of the voting rights

- any proposed acquisition of securities in a body corporate that will make the body corporate a subsidiary of the company
- information on proposed business the company intends to acquire
- opinion of directors on the sufficiency of working capital and proposal to raise additional working capital
- information on stated capital indicating the different elements and in respect of shares, and the different classes of shares
- the number and description of authorised, issued and treasury shares of each class
- the amount paid on issued shares of each class in-kind and in cash
- information on the amount remaining payable
- dividend per shares paid in the last five completed financial years in respect of each class of shares
- the number of unissued shares agreed to be issued and the amount payable in cash and in-kind
- particulars of beneficial owners holding more than twenty-five percent of shares of a class and number and description of shares held
- the amount of outstanding debentures issued or agreed to be issued by the company and its subsidiaries and proposed subsidiaries
- amount of any bank overdrafts of the company and its subsidiaries and proposed subsidiaries
- information on in-kind consideration for shares and debentures issued or agreed to be issued
- information on shares and debentures of subsidiaries or proposed subsidiaries which have been issued or agreed to be issued within the last two years for in-kind consideration
- information on shares and debentures of the company, its subsidiaries and proposed subsidiaries issued or agreed to be issued within the last two years for cash consideration stating the price and if not paid then when payable
- if the shares or debentures of the company, its subsidiaries or proposed subsidiaries are under option or agreed conditionally or unconditionally to be put under option, the information on the exercise of the option
- where the property is to be acquired by the company, its subsidiaries and proposed subsidiaries, information on the vendors, consideration, nature and extent of the interest of each director. This is not applicable where the contract for acquisition has been completed and payment made two years before the statement, or the acquisition is in the ordinary course of business or not connected to incorporation or conversion of a private company to a public company
- information on material contracts and other contracts entered in the ordinary course of business
- particulars of directors of the company proposed directors and Company Secretary or proposed Company Secretary
- particulars of accountants making the report

- financial statements, consolidated account and reports for the last five years of the company, subsidiaries or proposed subsidiaries or in respect of each financial year since incorporation if less than five years.

It must be signed by all the directors of the company including prospective directors named in the statement in lieu of prospectus even though they may not have been appointed at the time. In the event of failure to submit the statement in lieu of prospectus within the period provided, or where the statement is not signed as provided or does not contain the particulars required, the company and an officer of the company who is in default is liable to pay an administrative penalty to the Registrar.

Since the statement in lieu of prospectus is to provide information on the public company that may be relied on by members of the public to acquire shares or debentures of the company, the Act provides for consequences in the event of omission of required particulars or false statements. Section 303 of Act 992 provides as follows:

- “(5) Where a statement in lieu of prospectus delivered to the Registrar under subsection (1) includes an untrue statement or omits truthfully to state any of the particulars required to be stated by virtue of the Ninth Schedule then,*
- (a) a person, which expression for the purposes of this subsection does not include the company itself, who authorised the delivery of the statement in lieu of prospectus for registration commits an offence and is liable on summary conviction to a fine of not less than two hundred and fifty penalty units and not more than five hundred penalty units or to a term of imprisonment of not less than one year and not more than two years or to both the fine and the imprisonment, unless that person proves that the untrue or omitted statement was immaterial or that that person had reasonable grounds to believe and did, up to the time of the delivery for registration of the statement in lieu of prospectus, believe that the untrue statement was true;*
 - (b) an allottee who acquired shares or debentures in the company in reliance on the statement in lieu of prospectus, and who was misled by the untrue statement or omission, is entitled to rescind the allotment of those shares or debentures and to recover from a person guilty of an offence under paragraph (a) whether convicted or not, compensation for a loss which the allottee has suffered by reason of that reliance; or*
 - (c) a person who acquires shares or debentures in the company from an allottee in reliance on the statement in lieu of prospectus, and who*

was misled by the untrue statement or omission, is entitled to recover from a person guilty of an offence under paragraph (a), whether convicted or not, compensation for a loss which that person has suffered by reason of that reliance."

A statement in lieu of prospectus must present true and complete information as required under the Ninth Schedule of the Act. The information presented in the statement in lieu of prospectus is a representation to the public that may be relied on by members of the public to acquire shares and debentures of the company. False statements or omissions in the particulars provided rendering the information provided untrue or presenting a misleading understanding amount to a misrepresentation. Section 303(5) of the Act makes it an offence committed by the person, except the company, who authorises the delivery of the statement in lieu of prospectus to the Registrar. The offence attracts a punishment of a fine or term of imprisonment or both. The person may escape liability if he proves that the false statement or omission is immaterial or he believed on reasonable grounds the truthfulness of the statement up to the time the statement in lieu of prospectus was delivered to the Registrar for registration.

For an allottee who acquires shares or debentures of the company from the company, the section permits that allottee to rescind the allotment of the shares or debentures and seek compensation. The rescission and compensation are only applicable where the allottee relies on the untrue statement or is affected by an omission in the statement in lieu of prospectus. The allottee must, therefore, prove that he was induced by the false statement or that if he had knowledge of the omission, he would not have acquired the shares or debentures. If it can be established that the allottee was not influenced by the untrue statement or knew of the omission from other sources prior to acquiring the shares, the allottee will not be entitled to rescind the transaction or seek compensation. The compensation is to come from the person who authorised the statement in lieu of prospectus to be delivered to the Registrar, and not the company.

In the event that a person who relies on an untrue statement in the statement in lieu of prospectus to acquire shares or debentures did not acquire the shares or debentures from the company but an allottee, that person cannot rescind the acquisition. This is in line with the fact that the allottee is not the one who made the representation. Such a person is, however, entitled to seek compensation from the person who authorised the delivery of the statement in lieu of prospectus to the Registrar. The compensation is for the loss which the person has suffered as a result of reliance on the untrue statement in the statement in lieu of prospectus.

22.4.2 Prospectus

An incorporated public company may make a public offer or invitation to members of the public to acquire the shares or debentures of the company. For a public company to make a public offer or invitation, it must first prepare and deliver a prospectus to the Securities & Exchange Commission for approval. The prospectus is registered by the Registrar of companies once approved by the Commission. The approved and registered prospectus must be delivered to the person to whom the invitation is made. A public company cannot, therefore, make a public invitation or offer without an approved and registered prospectus by the Securities & Exchange Commission and Registrar respectively. The prospectus is the document that provides details about the offerings, shares or debentures, of the company to inform the members of the public to make an informed decision to acquire the shares or debentures. The statements in the prospectus are, therefore, representations that are intended to induce the public to either accept the offer made by the public company or make an offer to the public company to acquire the shares or debentures of the company.

Section 304 of Act 992 provides as follows:

- “(1) Despite section 294, an invitation to the public to acquire or dispose of any shares or debentures of a public company may be made if,*
- (a) within six months before the making of the invitation there has been delivered to the Commission for examination and approval by the Commission in accordance with section 308, a prospectus relating to the shares or debentures complying in all respects with relevant provisions of sections 305 to 307 and that prospectus has been registered with the Registrar;*
 - (b) except as provided in subsection (2) of this section, a person to whom the invitation is made is supplied with a true copy of the prospectus at the time when the invitation is first made to that person; and*
 - (c) a copy of the prospectus states on its face that it has been approved by the Commission and the date of the approval indicated.*
- (2) Electronic media with the prior consent in writing of the Commission or a newspaper may publish an advertisement or otherwise a summary of the contents of the prospectus, duly approved in accordance with section 308, so long as the summary*
- (a) does not contain a form of application for any shares or debentures which has not been approved by the Commission or, in respect of shares or debentures dealt in or to be dealt in on an approved stock exchange by that stock exchange; and*

(b) states with reasonable prominence where copies of the full prospectus may be obtained and the fact that it has been approved and the date of approval.”

The prospectus is required when the public company intends to make a public offer or invitation to acquire or dispose of the shares or debentures of the company. The public company is required to within six months prior to the public offer or invitation deliver a prospectus to the Commission for examination and approval. The prospectus must comply with the requirements of the Act. Upon approval of the prospectus, the approval must be endorsed on the face of a copy of the prospectus and supplied to a person to whom an invitation is made at the first time the invitation is made. The prospectus is also registered with the Registrar once approved by the Commission. An advert of the prospectus may be made through electronic media approved by the Commission or a newspaper. The content of the advert or summary of the prospectus as advertised must be approved by the Commission. The advert must however state where the full copy of the prospectus may be obtained and must not contain a form of application for shares or debentures not approved by the Commission or where shares or debentures are to be dealt with on an approved stock exchange. ‘Approved stock exchange’ means a body corporate approved as a stock exchange under the Securities Industry Act, 2016 (Act 929).¹⁵²⁶

22.4.3 Requirements to be satisfied by a prospectus

A prospectus delivered under section 304 of Act 992 is required to satisfy the requirements stated in sections 305 to 308 of Act 992.¹⁵²⁷ The information required in the prospectus is provided in the Tenth Schedule of Act 992. The information required depends on whether the prospectus relates to a general invitation or a restricted invitation.

Section 305 of Act 992 provides as follows:

“(1) Except as provided in section 306, where the invitation invites the public to acquire shares or debentures of a public company, the prospectus referred to in section 304 shall state the matters specified in Part One of the Tenth Schedule and set out the reports specified in Part Two of that Schedule.

(2) Subsection (1) shall not apply to,

(a) an invitation by a company in respect of shares or debentures of that company or any of the associated companies made solely to the existing shareholders or debenture holders of that company; or

(b) an invitation by a company in respect of shares or debentures of that company which are in all respects uniform with shares or debentures

¹⁵²⁶ First Schedule of Act 992.

¹⁵²⁷ Sections 304(1)(a) and section 308 of Act 992.

of that company previously issued and for the time being dealt in on an approved stock exchange.

- (3) A prospectus relating to an invitation to the public to acquire or dispose of shares or debentures of a public company, which is an invitation not falling within subsection (1) because it does not invite the public to acquire shares or debentures, or because it is excluded from the ambit of that subsection by virtue of subsection (2) need not state the matters or set out the reports specified in the Tenth Schedule.*
- (4) The prospectus referred to in subsection (3) shall not contain an untrue statement and, if the shares or debentures to which the prospectus relate are dealt in on a stock exchange, whether in the Republic or elsewhere, or if an application has been, or is being made to a stock exchange for permission to deal in those shares or debentures, the prospectus shall
 - (a) state that the shares or debentures are dealt in on that stock exchange or that application has been or is to be made for permission to deal in those shares or debentures on that stock exchange;*
 - (b) state whether or not that stock exchange is an approved stock exchange within the meaning of this Act; and*
 - (c) contain the particulars and information required by that stock exchange; and in any other case shall state that the shares or debentures are not dealt in on a stock exchange.**
- (5) An invitation falling within
 - (a) subsection (1) is in this Act described as a general invitation; and*
 - (b) subsection (3) is in this Act described as a restricted invitation."**

A general invitation refers to an invitation made to the public to acquire the shares or debentures of a public company. A prospectus for a general invitation must satisfy the requirements stated in Part One of the Tenth Schedule and provide reports specified in Part Two of the Tenth Schedule of the Act. A prospectus for a restricted invitation does not need to cover matters or set out the reports required under the Tenth Schedule of the Act. Even though a prospectus is required for a restricted invitation, the requirements in the Tenth Schedule are not mandatory. A restricted invitation refers to an invitation that does not invite the public to acquire shares or debentures; or an invitation to acquire the shares or debentures of the company or an associated company made to existing shareholders or debenture holders of the company; or an invitation to acquire shares or debentures of a company which is in all respects uniform with the shares or debentures of that company that is previously issued and for the time being dealt in on an approved stock exchange. In essence, the invitation is not made to the public but restricted to existing shareholders or employees or is an invitation that is the same as a previous invitation made for shares or debentures which is now traded on an approved stock exchange. Even though prospectus for a restricted invitation need not

cover all matters and provide reports required under the Tenth Schedule, the prospectus must not contain any false statement and must indicate if the shares are dealt in on a stock exchange or an application has been made to deal in on a stock exchange.

A summary of the particulars required a prospectus under the Tenth Schedule of Act 992 includes:

- a statement that *“A copy of this prospectus has been delivered to the Securities and Exchange Commission in accordance with subsection (1) of section 308 of the Companies Act, 2019 (Act 992). For the financial soundness of the company of the value of the securities on offer, investors are advised to consult a dealer, investment advisor or any other professional for appropriate advice”*.
- the full name of the company.
- the full description of the securities and terms including:
 - (a) deadline for applications;
 - (b) total amount payable for each share or debenture and the amount payable on application, allotment, and otherwise, for each share or debenture;
 - (c) the policy which will be adopted if applications exceed the shares or debentures on offer.
- an indication of whether an application has been or is being made to a stock exchange for permission to deal in the securities concerned and whether the stock exchange is approved stock exchange
- the particulars of each person making the invitation, if other than the company, and particulars of the company
- the particulars of each director and proposed director and of the Company Secretary or proposed Company Secretary.
- the name, address and professional qualification of the auditors of the company.
- the name and address of the registration officer, if any, underwriter of the invitation, bankers, stock-brokers and legal practitioners of the company
- for debentures, the particulars of any trustees for debenture holders, the date of the resolutions creating the debentures, and short particulars of the security for the debentures or, if the debentures are unsecured, a statement to that effect.
- the authorised business or businesses of the company.
- a brief summary of the history of the company and of any businesses to which the company has succeeded.
- the particulars of the subsidiaries of the company and of the bodies corporate in which the company is beneficially entitled to equity shares conferring twenty-five percent or more of the votes exercisable at a general meeting of the body corporate.
- the particulars of the holding company, if a subsidiary, and the number of each class of shares of the company held by the holding company.
- the particulars of any proposed subsidiary to be acquired
- a full description of the nature of that business to be acquired

- the location, area and tenure, including where appropriate, the rent and unexpired term of a lease or concession, of the main places of business of the company and the subsidiaries and proposed subsidiaries.
- a statement on the financial and trading prospects of the company together with material information which may be relevant to those prospects; and the material changes in the financial or trading position of the company which may have occurred since the end of the last completed financial year of the company
- a statement by the directors of the company on the sufficiency of the working capital of the company and if not sufficient, a proposal on raising the additional working capital
- the estimated amount of the expenses incidental and preliminary to the invitation and persons to whom they are to be made
- the particulars of any commissions paid within the two preceding years, or payable, as commission for acquiring any shares or debentures of the company or of any of the subsidiaries and proposed subsidiaries.
- for a public invitation to subscribe for any of the shares or debentures,
 - (a) a statement or an estimate of the net proceeds of the issue and a statement on how the proceeds were or are to be applied;
 - (b) the minimum amount which in the opinion of the directors of the company must be raised by the issue in order to provide sums, or, if part of the sums is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters:
 - (i) the purchase price of a property purchased or to be purchased;
 - (ii) any expenses incidental and preliminary to the invitation and issue, including commission payable for acquisition of the shares or debentures and listing on a stock exchange;
 - (iii) the repayment of any sums of money borrowed by the company in respect of any of the matters stated above; and
 - (iv) working capital;
- where a person other than the company is making the public invitation
 - (a) if the shares or debentures were issued by the company for cash, a statement of the price for each share or debenture at which those shares or debentures were issued, and of the total net proceeds of the issue;
 - (b) if the shares or debentures were issued by the company for a consideration other than cash, a statement of the nature of the consideration and an estimate by the directors of a fair value of the consideration and of the price for each share or debenture which the consideration represents; and
 - (c) if the person making the invitation did not acquire the shares or debentures directly from the company on their issues, a statement on the consideration, cash or in-kind, per shares and the total

- the particulars of the stated capital of the company, distinguishing between each of the items specified in subsection (l) of section 68 of this Act, and, in the case of paragraphs (a) and (b) between different classes of shares.
- the number and description of the authorised, issued and treasury shares of each class
- the amount paid on the issued shares of each class in cash or otherwise
- the amount remaining payable on the issued shares of each class, distinguishing between the amount presently due for payment and the amount not yet due for payment and, in the latter case, stating what amount the company has resolved shall not be capable of being called up, except in the event and for the purpose of the company being wound up
- the number of unissued shares of each class agreed to be issued and the amount payable for the shares distinguishing between the amount payable in cash and the amount payable otherwise than in cash
- if the shares of the company are divided into different classes, the rights in respect of voting, repayment, dividends and any other special rights attached to the several classes, and a statement on the consents necessary for the variation of those rights
- the amounts of the dividends paid per share for each class for the last ten years and particulars of any cases in which dividends have not been paid in respect of a class of shares in any of those years
- if any of the shares of the company are redeemable preference shares, the earliest date on which the company has the power to redeem those shares
- the name of every holder and beneficial owner of more than twenty-five percent of the shares or a class of shares of the company and the number and description of the shares held or owned
- the amount of the outstanding debentures issued or agreed to be issued by the company and any of the subsidiaries and proposed subsidiaries or, if none, a statement to that effect
- the particulars of any bank overdrafts of the company and any of the subsidiaries and the proposed subsidiaries as at the latest practicable date, which shall be stated, or if there are no bank overdrafts, a statement to that effect
- the nature of the consideration for the issue of any of the shares or debentures of the company issued or proposed to be issued otherwise than in cash
- the particulars of any shares or debentures of any of the subsidiaries and proposed subsidiaries of the company which have, within the immediately preceding two years, been issued, or which are proposed to be issued, otherwise than for cash and the nature of the considerations and for cash indicating the price and terms
- if the shares or debentures of the company, its subsidiaries or proposed subsidiaries are under option or agreed conditionally or unconditionally to be put under option, the information on the exercise of the option
- where property is to be acquired by the company, its subsidiaries and proposed subsidiaries, information on the vendors, consideration, nature and extent of the interest of each director.

This is not applicable where the contract for acquisition has been completed and payment made two years before the statement, or the acquisition is in the ordinary course of business or not connected to incorporation or conversion of a private company to a public company

- unless more than two years have elapsed since the registration of the company,
 - (a) amount of the expenses relating to the promotion and registration of the company and persons to whom those expenses have been paid or are payable;
 - (b) names of the promoters of the company;
 - (c) amount of the cash or securities paid, or benefit given or proposed to be given to a promoter and the consideration for the payment or benefit; and
 - (d) full particulars of the nature and extent of the interest of each director and proposed director in the promotion of the company
- experts consent to statements made in the prospectus
- the particulars of every material contract, other than contracts entered into in the ordinary course of business or completed more than two years before the date of publication of the prospectus
- the time and place at which the following documents or certified copies of those documents may be inspected:
 - (a) the constitution of the company;
 - (b) debenture trust deed;
 - (c) each material contract disclosed or, in the case of a contract not reduced into writing, a memorandum giving full particulars of the contract;
 - (d) the financial statements, consolidated accounts and reports for the five financial years of the company for the last five years or, if the company has been incorporated for less than five years, for the number of years in respect of which the company has or should have circulated the accounts and reports;
 - (e) the financial statements of every subsidiary and proposed subsidiary of the company and of every business acquired or to be acquired by the company for each of the last five financial years or, if a subsidiary or proposed subsidiary has been incorporated or a business has been carried on for less than five years, for the number of financial years completed since the incorporation or commencement;
 - (f) the other reports, letters, balance sheets, valuations and statements by an expert any part of which is extracted or referred to in the prospectus; and
 - (g) a written statement, signed by the accountants making the reports required, setting out the adjustments made by the accountants in arriving at the figures shown in the reports of the accountants and giving the reasons for the adjustments.

If any of the documents is in any other language, a certified translation of the document in English.

- the names and addresses of the accountants making the reports required
- a report by accountants duly qualified as an auditor of the company on

- (a) profits or losses of the company in respect of each of the last ten completed financial years or, if less than ten years, the number of years of each of the financial years since the incorporation of the company;
- (b) where the company is a holding company, in lieu of the report required by subparagraph (a) of this paragraph, a like report with respect to the profits or losses of the company and of the subsidiaries;
- (c) assets and liabilities of the company as at the end of the last financial year;
- (d) where the company is a holding company, in lieu of the report required by subparagraph (c) of this paragraph, a like report with respect to the assets and liabilities of the company, and of the subsidiaries;
- (e) aggregate emoluments paid by the company to the directors of the company or an associated company during the last period for which the accounts have been made up; and
- (f) with respect to any other matters which appear to the accountants to be relevant having regard to the purpose of the report.

In making the report, the accountants shall make the adjustments that are in their opinion appropriate for the purposes of the prospectus.

- where within the last ten years, the company has acquired a business or a subsidiary, or where at the date of the publication of the prospectus the company proposes to acquire a business or a proposed subsidiary, a report by accountants duly qualified as an auditor of the company,
 - (a) with respect to the profits or losses of that business or subsidiary or proposed subsidiary in respect of each of the last ten financial years or in respect of each of the financial years since the commencement of that business or the incorporation of that subsidiary or proposed subsidiary, if less than ten years; but
 - (i) the report shall deal with any of the profits or losses of a subsidiary or proposed subsidiary that can properly be regarded as attributable to the interests of the company;
 - (ii) where the report relates to a financial year before the subsidiary became a subsidiary of the company or relates to a proposed subsidiary only, any of the profits or losses shall be regarded as attributable to the interests of the company which would have been properly so attributable if the company had held the securities in the subsidiary or proposed subsidiary which the company holds at the date of publication of the prospectus or proposes to acquire; and
 - (iii) where the subsidiary or proposed subsidiary also has subsidiaries, the report shall be extended to the profits or losses of the subsidiary or proposed subsidiary and the subsidiaries so far as those profits or losses can properly be regarded as attributable to the interests of the company;

- (b) where a business or subsidiary has been acquired since the latest date to which the accounts of the company have been prepared, or where the company proposes to acquire a business or a proposed subsidiary, with respect to the assets and liabilities of that business or that subsidiary or proposed subsidiary as at the end of the last financial year but
- (i) the report shall deal with the assets and liabilities of the subsidiary or proposed subsidiary so far as the assets and liabilities can properly be regarded as attributable to the interests of the company;
 - (ii) in relation to a proposed subsidiary, only the assets and liabilities shall be regarded as attributable to the interests of the company which would have been properly so attributable if the company had held the securities in the proposed subsidiary which the company proposes to acquire; and
 - (iii) where the subsidiary or proposed subsidiary also has subsidiaries, the report shall be extended to the assets and liabilities of that subsidiary or proposed subsidiary and the subsidiaries so far as those assets and liabilities can properly be attributable to the interests of the company; and
- (c) any other matters which appear to the accountants to be relevant having regard to the purpose of the report.
- In making the report, the accountants shall make the adjustments, that are, in the opinion of the accountants appropriate for the purposes of the prospectus.

22.4.3 Exemptions

The Act permits under section 306 exemptions where the prospectus in relation to a general invitation need not cover all the matters listed above. Section 306 of Act 992 provides that:

- “(1) Where it is proposed to make a general invitation to the public to acquire shares or debentures of a public company, the Commission may, on the request of the applicant, grant exemption in respect of compliance with any of the requirements of the Tenth Schedule, having regard to the proposals as stated in the request as to the size and other circumstances of the invitation, compliance with the requirements of the Tenth Schedule would be burdensome.*
- (2) A certificate of exemption specified in this section shall state that having regard to the proposals as stated in the request as to the size and other circumstances of the invitation, compliance with the requirements of the Tenth Schedule would be unduly burdensome.*
- (3) Where a certificate of exemption is granted and the proposals are adhered to, a prospectus containing the particulars and information required by the Commission if duly published in the manner required by the Commission, shall be deemed to be a prospectus complying with the Tenth Schedule.”*

For an exemption to apply, the person making the general invitation must apply to the Commission for the exemption. The Commission is thus empowered to grant exemption where a prospectus for a general invitation will be approved even though it does not cover all the requirements under the Tenth Schedule. The exemption must be evidenced by a certificate of exemption which must state the reason for the exemption. The grounds upon which the exemption is to be granted relates to the size of the invitation and any other circumstances which makes compliance with the requirements burdensome. Pursuant to a certificate of exemption and the proposal for the exemption, a prospectus containing the information required by the Commission is valid even though the information does not cover all the requirements of the Tenth Schedule. The exemption is only applicable to a prospectus for a general invitation. As indicated, prospectus for restricted invitation does not need to cover all the requirements in the Tenth Schedule of Act 992.

A prospectus may contain statements of experts. Experts, for this purpose, include a lawyer, engineer, valuer, accountant, assayer and other persons whose profession or calling gives authority to a statement by that person.¹⁵²⁸ Given that the members of the public may place more reliance on the statement from experts in the prospectus, the Act requires that where the prospectus contains statements from experts, the consent of the expert must be obtained for the exact manner in which the statement is stated in the prospectus prior to the delivery of the prospectus.¹⁵²⁹ The consent must not be withdrawn at the time the prospectus is delivered to the Commission and the prospectus must expressly state that the expert has given and not withdrawn the consent.¹⁵³⁰ Where the consent is withdrawn after the delivery of the prospectus to the Commission but before the Commission examines and approves the prospectus, the person who delivered the prospectus must immediately inform the Commission.¹⁵³¹

22.4.4 Registration of prospectus

A prospectus must be approved by the Commission¹⁵³² and an approved stock exchange, where the prospectus relates to shares or debentures dealt or to be dealt in on an approved stock exchange¹⁵³³. Such approved prospectus must be registered by the Registrar of Companies prior to issue to the persons to whom the invitation is made.¹⁵³⁴ The first date of publication of the prospectus is deemed to be the date of registration of the prospectus unless the contrary is proved.¹⁵³⁵

¹⁵²⁸ Section 307(3) of Act 992.

¹⁵²⁹ Section 307(1)(a) and (b) of Act 992.

¹⁵³⁰ *Ibid.*

¹⁵³¹ Section 307(2) of Act 992.

¹⁵³² Sections 304(1)(a) and 308 of Act 992.

¹⁵³³ Section 308(6) of Act 992.

¹⁵³⁴ Sections 304(1)(a) and 308 of Act 992.

¹⁵³⁵ Section 308(9) of Act 992.

For the approval of the Commission, the completed prospectus in accordance with the requirements of the Act particularly the Tenth Schedule with reports required by that Schedule must be delivered to the Commission in triplicate.¹⁵³⁶ The prospectus delivered must be signed on behalf of the company and the person making the invitation.¹⁵³⁷ Where the prospectus relates to a general invitation being made by or on behalf of a company to acquire the shares or debentures of the company, the prospectus must be signed by all directors and proposed directors of the company named in the prospectus.¹⁵³⁸ The directors or proposed directors may authorise in writing an agent to sign the prospectus on their behalf.¹⁵³⁹ In addition, the person making the invitation or agent of such person authorised in writing must sign the prospectus.¹⁵⁴⁰ Where the person making the invitation is a firm or body corporate, the prospectus may be signed on behalf of the firm or the body corporate by at least half of the partners or two directors of the body corporate.¹⁵⁴¹ An agent authorised in writing by the partners or directors may sign on their behalf.¹⁵⁴²

A copy of the prospectus must have endorsed on or attached to it the consent of the expert required under section 307 of the Act.¹⁵⁴³ Where the prospectus relates to a general invitation, a certified copy or translation of each document required to be available for inspection in accordance with the Tenth Schedule and required by regulations of the approved stock exchange must be attached to the prospectus.¹⁵⁴⁴ Where an exemption has been granted in relation to any of the requirements in the Tenth Schedule, the copy of the prospectus must have endorsed on or attached to it, a certificate of exemption granted under section 306 of the Act.¹⁵⁴⁵ The Registrar may dispense with endorsement or attachment of a certified copy or translation of each of the documents required if such a document has been delivered to the Registrar and the Registrar is of the opinion that the copy delivered is readily identifiable and accessible.¹⁵⁴⁶

As indicated earlier, where the shares or debentures to which the prospectus relate are listed or an application has or will be made to list on an approved stock exchange, there must be delivered to the Commission at the time of delivery of the prospectus, a statement that the prospectus has been scrutinised by the stock exchange and the requirements relating to the content of the document has

¹⁵³⁶ Section 308(1) of Act 992.

¹⁵³⁷ Section 308(2) and (3) of Act 992.

¹⁵³⁸ Section 308(2) of Act 992.

¹⁵³⁹ *Ibid.*

¹⁵⁴⁰ Section 308(3) of Act 992.

¹⁵⁴¹ Section 308(4) of Act 992.

¹⁵⁴² *Ibid.*

¹⁵⁴³ Section 308(5)(a) of Act 992.

¹⁵⁴⁴ Section 308(5)(b) of Act 992.

¹⁵⁴⁵ *Ibid.*

¹⁵⁴⁶ *Ibid.*

been satisfied.¹⁵⁴⁷ The Registrar is required to register the prospectus within forty-eight hours of the approval of the prospectus by the Commission.¹⁵⁴⁸

Section 308(7) of Act 992 provides for the Registrar to seek the opinion of the Commission in the event that the Registrar must make a determination whether or not to register the prospectus. The subsection seems irrelevant in the current context where the requirement to deliver the prospectus to the Commission is mandatory. It is suspected that the restatement under this Act is a mistake. This is because the subsection was inserted in the now repealed Companies Act, 1963 pursuant also to the now repealed Securities Industry Law, 1993 at the time where the prospectus was delivered to the Registrar without the mandatory requirement under the repealed Companies Act, 1963 to deliver same to the Securities & Exchange Commission. Under the repealed Companies Act, 1963, the Registrar is required under section 279(9) to seek the opinion of the Commission prior to registration of the prospectus. That requirement is not relevant under the new Companies Act, 2019 since the Act now mandates the prospectus to be delivered to the Commission for approval, and it is only after such approval that the prospectus can be registered by the Registrar. Act 992 also does not contain the requirement where the Registrar is to register the prospectus within forty-eight hours where the prospectus is approved by an approved stock exchange or signed by an exempted dealer.

Section 308(8) of Act 992 provides that *“A copy of the prospectus which has been delivered for registration in accordance with this section shall state at its head the following: “A copy of this prospectus has been delivered to the Securities and Exchange Commission in accordance with subsection (8) of section 308 of the Companies Act, 2019. For the financial soundness of the company or the value of the securities on offer, investors are advised to consult a dealer, investment adviser or any other professional for the appropriate advice.”*” This is to make the requirement clear that even though the prospectus has been delivered and approved by the Commission, the approval of the prospectus by the Commission is not to be relied on as approval to acquire the securities on offer pursuant to the prospectus.

It must be emphasised that while it is not explicitly stated that the prospectus must be delivered to the Registrar of Companies for registration, that requirement is mandatory. A prospectus cannot be issued for the purpose of public invitation or public offer if it is not delivered for registration by the Registrar. The lack of explicit statement on the requirement to deliver the prospectus to the Registrar may be attributable to the replacement of Registrar with the Commission in Act 992 whilst maintaining the language from the repealed Companies Act, 1963 which explicitly mandates delivery to the Registrar.¹⁵⁴⁹ As indicated earlier, this also explains the language of section 308(7) of Act 992 which is now redundant.

¹⁵⁴⁷ Section 308(6) of Act 992.

¹⁵⁴⁸ Ibid.

¹⁵⁴⁹ Sections 275 and 279 of the repealed Companies Act, 1963 (Act 179) as amended.

22.5 Binding obligations on making an offer and the withdrawal of an offer

Generally, the requirements for an offer will be stated in the public invitation by the public company. The law, however, provides for requirements that must guide the response from the public. A public invitation requires delivery of the prospectus to the persons to whom the invitation is directed or an indication of where interested persons can obtain a copy of the prospectus. In order to allow such persons to review the information provided in the prospectus, the Act provides for a waiting period, where an application, offer or acceptance is not binding and creates no binding obligation. Section 309 of Act 992 provides as follows:

- “(1) For the purposes of this Act, “waiting period” means a period of twenty-one days after the first publication of a registered prospectus or a longer period that is stated in the prospectus as the period before the expiration of which applications, offers or acceptance in response to the prospectus will not be accepted or treated as binding.*
- (2) For the purposes of subsection (1),*
- (a) where the shares or debentures to which the invitation relates are dealt in on a stock exchange or where prospectus states that application has been or will be made for permission to deal in the shares or debentures on a stock exchange, and*
 - (b) to comply with the requirements of that stock exchange it is necessary to advertise the prospectus in one or more daily newspaper of national circulation,*
then unless the prospectus is advertised there has not been a publication of the prospectus.
- (3) A binding contract or legally enforceable obligation shall not be entered into in response to an invitation to the public in respect of the shares or debentures of a public company until after the expiration of the offer period, and an application, offer or acceptance by a person in response to the invitation is revocable by that person at any time before the expiration of the offer period.*
- (4) Subsection (3) does not invalidate a genuine underwriting agreement in respect of those shares or debentures.”*

The waiting period is to provide enough time to the members of the public to go through the prospectus, conduct the necessary due diligence on the company and obtain advice on the company and securities on offer prior to creating any binding obligation. The Act provides for a period of twenty-one days from the period of publication of the prospectus as the waiting period. Where the rules of a stock exchange on which the shares or debentures is listed and traded or to which an application has been made to list and trade the shares requires the prospectus to be advertised, the publication of the prospectus is not deemed to be made for the purposes of the twenty-one days

waiting period until the advertisement is made. No binding obligation is created pursuant to an application, offer or acceptance within the waiting period. An offer made within that period can be revoked within that period. However, the waiting period does not affect the validity of an underwriting agreement in relation to the shares or debentures. The underwriting agreement refers to an agreement under which an underwriter, which may be financial institutions, insurances companies, pensions funds, agrees to purchase the shares or debentures which are not taken by the public within the period permitted for an offer from the public, usually at a discount. The Act, however, sets the discount that can be granted at ten percent or such a lesser rate as stated in the constitution of the company.¹⁵⁵⁰

Once the waiting period has expired, a binding obligation can be created in relation to the application, offer or acceptance relating to the public invitation. However, an application for shares or debentures pursuant to a general invitation cannot be revoked within seven days after the waiting period.¹⁵⁵¹ The application or offer can be revoked after the expiration of the seven days after the waiting period. The only exception where the application can be revoked prior to the expiration of the seven days is where the person responsible for the prospectus has given public notice seeking to exclude or limit his responsibility in accordance with section 313 of the Act.¹⁵⁵² An application for shares or debentures pursuant to a general invitation to the public can, therefore, be revoked within the waiting period or after seven days from the waiting period.

22.6 Refusal of permission to list on stock exchange

Members of the public may be enticed to acquire shares or debentures of a public company on the understanding that such shares or debentures will be listed and traded on a stock exchange. In the event that an application to list on the stock exchange is refused or not granted, the Act provides that the agreement to acquire the shares becomes void. Section 311 of Act 992 provides that:

“(1) Where a prospectus, issued in connection with a general or restricted invitation to the public to acquire shares or debentures in a public company states that application has been or will be made for permission for the shares or debentures to be dealt in on a stock exchange, an agreement to acquire those shares or debentures made pursuance of that prospectus shall become void if the application is refused by that stock exchange or if permission to deal in the shares or debentures is not granted within twenty-eight days after the expiration of the offer period.

(2) Where an agreement becomes void in accordance with subsection (1), the person or persons making the invitation shall forthwith repay and restore without

¹⁵⁵⁰ Section 60(a) of Act 992.

¹⁵⁵¹ Section 310 of Act 992.

¹⁵⁵² *Ibid.*

interest the money and other property received from a person in response to the invitation.

- (3) Where the money or other property is not repaid or restored in accordance with subsection (2) within eight days after it becomes repayable or returnable, the person or persons making the invitation and, in the case of a body corporate, the directors of that body corporate is or are jointly and severally liable to repay that money or restore that property with interest at the yearly interest rate of a ninety-one day government treasury bill on the amount or value from the expiration of the eighty days.”**

The Act renders void a contract entered into to acquire the shares or debentures pursuant to a public invitation in relation to which the prospectus relating to the shares or debentures stated that an application has or will be made to a stock exchange to list and trade in those shares or debenture, if the application is refused by the stock exchange or the permission is not granted within twenty-eight days after the expiration of the waiting period. Where the agreement is voided, the person making the invitation is required to repay or restore to the person who responded to the invitation the amount of money or property received from that person. No interest is, however, chargeable on the amount. In the case where the person making the invitation is a corporate entity and the money or property has not been repaid or returned within eight days after the agreement is voided, the directors of the corporate entity will be jointly and severally liable to repay the money or restore the property with interest calculated from the expiration of the eighth day at the yearly interest rate of ninety-one day government treasury bill on the amount or value of the property. A director is not liable if the director established that the failure to repay the money or restore the property is not due to misconduct or negligence of the director.¹⁵⁵³

In order to ensure that the money paid is available to repay the person who responded to the public invitation in the event that the agreement is void, the law requires that payment should be made into a separate bank account and held in trust. Section 311(5) of Act 992 provides that:

“(5) So long as the person making the invitation may become liable to repay the money in accordance with subsection (2), the moneys received in response to the invitation shall be kept in a separate bank account and shall be held on trust to give effect to this section; and where there is a default in complying with this subsection, the persons making the invitation and, in the case of a body corporate, every officer of the body corporate who is in default is liable to pay to the Registrar, an administrative penalty of seven hundred and fifty penalty units.”

¹⁵⁵³ Section 311(4) of Act 992.

22.7 Minimum subscription

Shares or debentures are issued by a company, public or private, for one purpose. That is to raise capital for the business of the company. Consideration received from the issue of shares adds to the stated capital¹⁵⁵⁴ whilst loans raised through debentures constitute loan capital¹⁵⁵⁵. Where a public company seeks to raise capital through public invitation, the Act requires the prospectus to state the purpose for which the capital is being raised. In addition, the Act requires the directors of the company to state the minimum subscription amount that must be raised for the company to be able to proceed with the use of capital raised for the stated purpose. This is to avoid a situation where the company is unable to raise the required minimum amount and so is unable to undertake the activity for which the capital is intended leading to the possibility of diverting the lesser amount raised to ventures other than that for which the members gave the money. Related to that is the minimum amount that must be paid on the shares even where the shareholder is not paying the full amount on the shares taken.

The above requirements are dealt with under section 312 of the Act. First, the section deals with the minimum amount subscribers for the company's shares should pay upon application for the shares. Shareholders do not need to pay for all the shares at the time of acquisition or debenture holders do not need to provide the full loan amount upon the issue of the debenture. Payment can be made in the future on stated dates or upon call by the company or disbursement of the loan can be made at future dates. In relation to a public invitation, however, the Act requires a minimum payment at the time of the application. Section 312 of Act 992 provides *“(1) Where a public company makes a general invitation to the public to subscribe for any of the shares or debentures of the company, the amount of money payable on application for the shares or debentures shall not be less than twenty percent of the subscription price.”* The Act, therefore, requires that at the time of application in response to a general invitation, the applicant must pay twenty percent of the subscription price for the shares or debentures subscribed for by the person.

Secondly, the section deals with the total minimum amount the company must receive in relation to the public invitation as stated in the prospectus. The minimum subscription amount must, therefore, be stated in the prospectus prior to the company or person making the public invitation. Section 312 of Act 992 provides that:

“(2) Unless, within twenty-eight days of the expiration of the offer period, the amount stated in the prospectus as the minimum amount of money which, in the opinion of the directors, must be raised in order to provide for the matters specified in subparagraph (b) of paragraph 22 of the Tenth Schedule, in this section call the minimum subscription, has been subscribed and the amount payable on application

¹⁵⁵⁴ Section 68 of Act 992.

¹⁵⁵⁵ Section 83(1) of Act 992.

for the minimum subscription has been paid to and received by the company, an agreement to subscribe for those shares or debentures shall become void at the expiration of the twenty-eight days."

The directors must indicate in the prospectus, the minimum subscription amount. The minimum subscription amount must cover items stated in paragraph 22(b) of the Tenth Schedule of the Act. The particulars required in the prospectus are found in paragraph 22(b) of the Tenth Schedule of Act 992 which provides that:

*"Where the company is inviting or, under section 296 of this Act, is deemed to be inviting, the public to subscribe for any of the shares or debentures,
(b) the minimum amount of which in the opinion of the directors of the company must be raised by the issue in order to provide sums, or, if part of the sums is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters;*

- (i) the purchase price of a property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;*
- (ii) any expenses incidental and preliminary to the invitation and issue, including the expenses of an application to a stock exchange for permission to deal in the shares or debentures, payable by the company, and the commission so payable to a person in consideration of that person agreeing to subscribe for, or of that person procuring or agreeing to procure subscriptions for, any shares or debentures of the company;*
- (iii) the repayment of any moneys borrowed by the company in respect of any of the matters stated in this paragraph; and*
- (iv) working capital".*

The minimum subscription amount must thus cover the expenses relating to the invitation, working capital of the company, and if a property is to be acquired or has been acquired, the amount required to pay the consideration or part of the consideration to be paid. If a loan has been taken to pay for the property, then the amount required to repay the loan including interest. In the event that the minimum subscription amount has not been subscribed to or the minimum amount has not been paid and received by the company after twenty-eight days of the offer period, all agreements to subscribe to the shares or debentures of the company in relation to that public invitation is void. The agreement to subscribe to the shares or debentures will be void, twenty-eight days after the offer period, in one of three instances where:

- (a) the subscription has not been up to the minimum amount,
- (b) the subscription is up to the minimum amount but the amount paid pursuant to the subscription is not to the minimum subscription; or

- (c) the subscription is up to the minimum amount, the amount paid pursuant to the subscription is to the minimum subscription, but the amount received by the company is not up to the minimum subscription.

Once the agreement to subscribe is void under any of the above circumstances, section 312 of Act 992 provides for the following consequences:

- “(3) Where an agreement becomes void in accordance with subsection (2), the company shall repay without interest the moneys received from any persons in response to the invitation.*
- (4) If the money is not repaid in accordance with subsection (3) within eight days after it becomes repayable, the directors of the company are jointly and severally liable to repay that amount with interest at the yearly interest rate of a ninety-one day government treasury bill on the amount or value from the expiration of the eighth day.*
- (5) A director is not liable under subsection (4) if the director proves that the default in the repayment of the money was not due to the misconduct or negligence of the director.”*

The company is required to repay the money to the persons who responded to the invitation. If the repayment is done within eight days, no interest is chargeable, but if not, the company must pay interest. If the company fails to repay within the eight days, the directors are jointly and severally liable for the payment unless the director can establish that the failure to pay is not due to misconduct or negligence on the part of the director. In the event that the agreement to subscribe is void in accordance with the Act, the Act requires the sums of money received in response to the invitation to be kept in a separate bank account and held in trust to give effect to repayment.¹⁵⁵⁶ Failure to keep the money in a separate account as trustee attracts a penalty in the nature of an administrative fine imposed on the company and every officer of the company who is in default.¹⁵⁵⁷

22.8 Remedy for mis-statement or omissions in a prospectus

It is important that the prospectus discloses full information to the public who will rely on the prospectus to enter into an agreement with the company or an existing shareholder to acquire the shares or debentures of the company. The Act, therefore, provides for civil and criminal remedies for mis-statement and omissions in a prospectus. This is to protect the public from being misled to acquire shares or debentures of a public company without full and truthful disclosures of information required in the prospectus in accordance with the Act. Four principal remedies are provided under the Act. The remedies provided cover both civil and criminal remedies as follows:

¹⁵⁵⁶ Section 312(6) of Act 992.

¹⁵⁵⁷ Ibid.

- (a) compensation for the loss suffered
- (b) rescission of the agreement to acquire the shares or debentures
- (c) payment of administrative penalties
- (d) imprisonment

22.8.1 Compensation

Section 313(1) of Act 992 which states the civil remedies provides that:

“(1) Where a prospectus published in connection with a general or restricted invitation to the public in respect of shares or debentures of a public company contains an untrue statement or omits to state any of the particulars or to set out any of the reports which, under this Act, it is required to state or set out, subject to this section, a person specified in subsection (2) is liable to pay compensation to the persons who acquire or dispose of the shares or debentures on the faith of the prospectus for the loss they may have sustained by reason of the untrue statement or omission.”

The subsection sets out three instances where compensation may become payable to a person who relied on the prospectus and incurred a loss. First, the prospectus contains statements that are false or untrue. Second, the prospectus omits to state particulars required under the Tenth Schedule of the Act. Third, the prospectus does not contain any of the reports required under the Tenth Schedule of the Act. In all these instances, the person seeking compensation must have relied on the prospectus to acquire the shares or debentures of the company. Such acquisition must have resulted in the person incurring a loss which he otherwise would not have incurred but for the false statement or omission.

The compensation is payable by persons indicated in subsection (2) of section 313 of the Act. Section 313(2) of Act 992 provides as follows:

“(2) Subject to this section, the following persons are liable to pay compensation in accordance with subsection (1):

- (a) a person making the invitation to which the prospectus relates;*
- (b) a person who was a director of a body corporate making the invitation at the time when the prospectus was published;*
- (c) where the invitation was made by the company to whose shares or debentures the invitation relates,*
 - (i) a person who has personally authorised to be named and is named in the prospectus as a director or as having agreed to become a director, immediately or after an interval of time; or*

- (ii) a promoter of the company who was a party to the preparation of the prospectus; and*
- (d) a person, who pursuant to section 307 has consented to the publication of the prospectus containing a statement by that person as an expert."*

A person who incurred loss as a result of relying on a prospectus that contains a false statement or omits a statement or report required to be included can claim compensation from any of the above persons, who in essence have the responsibility to ensure the prospectus does not contain the false statement or is complete. Compensation may be claimed from a person who makes the invitation to which the prospectus relates, or a person who is a director of the body corporate making the invitation, or persons named in the prospectus as a director or who has agreed to be appointed a director, or an expert who consented for his statement to be included as an expert statement. The Act does not impose strict liability on these persons. The Act, therefore, exempts them from the liability to compensate in some instances listed in section 313 of Act 992.

Section 313(3) to (6) create exceptions or provide some defences available to the above persons who otherwise may be liable to the person incurring the loss. Section 313 of Act 992 provides as follows:

- "(3) A person is not liable under subsection (1) and (2) if that person proves*
- (a) that as regards an untrue statement, not purporting to be made on the authority of an expert, other than that person, or of a public official document or statement, that person had reasonable grounds to believe and did believe up to the time of the publication of the prospectus or, where a waiting period applies, up to the expiration of the waiting period, that the statement is true;*
 - (b) that as regards an omission, that person was not cognisant of the omission up to the time of the publication of the prospectus or, where a waiting period is applicable, up to the expiration of the waiting period;*
 - (c) that as regards an untrue statement purporting to be statement by an expert, other than that person, or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation, and that that person had reasonable grounds to believe and did believe up to the time of the publication of the prospectus that the person making the statement was competent to make it and had given the consent required by section 307 and had not withdrawn that consent before the date of registration of the prospectus.*

- (d) that as regards an untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document;*
 - (e) that after the publication of the prospectus but before expiration of a waiting period that person, on becoming aware of an untrue statement in the prospectus or omission from the prospectus withdrew the consent given to the prospectus and gave reasonable public notice of the withdrawal and of the reason for the withdrawal;*
or
 - (f) that the prospectus was published without the knowledge of, and that, on becoming aware of the publication, that person forthwith gave reasonable public notice that it was published without the knowledge of that person.*
- (4) A person specified in subparagraph (i) of paragraph (c) of subsection (2) is not liable under subsections (1) and (2) if that person proves that having consented to being named as a director or as having agreed to become a director the consent was withdrawn before the registration of the prospectus and that it was published without the authority or consent of that person.*
- (5) A person specified in paragraph (d) of subsection (2) is not liable under subsections (1) and (2) of this section,*
 - (a) if the untrue statement or omission was not made by that person;*
 - (b) if that person proves*
 - (i) that as regards an untrue statement made by that person, that person was competent to make the statement and had reasonable grounds to believe and did believe, up to the date of publication of the prospectus or, where a waiting period applies, up to the expiration of the waiting period, that the statement was true;*
 - (ii) that having given consent under section 307 that person withdrew the consent in writing before delivery of the prospectus for registration; or*
 - (iii) that, after delivery of the prospectus for registration but before publication of the prospectus, or, where a waiting period applies, before the expiration of the waiting period, that person, on becoming aware of the untrue statement or omission, withdrew the consent in writing and gave*

reasonable public notice of the withdrawal, and of the reason for the withdrawal.

(6) Where,

(a) a person is named in prospectus as a director of a company or as having agreed to become a director of a company, and that person has not consented to become a director or has withdrawn that consent before the publication of the prospectus and has not authorised or consented to the publication, or

(b) the consent of a person is required under section 307 to the publication of the prospectus and that person has not given that consent or has withdrawn the consent before the publication of the prospectus, a person making the invitation to which the prospectus relates and a person who was a director of a body corporate making the invitation at the time when the prospectus was published, except a person without whose knowledge or consent the prospectus was published, is liable to indemnify the person referred to in paragraph (a) or (b) of this subsection against damages, costs and expenses to which that person may be made liable by reason of the name having been inserted in the prospectus or of the inclusion in the prospectus of a statement purporting to be made by that person as an expert, or in contesting legal proceedings brought against that person in respect of the prospectus."

The above are defences open to any person coming under subsection (2) of section 313 of the Act who is liable to compensate a person who incurred loss relying on a prospectus containing false statements or omitting statements or reports to acquire shares or debentures of a public company. In essence, the person must show good faith belief in the statement or that the person exercises diligence after becoming aware of the false statement or omission, or lack of responsibility on the part of the person in the publication of the false statement or omission of the statement or report. A person who successfully established the defence will not be liable to pay the compensation to the person who has suffered the loss.

22.8.2 Rescission

A person who entered into a contract to acquire from a public company or dispose to the public company shares or debentures of that public company in reliance on a prospectus that contains a false statement may rescind the contract. Section 314 of Act 992 provides that:

"(1) Where a person acquires shares or debentures of a public company from that company or disposes shares or debentures of a public company to that company as a result of an untrue statement of a material fact made, whether innocently

or fraudulently, in a prospectus published in connection with an invitation to the public made by or on behalf of that company, that person is, subject to subsection (2), entitled to rescind the acquisition or disposition of the shares or debentures.

- (2) A person is not entitled to rescission unless that person claims to rescind with reasonable promptitude after discovering that the untrue statement was made and, in any case, before the commencement of the winding up of the company."*

The remedy of rescission is only available in the event of a false statement in the prospectus. The section does not expressly provide for rescission in the event of omission of statement or reports required under the Tenth Schedule of the Act. However, in the event the omission of statement or report required renders untrue the statements in the prospectus, the remedy of rescission, it is suggested, must be available to the person entering into a contract to acquire shares or debentures based on the prospectus. Secondly, the untrue statement must relate to a material fact. It is therefore not all untrue statements that will give rise to the remedy of rescission. The untrue statement must be of material fact, and not an opinion. Thirdly, the remedy of rescission is only available where the contract of acquisition or disposal of the shares or debentures is between the person seeking to rescind and the public company whose shares or debentures are the subject of the contract. Therefore, where a person acquires or disposes of shares or debentures to a person other than the public company, the remedy of rescission will not be available. Fourthly, the remedy of rescission is lost when it is not exercised within a reasonable time after the person becomes aware of the false statement and before the commencement of the winding up of the company.

22.8.3 Fine and imprisonment

Stating false statement or omitting particulars or reports required under the Tenth Schedule of the Act also constitutes a criminal offence for which a person can be convicted. Upon conviction, a person is liable to pay a fine or be imprisoned or both. Section 318 of Act 992 provides that:

- "(1) Where a prospectus, an advertisement or a circular published in relation to an invitation to the public to acquire or dispose of shares or debentures of a company or to deposit money with a company,*
(a) contains an untrue statement, or
(b) omits truthfully to state any of the matters which, under a section of this Part, it is required to state,
a person who authorised the publication of the prospectus, advertisement or circular commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than one thousand penalty units or a term of imprisonment of not less than one year and not more than two years or to both the fine and

imprisonment, or in the case of a body corporate to a fine of not less than five hundred penalty units and not more than one thousand penalty units, unless that person proves that, the untrue or omitted statement was immaterial or that, that person had reasonable grounds to believe and did believe, up to the time of publication of the prospectus that, the statement was true.

(2) For the purpose of subsection (1), a person has not authorised the publication of a prospectus by reason only of that person having given the consent required by section 307 and the Registrar has not authorised the publication of an advertisement or circular by reason of the Registrar having given the consent referred to in section 316."

The criminal offence is imposed on the person who authorised the publication of the prospectus, advertisement or circular for the public invitation. The person is liable on conviction to pay a fine of between five hundred to one thousand penalty units or terms of imprisonment between one to two years, or both the fine and term of imprisonment. However, where the person who authorised the publication of the prospectus, advertisement or circular of public invitation is a body corporate, the body corporate can only be liable for a fine and not imprisonment. The section also makes available a number of defences to the person. The person may escape liability where the person establishes that the untrue statement or omission is not material, or that the person has reasonable ground to believe and did believe the statement was true up to the time of publication. A person who gave consent as an expert for a publication of a statement of that person is not for that reason only deemed to have made publication for the purposes of criminal liability under the section. Consent given by the Registrar also cannot be construed as publication by the Registrar.

22.9 Public invitation to deposit money with public companies

As indicated earlier, public companies are companies that do not have any of the restrictions or prohibitions provided in section 7(5) of Act 992 in the constitutions of that companies.¹⁵⁵⁸ Of relevance is the prohibition in the constitution of a private company not to invite the public to deposit money with the private company, whether for a fixed period or payable at call with or without interest. Even in the absence of the prohibition, a public company that has satisfied the requirements of statement in lieu of prospectus and prospectus is not permitted to make a public invitation for deposit of money. Section 316(1) of the Act impliedly prohibit such invitation to be made by public companies unless the public company is a bank or financial institution licensed to do so or the public company is permitted in writing by the Securities & Exchange Commission to do so.

¹⁵⁵⁸ Section 7(7) of Act 992.

Section 316 of Act 992 provides that:

- “(1) Despite section 294, an invitation to the public to deposit money with a public company may be made if,*
- (a) the public company is licensed, under the Banks and Specialised Deposit-Taking Institution Act, 2016 (Act 930) and Non-Banking Financial Institutions Act, 2008 (Act 774) to carry on banking business; or*
 - (b) before the making of the invitation, the written consent of the Commission has been obtained to the making of the invitation and the invitation is made in accordance with the conditions and restrictions that the Registrar has imposed.”*

A public company which satisfies the general requirements of a public company in relation to statement in lieu of prospectus and prospectus cannot, therefore, invite the public to deposit money with the company. The restriction is applicable notwithstanding that the public company does not have the prohibition against such invitation in its constitution. An invitation to the public to deposit money with a public company can only be made by a public company which is registered and licensed to carry on the business of banking or written consent has been obtained from the Commission.

The Commission in granting the written consent may require the Registrar to approve the advertisement or circular to be used in relation to the invitation.¹⁵⁵⁹ The Act also makes a provision for remedy of compensation where the advertisement or circular used in the public invitation to deposit money contains a false statement.¹⁵⁶⁰ The person must have relied on the advertisement or circular to incur a loss due to the false statement.¹⁵⁶¹ The person who is liable to pay the compensation is the person who made the publication or is a director of a body corporate making invitation at the time when the advertisement or circular was published.¹⁵⁶² The person may escape liability to compensate if the person established he has reasonable ground to believe and did believe the truth of the statement in the advertisement or circular, or that the publication was made without knowledge of the person and that he issued a public disclaimer within a reasonable time of becoming aware of the publication of the advert or circular.¹⁵⁶³

The person who deposited the money with the public company on reliance on the false statement of a material fact in the advertisement or circular is entitled to recover from the public company the

¹⁵⁵⁹ Section 316(2) of Act 992.

¹⁵⁶⁰ Section 316(3) of Act 992.

¹⁵⁶¹ Ibid.

¹⁵⁶² Ibid.

¹⁵⁶³ Section 216(4) of Act 992.

money that is deposited.¹⁵⁶⁴ The public company is required to immediately refund the money with interest at a yearly rate of five percent or the rate agreed on the deposit if higher.¹⁵⁶⁵

22.10 Waivers and modifications

The Act prohibits parties to a contract to waive compliance with the requirement on public companies in sections 303 to 319 of the Act. Any such waiver is void. Section 317 of the Act provides that: *“A condition purporting to require or bind a person to waive compliance with a section of this Part, or purporting to affect that person with notice of a contract, document or matter, not specifically referred to in a prospectus or statement in lieu of prospectus, advertisement or circular, is void.”* However, the Securities & Exchange Commission has the power to waive or modify the application of the sections. Section 319 of Act 992 provides:

“(1) Despite any other provision of this Act, the Commission may waive or modify the requirements of a provision of Part A of Chapter Four in relation to an invitation to the public to acquire or dispose of shares or debentures or to deposit money with the company for a fixed period or payable at call whether bearing or not bearing interest.

(2) An invitation and a prospectus relating to that invitation shall be deemed to comply with this Act to the extent that the Commission has waived or modified any of the requirements.”

The Commission can waive or modify the application of sections 303 to 318 to a public company. Once waived or modified by the Commission, an invitation or prospectus made or issued based on the waiver or modification will be deemed to satisfy the requirements.

22.11 Listing of securities of a public company

The advantage of a public company is the ability to invite the public to acquire the shares and debentures of the company. A public company is thus able to raise capital – stated capital and loan capital – from the public. An easy way to sell its shares and debentures to the public is through available financial markets. The stock exchange serves as one of the marketplaces for a company to offer its securities to the public and to trade in its securities. A public company does not need to be listed. There is, therefore, a distinction between a public company and a listed company. A listed company must be a public company.¹⁵⁶⁶ A listed company is a public company who has successfully made an application to a stock exchange and whose shares or debentures are listed on the exchange.

¹⁵⁶⁴ Section 316(5) of Act 992.

¹⁵⁶⁵ Ibid.

¹⁵⁶⁶ Rule 4(6)(a) of the Listing Rules: Regulations 2 of L.I. 1509.

As indicated, the Securities and Exchange Commission, established under the Securities Industry Act, 2016 (Act 929) regulates the offer and trading of securities and generally the financial market. A public company must submit its statement in lieu of prospectus and prospectus for approval of the Commission prior to any public invitation. The Commission is also empowered to approve securities exchange that offers a marketplace for listing and trading in securities of a public company.¹⁵⁶⁷ Section 216 of the Securities Industry Act, 2016 (Act 929) provides that *“‘securities exchange’ means an exchange or approved trading facility such as a stock exchange, commodity exchange, metal exchange, petroleum exchange, over the counter market and other derivatives exchanges that use instruments for trading”*. The section further provides that *“‘stock exchange’ means a market, exchange, a facility or any other place at which or on which securities are offered for sale, purchase or exchange”*. The Companies Act, 2019 (Act 992) provides that *“‘stock exchange’ means any body corporate or association of persons operating an exchange or market on which securities are acquired and disposed of”*.

Section 42 of Act 929 provides that *“A person shall not establish or assist in establishing or maintaining or pose as providing or maintaining a securities exchange unless that person is authorised under the Act.”* Section 43 of Act 929 states the requirements of the application to the Commission for authorisation of a securities exchange. Among the requirements, the approval can be granted to only a body corporate with rules approved by the Commission.

The Ghana Stock Exchange has been approved as a securities exchange and provides a marketplace for listing and trading in securities. The Ghana Stock Exchange has listing rules the provides for the conditions that must be satisfied prior to listing and continuing conditions that must be complied with for continue listing and trading of listed securities. The Listing Rules have been passed as the Stock Exchange (Ghana Stock Exchange) Listing Regulations 1990 (L.I. 1509). Listing and trading also require the involvement of other operators who are required to be licensed by the Commission. Section 109 of Act 929 provides:

- “(1) A person shall not carry on business as a securities exchange, hedge fund, private equity fund, venture capital fund, nominee, credit rating agency, broker-dealer, primary dealer, investment adviser, fund manager, trustee, custodian, securities depository, clearing and settlement services, registrar, underwriter, issuing house or as any other operator required to hold a licence as the Minister by notice in the Gazette may prescribe, or pose as carrying on the business unless that person holds a valid licence issued under this Act.*
- (2) A person shall not act as a representative for a person referred to in subsection (1) unless that person is the holder of a relevant representative’s licence issued under this Act.*

¹⁵⁶⁷ Sections 42 and 43 of Act 929.

(3) A person desirous of performing the function of a market maker in the securities industry shall obtain a licence from the Commission and shall comply with the rules and guidelines issued by the Commission."

A public company which has satisfied the requirements of the statement in lieu of prospectus and the prospectus must, in addition, satisfy the listing requirement spelt out under the Stock Exchange (Ghana Stock Exchange) Listing Regulations 1990 (L.I. 1509) and Ghana Stock Exchange Rule Book (generally referred to as the Listing Rules) to be able to list on the Ghana Stock Exchange. A public company that intends to list must, therefore, satisfy the listing requirements and requirements of the Commission. The Commission and approved securities exchange complement each other in dealing with the listing and trading of securities with the Commission as the regulator. The approved securities exchange must provide required assistance to enable the Commission perform mandated tasks under Act 929.¹⁵⁶⁸ The Commission exercises oversight over the operations of the approved securities exchange including disciplinary measures taken by the exchange.¹⁵⁶⁹

The listing rules and the Regulations provide for requirements for listing share and debt instruments. These requirements cover the need to appoint a licensed dealing member,¹⁵⁷⁰ application to be made¹⁵⁷¹ and supporting documents to be submitted¹⁵⁷². In addition, the Listing Rules cover matters that must be in the registered constitution of the public company¹⁵⁷³, qualification of the directors and composition of the board of directors including the requirement of having fifty percent majority of the directors being non-executive directors¹⁵⁷⁴, requirements of annual returns and financial statements of the company which must be at least three years, and other requirements¹⁵⁷⁵. In addition, there are requirements relating to the capital and shares spread for listing.¹⁵⁷⁶ The company is to meet stated post-floating capital requirements relating to First List and Second List and must float to the public at least twenty-five percent of number of its issued shares.¹⁵⁷⁷ There are also requirements relating to listing debt securities by public companies.¹⁵⁷⁸

The decision to permit listing on the exchange is the sole decision of the Ghana Stock Exchange acting through its Council.¹⁵⁷⁹ It is recommended in practice to engage with the Ghana Stock

¹⁵⁶⁸ Section 45 of Act 929.

¹⁵⁶⁹ Section 46 of Act 929.

¹⁵⁷⁰ Rule 3 of the Listing Rules and regulation 1 of L.I. 1509.

¹⁵⁷¹ Rules 4(1), 22 and 24 of the Listing Rules; Regulations 2(1), 20 and 22 of L.I. 1509.

¹⁵⁷² Rules 12 and 23 of the Listing Rules; Regulations 10 and 21 of L.I. 1509.

¹⁵⁷³ Part V of the Listing Rules; Part V of L.I. 1509.

¹⁵⁷⁴ Rule 11 of the Listing Rules; Regulation 8 of L.I. 1509.

¹⁵⁷⁵ Rule 10 of the Listing Rules; Regulation 7 of L.I. 1509.

¹⁵⁷⁶ Rule 6 of the Listing Rules; Regulation 4 of L.I. 1509.

¹⁵⁷⁷ Rule 6 of the Listing Rules; Regulation 4 of L.I. 1509.

¹⁵⁷⁸ Rule 7 of the Listing Rules; Regulation 5 of L.I. 1509.

¹⁵⁷⁹ Rule 5(1) of the Listing Rules; Regulation 3 of L.I. 1509.

Exchange for specific conditions that must be satisfied for listing. The Ghana Stock Exchange also maintains the power to require compliance with additional requirements that may be issued and grant exemptions from compliance requirements in the Listing Rules.

Once a public company list its shares or debentures on the stock exchange, those shares and debentures can be acquired by members of the public. In addition, the shares and debentures can be traded on the secondary market where existing holders can sell those instruments as and when there are existing buyers who agreed to acquire those instruments. A company can also de-list from the stock exchange on its own or by the Stock Exchange subject to notice requirements.

As noted earlier, the transactions in securities through the stock exchange are generally done through operators who must be licensed by the Securities and Exchange Commission. The Commission regulates the operators including activities of the stock exchange. In exercise of its powers, Act 929 provides for rules on false trading and market rigging transactions¹⁵⁸⁰, stock market manipulation¹⁵⁸¹, false or misleading information¹⁵⁸², fraudulent inducing persons to deal in securities¹⁵⁸³, dissemination of information about illegal transactions¹⁵⁸⁴, employment of manipulative and deceptive devices¹⁵⁸⁵, prohibition of dealings in securities by insiders¹⁵⁸⁶, and penalties for such prohibited dealings¹⁵⁸⁷.

In addition, there are stringent disclosure requirements that must be satisfied in all public offerings and dealings in securities especially for listed public companies. Part VII of the Listing Rules provides for such disclosure requirements. The listed public company must maintain high standards of disclosure, fully disclose to the public information that enables informed investment decisions, discloses information that have material effect on the market activity and price of list listed securities. The Rules listed matters on which immediate disclosures must be made and indicate that when in doubt, one must err on the side of disclosure.

Other than the stock exchange, the Ghana Stock Exchange runs a parallel marketplace, the Ghana Alternative Market (GAX) which provides for less stringent rules under the Ghana Alternative Market Rules for listing of public companies. The GAX Rules are less stringent in that it relaxes some of the conditions that must be satisfied for listing on the Ghana Stock Exchange. Particularly, it

¹⁵⁸⁰ Section 147 of Act 929.

¹⁵⁸¹ Section 148 of Act 929.

¹⁵⁸² Section 149 of Act 929.

¹⁵⁸³ Section 150 of Act 929.

¹⁵⁸⁴ Section 151 of Act 929.

¹⁵⁸⁵ Section 152 of Act 929.

¹⁵⁸⁶ Section 153 of Act 929.

¹⁵⁸⁷ Section 154 of Act 929.

makes it possible to list start-up companies which may not satisfy the capital requirements and minimum number of years of operation for listing on the stock exchange.

23.0 REMEDIES FOR CORPORATE WRONGS

23.1 Introduction

A company as a person may be wronged by the shareholders or officers of the company or third parties that deal with the company by breaching a contract with the company, committing a wrong under tort or act contrary to law in relation to the company. A director may in acting on behalf of a company breach the duties imposed on the director by law. A shareholder may fail to pay for the shares issued by the company. An employee may breach the employment contract between the employee and the company. Persons entrusted with the power to administer the business of the company may fail to either administer the business or wrongly administer the business of the company. Persons who are to take decision on behalf of the company may breach the law in taking the decision on behalf of the company, take wrong decision on behalf of the company or take decision not in the interest of the company. The negligence of other persons may cause damage to the company or the company may be defamed by a publication made by others. Similarly, a company may commit wrong against other persons, either related persons, as its officers, shareholders or debenture holders, or third parties. The negligence of the company may cause damage to others. A company may breach a contract of sale between the company and others. A company may breach a law.

In short, a wrong may be committed against the company under law, tort or contract or the company may commit wrong against third parties under law, tort or contract. There should not be any difficulty in bringing an action to remedy such wrongs either by the company or against the company. A recognition that the company is a person under the doctrine of the separate legal personality¹⁵⁸⁸ and related principle that the company can sue and be sued in its own name¹⁵⁸⁹ leads to the simple understanding that the persons wronged by the company can take legal action against the company to assert the right, the same way the company may take legal action against others to assert the right of the company.

However, the complication is the fact that the company is an artificial person. The decision to take legal action to assert the right of the company must be taken by others vested with the power to do so on behalf of the company. The wrong may be committed against the company by the very persons charged with the responsibility to take legal action on behalf of the company. Directors may breach duties owed to the company. The directors or colleague directors may not take legal action on behalf of the company against the offending directors. Secondly, even though, the wrong may be directly against the company, it affects others. A wrong committed by a third party against the company

¹⁵⁸⁸ *Salomon v. Salomon & Co* [1897] AC 22; [1895-9] All ER 33; *Morkor v. Kuma* (East Coast Fisheries Case) [1998-99] SCGLR 620.

¹⁵⁸⁹ *Ibid.* See also section 14(2) of Act 992.

may directly affect the financial performance of the company hence the payment of dividend to shareholders who may want to assert their rights. Thirdly, since the corporate powers are exercised through a majority decision, either by the board or members, the minority may be of the view that the decision of the majority is wrong or a decision not to take an action in the name of the company against a third party is wrong and may want to take legal action on behalf of the company against the majority in such instances or against the third party. Fourthly, given its artificial personality, a third party wronged by the company may seek to take direct action against the person who actual occasioned the wrongful action or authorised the wrongful action on behalf of the company.

In view of the above complication, this chapter on remedies for corporate wrongs discusses the issues on who institutes action for wrongful actions or omissions against the company; in the event the company is to take action, who can take legal action on behalf of the company; what are the specific corporate wrongs against whom legal actions can be taken; and what specific remedies are available for such wrongs.

22.2 Rule in *Foss v. Harbottle*

In 1843, the court discussed the issue as to who can take legal action on behalf of the company for an alleged wrong committed against the company in the case of *Foss v. Harbottle*¹⁵⁹⁰. The case laid down the general principle applicable in the institution of legal action for corporate wrongs. However, there have been a number of modifications and exceptions to the principle established by the case in subsequent cases and by statutory interventions. In view of the scope of the modifications and interventions, it may be argued that principles established by the case may no longer be applicable. A discussion of the principles established by the case and subsequent exceptions by cases and statute is useful.

*Foss v. Harbottle*¹⁵⁹¹ - in this case, Richard Foss and Edward Starkie Turton were two minority shareholders in the company called "Victoria Park Company". The Company had been set up in September 1835 to buy 180 acres (0.73 km²) of land near Manchester (which became Victoria Park, Manchester). The claimants alleged that a number of improper and fraudulent transactions have been entered into and the property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property by the directors. That the directors have made a secret profit and breached their fiduciary duties to the Company. The Claimants asked that the directors and officers liable for the wrongs be held accountable to the company and that a receiver be appointed. The defendants were the five directors of the company – Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, Richard Bealey – and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane); and also H Rotton, E Lloyd, T Peet, J Biggs

¹⁵⁹⁰ (1843), 2 Hare 461; 9 Digest (Repl.) 36.

¹⁵⁹¹ *Ibid.*

and S. Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupts. The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has the standing to sue. That two rules are applicable in an action for a wrong committed against the company: firstly, the "*proper plaintiff rule*", that a wrong done to the company may be asserted by the company alone; and secondly, the "*majority rule principle*", that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere. The Vice-Chancellor reasoned that it would be redundant for the court to do what the company could easily and validly undo. Wigram, V-C stated:

"The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the Attorney-General v Wilson (1840) Cr & Ph 1 (without going further) it may be stated as undoubted law that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the Attorney-General v Wilson in this – that, instead of the corporation being formally represented as Plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of—the Plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

*It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *primâ facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative...*

The first objection taken in the argument for the Defendants was that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested it would be too much to hold that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private

property, are to be deprived of their civil rights, inter se, because, in order to make their common objects more attainable, the Crown or the Legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in Wallworth v Holt (4 Myl & Cr 635; see also 17 Ves 320, per Lord Eldon) and other cases would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, rules which, though in a sense technical, are founded on general principles of justice and convenience; and the question is whether a case is stated in this bill entitling the Plaintiffs to sue in their private characters...

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might primâ facie entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorised by the powers of the Act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of Preston v The Grand Collier Dock Company (1840) 11 Sim 327, SC; 2 Railway Cases 335.

On the first point it is only necessary to refer to the clauses of the Act to shew that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the Act of Incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is that, although the Act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui

que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions...

*The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise? But this part of the case is of greater difficulty upon the merits. I follow, with entire assent, the opinion expressed by the Vice-Chancellor in *Preston v The Grand Collier Dock Company*, that if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the Act. The mortgagees are not Defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the Defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal Acts are sought to be visited personally upon the directors. The*

money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question—the question of confirmation or avoidance—cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.”

In brief, the position of the court is that the rightful plaintiff or claimant in the event of wrong against the company is the company. That is, where the company suffers damages due to the action of third parties or constituent, the right party to take legal action is the company and not members. This is known as the *proper plaintiff rule*. Secondly, that so long as the company could confirm or avoid the impugned matter through rectification by a decision of the majority of the shareholder, the minority shareholders could not sue the directors personally, or sue in the name of the company, in respect of the impugned matter. This is known as the *majority rule principle*. In other words, the general common law rule provides that where a decision or act done is irregular, the minority cannot sue in their name (since they are not proper plaintiff) and cannot also sue in the name of the company once the irregular act or decision can be rectified by the majority.

The majority rule principle and the proper plaintiff rule as developed in the case of *Foss v. Harbottle*¹⁵⁹² was an offshoot of the separate legal status of companies established under the *Salomon v. Salomon & Co*¹⁵⁹³. A number of cases have further explained the proper claimant or plaintiff rule and the majority rule principle.

¹⁵⁹² Ibid.

¹⁵⁹³ [1897] AC 22; [1895-9] All ER 33.

*Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2)*¹⁵⁹⁴ – in this case, a shareholder instituted an action to recover loss resulted from the diminutive value of his shares due to damage suffered by the company as a result of the action of the defendant. The Court of Appeal whilst holding that the shareholder is not the proper plaintiff to sue for the damage caused to the company explained the proper plaintiff rule @ pg. 204 as:

“elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other reliefs on behalf of C for injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in Foss v. Harbottle (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence.”

The proper plaintiff rule has also been stated in the case of *Appenteng and others v. Bank of West Africa Ltd and others*¹⁵⁹⁵ and *Bank of West Africa Ltd v. Appenteng*¹⁵⁹⁶. These cases are discussed in later subchapters.

In *Bagshaw v. Eastern Union Railway Co*¹⁵⁹⁷, Wigram V.C. explained the majority rule principle @ pg. 130 as follows:

“...if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains.”

22.2.1 Justification for the rule in Foss v. Harbottle

A number of justifications have been stated in support of the principles stated in Foss v. Harbottle. These include:

- (a) Avoiding multiplicity of suits – a single act or decision constituting a wrong against a company affects a number of stakeholders. Where the courts permit actions to be instituted by others in the name of the company or their individual names, there may be multiple suits by many stakeholders in respect of a single action or decision. The insistence that the rightful plaintiff should be the company and not any other stakeholders thus avoid multiplicity of actions in respect of the same act or decision.

¹⁵⁹⁴ [1982] Ch 204.

¹⁵⁹⁵ [1961] GLR 196 at 203 (H.C.).

¹⁵⁹⁶ [1972] 1 GLR 153 at 163 (CA).

¹⁵⁹⁷ (1849) 7 Hare 114.

In *Macdugall v. Gardiner*¹⁵⁹⁸, Mellish LJ stated the position @ pg. 25 as:

“Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them – some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation.”

*Orr v. Glasgow, Airdrie and Monklands Junction Railway Co*¹⁵⁹⁹ – in this case, an action by shareholders for a reduction on the ground of misapplication of the sums of money raised on the call was dismissed. A petition was then presented by the shareholders against the directors, managers and the Joint Stock Company for diligence and account. The court held that the action cannot be sustained. Lord Campbell LC @ pg. 803 stated:

“If one shareholder is allowed to bring such an action, then each individual who has a different complaint of his own on different parts of the accounts which have been rendered may follow the example, and the Company may be torn in pieces, and utterly ruined by the litigation in which it is involved.”

- (b) Ability of the majority to regularize the irregular act or decision: the court will not pronounce on an irregular matter where that matter can be regularized by the subsequent act of the company. Where a decision taken on behalf of the company or an act done on behalf of the company which is irregular but can be regularized by the company, the court will not entertain the action since the decision of the court may be overridden by the subsequent action of the company. The company through rectification of the prior irregular act or decision may regularize an act or decision thereby emptying the judgment of the court. The court will, therefore, not make a decision in vain.

In *Bagshaw v. Eastern Union Railway Co*¹⁶⁰⁰, Wigram V.C. stated @ pg. 130:

“... if the act, though it be the act of the directors only, be one which a general

¹⁵⁹⁸ (1875) 1 Ch. D 13.

¹⁵⁹⁹ (1860) 3 Macq 799.

¹⁶⁰⁰ (1849) 7 Hare 114.

meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains."

In *Burland v. Earle*¹⁶⁰¹, Lord Davel stated @ pg. 94 that:

"It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority is clear."

- (c) Majority rule: a decision of an association must be made by the majority when consensus cannot be achieved. Where this is not the case, the association will likely not be able to act as an association. In relation to a company made up of a group of members, the majority of members should be able to make a decision as an organ of the company which should be deemed a decision of the company. The minority should not be permitted to hold the majority by stifling decision making through instituting court action against decisions taken by the majority.

In *Cooper v. Gordon*¹⁶⁰², Stuart V.C. stated:

"The submission of the minority is the principle on which civil society is founded. It is a principle essential for that reasonable harmony, which is necessary for the coherence of all societies, great or small, civil or religious."

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*¹⁶⁰³, Lord Wilberforce stated @ pg. 229:

"The Principle of majority rule is thought by commentators to be the basis of the rule in Foss v. Harbottle."

- (d) Reluctance of the courts to make or interfere in business decision or policy: the law confers the powers to administer the business of a company on directors and in some cases the members of the company.¹⁶⁰⁴ Judges must therefore not turn themselves into managers of a company by making business decisions for the company. The courts will therefore not interfere in the decision making of a company beyond determining the lawfulness or otherwise of the business decision.

¹⁶⁰¹ [1902] AC 83.

¹⁶⁰² (1869) LR 8 Eq 249.

¹⁶⁰³ [1978] 2 MLJ 227.

¹⁶⁰⁴ Section 144 of Act 992.

Howard Smith Ltd v. Ampol Petroleum Ltd¹⁶⁰⁵ - Lord Wilberforce stated @ pg 834 that:

"It would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

In **Burland v. Earle**¹⁶⁰⁶, Lord Davel stated @ pg. 93 that:

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."

- (e) Separate legal personality: upon the incorporation of a company, the company becomes a separate legal entity with its capacity separate, distinct and independent of the members and directors.¹⁶⁰⁷ The company is clothed with the capacity to sue and be sued. As such, for a wrong committed against the company, the only rightful person to make a claim is the company and not the shareholders.

In **Morkor v. Kuma (East Coast Fisheries Case)**¹⁶⁰⁸ – Her Ladyship, Sophia Akuffo JSC stated that:

"Save as otherwise restricted by its Regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorised business. In this capacity, a company is a corporate being, which, within the bounds of the Companies Act, 1963 (Act 179) and the Regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it."

Appenteng v. Bank of West Africa¹⁶⁰⁹ – a case in which a shareholder sued the defendant for giving a company in which the plaintiff was a shareholder negligent advice. Ollenu J. stated @ pg. 203 that:

"Again on the principle laid down in Foss v Harbottle and Edwards v Halliwell"¹⁶¹⁰ that to redress a wrong done to a company or to recover money or damages due to it the action must be brought by the company itself."

¹⁶⁰⁵ [1974] 2 KB 821.

¹⁶⁰⁶ [1902] AC 83.

¹⁶⁰⁷ Salomon v. Salomon & Co. [1897] AC 22.

¹⁶⁰⁸ [1998-99] SCGLR 620.

¹⁶⁰⁹ [1961] GLR 196 (H.C.).

¹⁶¹⁰ [1950] W N 537, [1950] 2 All ER 1064.

In *Burland v. Earle*¹⁶¹¹, Lord Davel stated @ pg. 93 that:

“Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself”.

- (f) Exhaustion of local remedy: the courts have also taken the position that where local remedies are available to address a wrong, the local remedies must be exhausted prior to bringing a claim in court. An action in court must therefore be a measure of last resort after exhaustion of local remedies.

*Orr v. Glasgow, Airdrie and Monklands Junction Railway Co*¹⁶¹², Lord Campbell LC @ pg. 802-3 stated:

“Now, it seems to me that under these circumstances, until there has been a complaint made, and until there has been an effort made to obtain justice by applying to the Company, this mode of bringing an action at the suit of one or of several of the shareholders is incompetent. It may probably be unnecessary. At all events it would be right to try what could be done without appealing to a Court of Justice. Such an appeal to a Court of Justice under such circumstances evidently leads to the most inconvenient consequences, and unless it be absolutely necessary, I think it ought not to be permitted. Now here there has been no complaint at any public meeting of the Company, as far as we know, and no attempt to make any such complaint of the accounts rendered, or to call a meeting for the purpose. There are means of calling a meeting, but none of them have been resorted to. But this action is brought by several gentlemen against the Company and against the Directors of the Company, and I think that according to the analogy of the cases that have been decided in England, which rest upon principles that are equally applicable to Scotland, this ought not to be permitted. If one shareholder is allowed to bring such an action, then each individual who has a different complaint of his own on different parts of the accounts which have been rendered may follow the example, and the Company may be torn in pieces, and utterly ruined by the litigation in which it is involved.

It seems to me, therefore, that this is a case in which in the first instance, until application has been made to obtain justice by the means which the Legislature has put in the possession of every shareholder, such an action cannot be maintained. I do not find here anything which might not have been ratified and adopted by the Company if they had thought fit.”

¹⁶¹¹ [1902] AC 83.

¹⁶¹² (1860) 3 Macq 799.

The proper plaintiff rule which dictates that a wrong committed against the company must be vindicated by the company, which was based on the separate legal personality concept, answered the question of who can take action for the wrong committed against the company. In addition, the decision to take an action in the name of the company must be by the majority of directors. In that event, if a wrong which is irregular can be rectified by the majority of members, the court will not entertain the action. This was the majority rule principle. Both the proper plaintiff rule and majority rule principle were stated in the case of *Foss v. Harbottle* (supra), which is seen as the foundational case on the remedy for corporate wrong.

22.2.2 Exceptions to the rule in *Foss v. Harbottle*

A number of exceptions have been made to the two principles established in the case of *Foss v. Harbottle*. Four exceptions have been identified in the case of *Edwards v. Halliwell*^{1613, 1614}. These exceptions relate to:

- (a) protection of personal rights of members;
- (b) providing a remedy against illegal or ultra vires act;
- (c) avoiding fraud on the minority by a majority who are in control of the company; and
- (d) ensuring that requirement of a special majority is not circumvented.

*Edwards v. Halliwell*¹⁶¹⁵ - Rule 19 of the rules of the defendant trade union provided: “*The regular contributions of employed members shall be as per tables ... and no alteration to same shall be made until a ballot vote of the members has been taken and a two-thirds majority obtained.*” In December 1943, a delegate meeting of the union, without taking any ballot, passed a resolution increasing the amount of the contributions of employed members. The plaintiffs, two members of the union, claimed against two members of the executive committee of the union and the union itself a declaration that the alteration adopted at the delegate meeting was invalid. The court granted the application of the members to set aside the increase. That what is required is a special majority and not a simple majority as provided in the case of *Foss v. Harbottle*. Therefore, the rule in *Foss v. Harbottle* is not applicable in the instant case. Further, it was implicit in the rule in *Foss v. Harbottle* that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of members of the association in question as opposed to a cause of action which some individual member could assert in his own right. In the present case, the personal and individual rights of membership of the plaintiffs had been invaded and particular damage inflicted by the invalid alteration of the tables of contributions, and in such circumstances, the rule in *Foss v. Harbottle* had no application to individual members who were suing, not in the right of

¹⁶¹³ [1950] 2 All ER 1063.

¹⁶¹⁴ See Philip Ebow Bondzi-Simpson, *Company Law in Ghana*, (2nd Edition, Avant Associates Ltd, 2009) @ pg. 274.

¹⁶¹⁵ [1950] 2 All ER 1063.

the union, but in their own right to protect from invasion their individual rights as members, and, therefore, the plaintiffs were entitled to their declaration. Jenkins LJ stated @ pgs. 1066-7 that:

"The rule in Foss v. Harbottle, as I understand it, come to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the member of the company or association is in favour of what has been done, then cadit quaestio. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body or corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.

The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association, the rule has not application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases, a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a Minority Shareholder's action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance would never reach the court because the wrongdoers themselves being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interest of justice.

There is a further exception which seems to be to touch this case directly. That is the exception noted by Romer J. in Cotter v. National Union of Seamen. He pointed out that the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, as, for instance, in the case of a limited company under the Companies Act, a special resolution duly passed as such. As Romer J. pointed

out, the reason for the exception is clear, because otherwise, if the rule were applied in its full rigour, a company, which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be allow a company acting in breach of its article to do de facto by ordinary resolution that which according to its own regulations could only be done by special resolution. The exception exactly fits the present case inasmuch as here the act complained of its something which could only have been validly done, not by a simple majority, but by a two thirds majority obtained by ballot vote. In my judgment, therefore, the reliance on the rule in Foss v. Harbottle in the present case may be regarded as misconceived on that ground alone."

The common law, therefore, provides four exceptions to the principles established in the case of Foss v. Harbottle. As such, per the decision in *Edward v. Halliwell*, notwithstanding the proper plaintiff rule and the majority rule principle, a member or minority members of a company may make a claim against directors or other members if:

- (a) the wrongful action is illegal or ultra vires,
- (b) the wrongdoers are in control of the company in what amount to a fraud being perpetrated against the minority,
- (c) the act complained against could only have been duly authorised by a special majority, and not a simple majority, or
- (d) the wrongful act infringes directly on the personal right of the member.

This position has been restated in the case of *Appenteng v. Bank of West Africa*¹⁶¹⁶. In that case, the plaintiffs, shareholders of Mpotimmaa Ltd, sued the defendant bank for negligent advice to Mpotimma Ltd. The plaintiffs alleged that they had suffered loss which was personal and individual to them as a result of damage caused by the negligent advice of the defendant bank. The issue for determination was whether the plaintiff falls within the exception permitted under the common law to the proper plaintiff rule especially if the act complained of affected their personal rights. In holding that the plaintiffs had no right to maintain the action, Ollenu J stated @ pg. 202-3:

"Again on the principle laid down in Foss v Harbottle and Edwards v Halliwell that to redress a wrong done to a company or to recover money or damages due to it the action must be brought by the company itself. Counsel for the plaintiff submitted that in this case the corporate wrong has affected the individual rights of shareholders therefore comes within the exceptions to the general principle."
Now an individual right the invasion of which will give a shareholder a cause of action for wrong done to the corporate body, must be a legal right, a right which is

¹⁶¹⁶ [1961] GLR 196 (H.C.).

enforceable at law. It is true that the purpose with which a shareholder invests his money in a company is that the company should be a going concern and be able to declare profits and pay dividends. But a shareholder has no legal right that a company should always be a going concern. If the company should make profits and pay dividends good luck to him, if it should declare loss and be unable to pay dividends then that's just too bad, he cannot sue anyone to compel profits to be declared. He has a legal right that he should be paid a share of it proportionate to his investment, and he can enforce payment of that share to him. It follows from this that loss of business interests and yearly profits and dividends do not constitute an invasion of any legal rights of the plaintiffs, shareholders of Mpotimma Ltd. Therefore the plaintiffs do not come within the exception to the general principle; they have no claim".

The common law thus makes exceptions to the proper plaintiff rule and the majority rule principle as stated in the case of *Foss v. Harbottle*. Further inroads have been made by statute granting right to members, individually or as a minority, to institute an action to redress wrongs committed by decisions or acts by or on behalf of the company.

22.3 Statutory position on remedies

The statute has made inroads to the rules in *Foss v. Harbottle*, modifying the rules and creating more exceptions than stated in the case of *Edwards v. Halliwell*. Given the extent of the inroads made by statutory provisions, one is tempted to take the view that the principles established in *Foss v. Harbottle* have been abolished. However, that will not be accurate as the proper plaintiff rule continues to be applicable unless one can point to a specific statutory provision that confers a right on a member or director of a company to take action for wrong committed directly against the company which may or may not affect the member or director. In addition, the proper plaintiff rule continues, by and large, to be the position where it relates to wrong committed by persons other than persons exercising corporate powers against the company. Thus, where a party with which a company enters into a contract breaches the contract, the company still remains the rightful plaintiff in an action to enforce the contract. In relation to the majority rule principle, this seems to be essentially abolished as the courts will not permit an irregular act or decision to continue even though the majority can rectify, thereby regularizing, the otherwise irregular act or decision.

The inroads made by statute relates to rights conferred on members to sue either in the name of or on behalf of the company for breach of duties owed to the company, or wrong committed by third parties against the company where the majority of the directors fail to take action; the rights of members to sue in the name of the member either in a personal action or representative action for corporate improprieties including illegal and ultra vires or irregular acts; rights of members to bring

an action for what amounts to oppressions; and rights of members and directors to institute derivative actions for corporate improprieties. The statutory intervention is, therefore, discussed in relation to:

- (a) Right of members to sue in the name of the company
- (b) Rights of members to sue in the name of the member either in personal action or representative actions
- (c) Right of members to bring an action against illegal or irregular acts undertaken on behalf of the company
- (d) Right of members or debenture holders to bring an action for a remedy against oppression
- (e) Derivative action conferred on members and directors of the company

22.3.1 Right of members to sue

The proper plaintiff rule stated in *Foss v. Harbottle* continues to be applicable in Ghana as the general position. The proper plaintiff when a wrong is committed against the company is the company. The Act vests the power to commence legal action for wrong committed against the company to be taken by the directors in the name of the company.¹⁶¹⁷ Where the directors fail to take action, the action may be taken by the members in the name of the company.¹⁶¹⁸ If the wrong is committed by the directors in breach of the duties owed to the company, the members by ordinary resolution are permitted to take action in the name of the company.¹⁶¹⁹ In all these instances, the action is taken in the name of the company in accordance with the proper plaintiff rule. The action is by the company. However, the Companies Act, 2019 provides for a number of exceptions that allow members to institute action against corporate improprieties but not in the name of the company. The action is taken in the name of the member or members. The action may be taken by the member in the name of the member alone or in a representative capacity. The rights of members to take action in the name of the member, either in a personal capacity or representative capacity, and the right to take action in the name of the company are discussed below.

22.3.1.1 Action by a member for wrong affecting the member

Members have the right under the act to take legal actions for corporate wrongs against the member that affects the personal rights of the members. This right comes under the exception in *Edward v. Halliwell* where the wrongful act directly infringes the rights of members. Where rights are conferred on the member either under the Act or the constitution of the company, and that right has been violated, the member has the right to institute an action in court to assert such right. The action may be taken in the member's name as a personal action or taken as a representative action in the

¹⁶¹⁷ Section 144(3) of Act 992.

¹⁶¹⁸ Section 144(4)(b) of Act 992.

¹⁶¹⁹ Section 200(2) of Act 992.

name of the member and on behalf of other affected members. Examples under the Act may be illustrative on this.

Breach of the terms of the constitution amounts to a breach of a contract and a member is entitled to bring an action just like an action for breach of contract. Section 29(1) of Act 992 provides that one of the effects of the constitution of a company is that it becomes a contract under seal binding among the members, officers and the company.¹⁶²⁰ The breach of any of the terms of that contract by a member as a party to the contract is enforceable through court action. Subsection (3) of section 29 of Act 992 provides that:

“(3) In an action by a member or an officer to enforce an obligation owed under the constitution to that member or officer and any other member or officer, that member or officer, shall if any other member or officer is affected by the alleged breach of the obligation, sue in a representative capacity on behalf of that member or officer and all other members or officers who may be affected other than any who are defendants and the provisions of section 205 shall apply.”

A member is thus permitted to sue to enforce an obligation owed that member under the constitution of the company. The obligation may be owed by officers, by the company or other members. Once the obligation is owed to the member, failure or refusal to perform the obligation, entitles the member to bring an action to enforce the obligation. In the event the obligation is not owed to that member alone but to other members as well, the member must institute the action in a representative capacity in the member's name and the name of the other affected members. Section 205 of Act 992 on representative action is applicable to an action instituted by the member in a representative capacity.

The Companies Act, 2019 is also replete with provisions where rights conferred on a member can be enforced by the member against the company. A member, whose right to attend and vote at general meetings under section 34 of Act 992 is denied, has the right to take action in court except in cases of incidental omissions to give notice or non-receipt of notice. A member has a right to take action if the name of the member is omitted from the register of members.¹⁶²¹ A class of shareholders whose rights are varied contrary to section 50 of Act 992 have a right to bring an action for cancellation of the variation. A shareholder to whom the company has not issued a share certificate has the right to bring an action in court for an order directed at the company to issue the share certificate.¹⁶²² A shareholder may bring an action when a company does not make available for inspection the share deals account in accordance with section 65 of Act 992.¹⁶²³ A shareholder may bring an action in court

¹⁶²⁰ Subsection (1) of section 29 of Act 992.

¹⁶²¹ Section 38(1) of Act 992.

¹⁶²² Section 55(4) of Act 992.

¹⁶²³ Section 65(9) of Act 992.

for an injunction to restraint unlawful payment of dividend.¹⁶²⁴ A shareholder may bring an action in court where the company lawfully declared dividend but failed to pay the dividend to the shareholder in accordance with section 76 of Act 992. Where a company fails to permit inspection of minutes books, a member may apply to the court for an order compelling inspection.¹⁶²⁵ A member may bring an action against a director to enforce civil liabilities for breach of duties of the director to the company.¹⁶²⁶ A member may bring an action for an injunction to restrain an illegal act or transaction or ultra vires act which breaches the constitution of the company, or resolutions not properly passed in accordance with the Act or the constitution of the company.¹⁶²⁷ The member may also opt for a declaration of that illegal or ultra vires transaction void.¹⁶²⁸

All the above examples illustrate that the Companies Act, 2019 permits members to have recourse to court where rights conferred on the member either under the Act or the constitution of a company has been violated, or an obligation owed to the member has not been fulfilled by the company or persons who act on behalf of the company. These actions are instituted in the name of the member or affected members. A member may bring an action as a personal action, that is the affected members instituting the action in the name of the member or members, who will all be plaintiffs to the action. A member may also institute the action in a representative capacity, that is on behalf of the member and other affected members who may not necessarily consent to the action and take no active step in the proceedings. Representative action is governed under section 205 and is discussed in sub-chapter 23.4 of this book.

22.3.1.2 Action by a member for wrong affecting the company

As indicated above, members can take action for wrongs affecting the member. A wrong affecting the company must be vindicated by the company under the proper plaintiff rule. However, as an artificial person, who takes the action on behalf of the company? Under section 144 of Act 992, the default position is that the powers to manage the business of the company are vested in the directors.¹⁶²⁹ Thus, directors are to determine whether it is in the best interest of the company to institute an action in the name of the company to asserts the right of the company. Where directors failed or refuse to take legal action to assert the rights of the company, Act 992 confers on the members of a company the right to institute an action in the name of the company.

Section 144(5) of Act 992 provides that *“(5) Subject to section 145, the members in general meeting may (b) institute legal proceedings in the name of and on behalf of the company if the board of*

¹⁶²⁴ Section 72(3) of Act 992.

¹⁶²⁵ Section 167(4) of Act 992.

¹⁶²⁶ Section 200(1) of Act 992.

¹⁶²⁷ Section 218(1) of Act 992.

¹⁶²⁸ Ibid.

¹⁶²⁹ Subsection (3) of section 144 of Act 992.

directors refuse or neglect to do so". Impliedly, the decision to take legal proceedings on behalf of a company is vested in the directors of the company as the organ with the default powers to manage the business of the company.¹⁶³⁰ It has been held that the power to institute legal action in the name of the company must be exercised by a resolution of the board of directors.¹⁶³¹ The directors in making the decision must be guided by the duties imposed on the directors particularly whether, on the whole, it is in the interest of the company to bring the action. However, where the directors fail or neglect to do so, Act 992 permits the members in general meeting to take the decision to institute the action on behalf of the company. However, this is not an exception to the proper plaintiff rule, as the company remains the rightful person in whose name the action is instituted. The issue relates to who authorises the action in the name of the company. The statute vests the power in the board of directors but their failure or neglect to exercise the power permits the members in a general meeting to do so.

The general position, therefore, is that a company is the rightful plaintiff to take legal proceedings against wrongs that affect the company. The board of directors are vested with the power to make decision on whether to pursue the action in the name of and on behalf of the company. However, where the board fails to take legal proceedings, the members are permitted to take legal action in the name and on behalf of the company to enforce the rights of the company.

22.3.2 Action to enforce breach of duties by directors

Given the fact that directors are in control of the business of the company, wrong committed against the company by directors are difficult to enforce by other directors bringing an action in the name of the company against the defaulting director. The other directors may be reluctant to take legal action in the name of the company against one of their members. However, per the rule in *Foss v. Harbottle*, the company is the right person to assert its rights as the duties of directors are owed to the company and not members. However, the statute makes an exception by permitting members to also institute the legal action in the name of the members against the directors. This is an exception to the proper plaintiff rule, permitted under the Companies Act, 2019. Other than the directors, the Act also permits other constituents to bring legal action in the name of the company against the directors. Section 200 of Act 992 provides that:

“(1) Proceedings may be instituted by the company or by a member of the company to

- (a) enforce the liabilities referred to in section 199;*
- (b) restrain a threatened breach of a duty under sections 190 to 192; or*
- (c) recover from a director of the company a property of the company.*

¹⁶³⁰ Ibid.

¹⁶³¹ *Golden Gates Services Ltd v Ghana Ports and Harbours Authority and Others* Commercial Court, Accra, suit number Misc 4/09, unreported decision of Amadu Tanko J dated 17 March 2009.

- (2) Proceedings may be instituted by the company on the authority of the board of directors or of a receiver and manager or liquidator of the company, or of an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or has been passed at a general meeting.*
- (3) Subject to subsection (5) of section 19 and at a general meeting for the purposes of subsection (2), neither the proposed defendants nor the holders of shares in which all or any of them are beneficially interested shall vote on the resolution and if all or any of them do vote, the votes shall not be counted.*
- (4) After an investigation of the affairs of the company, proceedings may pursuant to section 234 be instituted in the name of the company by the Registrar.*
- (5) Where proceedings are instituted by a member, that member may either bring a directive action under section 201 or a representative action under section 205 on behalf of that member and all other members, except members who are defendants to the action, and shall join the company as a defendant; and to that representative action the provisions of section 349, shall apply.*
- (6) The Court, on the application of a defendant,*
 - (a) may stay proceedings by the member if satisfied that, in all the circumstances, including the participation of that member in the transaction complained of, and the circumstances in which that member became a member, it is inequitable that the member should be allowed to have the conduct of the action,*
 - (b) may order the member to give security for payment of the costs of the defendants; and*
 - (c) may direct that the action or any part of the action shall be heard in chambers.*
- (7) A period of limitation shall not apply to proceedings under this section, but in those proceedings the Court may relieve a director from liability in whole or in part and on the terms that, in all the circumstances including lapse of time, the Court considers it equitable.*
- (8) In proceedings under this section the Court may, in the interest of justice, order that a sum of money found to be payable by a defendant shall be restored, in whole or in part, to members or former members of the company instead of to the company.*
- (9) Where the Court makes an order, the Court may order that the necessary enquiries shall be made to ascertain the identity of the members and former members concerned and may give the consequential directions that may be necessary or expedient.*
- (10) Proceedings under this section shall not be discontinued, settled or*

compromised without the approval of the Court after notice of the proposed discontinuance, settlement or compromise has been given to all members of the company and to the Registrar in the manner that the Court directs.

- (11) Within the time prescribed by the notice, a member of the company and the Registrar may appear and call the attention of the Court to the matters which seem relevant and may give evidence and call witnesses.*
- (12) Where the Court does not approve the discontinuance or compromise, the Court may give the conduct of the action to a member willing to continue the proceedings, or to the Registrar in the name of the company, making the consequential orders regarding the parties to the action or otherwise that may be necessary or expedient."*

The section maintains the proper plaintiff rule in the case of *Foss v. Harbottle*. It indicates that the company is the proper plaintiff to bring an action to enforce civil liabilities against directors for breach of fiduciary duties stated in the Act or restrain threatened breach or recover property from the director. Under subsection (1), the company can thus institute an action against the directors. As an artificial person, subsections (2) and (4) state five categories of persons who can initiate the action in the name and on behalf of the company against the defaulting directors. The persons who can take the decision on behalf of the company and institute the action in the name of the company are:

- (i) board of directors of the company,
- (ii) a receiver or manager of the company,
- (iii) a liquidator of the company,
- (iv) members of the company, and
- (v) Registrar.

The directors not responsible for the wrongful act can thus take legal action in the name of the company against the defaulting director. In addition, a receiver or manager appointed over assets of a company can take legal action against a defaulting director in the name of the company. Where a company is in liquidation, the appointed liquidator assumes the powers of the board of directors and thus can take legal action for breach of duties committed by directors in the name of the company.¹⁶³² Finally, the Registrar after an investigation into the affairs of a company is permitted to take legal action in the name of the company against the defaulting directors. In the action, the proper plaintiff is the company. The defendant is the defaulting directors and persons who knowingly participated in the breach with the defaulting directors.¹⁶³³

Where the action is to be instituted in the name of the company on the authority of the members, the decision must be by ordinary resolution which is passed either at a general meeting or agreed to by

¹⁶³² Section 283 of Act 992 and section 97 of Corporate Insolvency and Restructuring Act, 2020 (Act 1015).

¹⁶³³ Section 199 of Act 992.

members of the company entitled to attend and vote at a general meeting. This means that even though the resolution is not passed at a general meeting, it does not need to be unanimous as provided in section 163 of Act 992, but a resolution agreed to by a simple majority of members. If the resolution is to be passed at a general meeting, subsection (3) prohibits the proposed defaulting defendants or persons who hold shares that the proposed defendants are beneficially interested from voting on the resolution.

As an exception to the proper plaintiff rule in *Foss v. Harbottle*, subsection (1) permits members to also institute an action in the name of the member against the defaulting directors and persons who knowingly participated in the breach with the defaulting directors. It stands to reason that if the plaintiffs in *Foss v. Harbottle* institute an action on similar facts in Ghana after the coming into force of the Companies Act, the plaintiff would have the capacity to bring the action. Section 200(1) of Act 992 confer such rights on the members of a company to maintain an action in the name of the members against defaulting directors and persons who knowingly participated in the breach with the directors. Subsection (5) of section 200 of the Act requires the members to either institute the action in a representative capacity or as a derivative action. In such an action, the plaintiffs are the members and not the company. The company must, however, be joined as a nominal defendant since the action complained of was taken on behalf of the company by the defaulting director and any other person who knowingly participated in the breach with the director.

Where the action is instituted by a member, the defendant may apply to the court for a stay of proceeding on the ground that the member instituting the action participated in the act complained of or the circumstances under which the member becomes a member make it inequitable for the member to be permitted to maintain the action. The defendant may also apply for the Court to give an order for the member to give security for payment of the cost to the defendant and that the action or part of the action may be heard in chambers rather than open court. The security for cost is to ensure damages awarded in favour of directors are paid, and the hearing of the proceeding in chambers is to protect the reputation of the directors or company. Such an action may have far reaching implications for the business of the company if aired in the public.

There is no period of limitation applicable to an action brought by the company or members against defaulting directors under section 200. However, the Court may relieve the director from liability in whole or in part and on terms as the Court consider equitable taking account of all circumstances including lapse of time. Where the Court considers it in the interest of justice, the amount ordered to be paid in the action may be restored to the members or former members rather than the company. For that purpose, the Court may order an enquiry to ascertain the identity of the members and former members.

Proceedings instituted by a member under section 200 of the Act cannot be compromised, settled or

discontinued without court approval and notice to all the members of the company and Registrar as the Court directs. Member of the company or the Registrar may appear to give evidence as a witness within a period indicated in the notice for the compromise, settlement or discontinuance. Where the Court does not approve the compromise, settlement or discontinuance, the Court may permit any member or the Registrar to take over the conduct of the action and make such consequential order to give effect to the action.

The remedies available in action under section 200 are stated in both sections 199 and 200 of Act 992 as damages for the loss the company suffered as a result of the breach; an order for the defendants to account; order for rescission of contract between the company and defaulting director; or an order for an injunction to restrain a threatened breach of duty by the director; and order to recover property of a company from a director.

23.3.3 Action against illegal or irregular activity

Act 992 impliedly abolishes the majority rule principle as stated in *Foss v. Harbottle*. Act 992 thus permits a member of the company to bring an action for an injunction to prevent illegal or irregular acts or resolution that are yet to be done or passed. The member can also bring an action for declaration that an illegal or irregular act or decision of the company be declared void. It does not matter whether the irregular or illegal act can be rendered legal or regular by a resolution of a simple majority of the members of the company. Section 218 of Act 992 provides that:

- “(1) The Court on the application of a member may by injunction restrain the company,*
- (a) from doing an act or entering into a transaction which is illegal or beyond the power or capacity of the company or which infringes a provision of the constitution of the company, or*
 - (b) from acting on a resolution not properly passed in accordance with this Act or the constitution of the company, and may declare that act, transaction or resolution already done, entered into, or passed to be void.*
- (2) Subsection (1) does not derogate from the protection afforded by a provision of this Act to a person dealing with the company.*
- (3) In relation to acts beyond the capacity or power of the company, this section is subject to section 19 and does not limit its application.*
- (4) The right afforded to a member to apply to the Court, does not limit the right that member may have to institute proceedings against a director of the company pursuant to section 200 or to apply to the Court under section 219.*
- (5) In proceedings by a member under this section, the Court may order the member to give security for the costs of the company and may direct that the application*

shall be heard in chambers."

A member has the right under section 218 to bring an action against the company notwithstanding the act is done or to be done, or decision is taken by the board of directors or majority of the members on behalf of the company. Once the act, decision or the intended act is contrary to law or the constitution of the company, any member is permitted to institute an action under the section. It does not matter that the irregular act can be rectified by a vote of a simple majority of the company. In the event the act, transaction or resolution has already been done, entered into or passed, the member is to apply to the court to have the act, transaction or resolution declared void. However, if an act, transaction or resolution that is contrary to the Act or law, or the constitution of the company, is yet to be done, entered into or passed, the member can apply for an injunction to restrain the performance of the act, the entry into the transaction or passage of the resolution. Two remedies are therefore available under the section, remedy of injunction to prohibit the illegal or irregular act yet to be done, or declaration of the illegal or irregular act yet to be done as void. The only person permitted to bring the action under section 218 of the Act is a member of the company. It has however been held that in relation to acts contrary to law, the member must be affected to have the capacity to take legal action.

*Anderson v. Midland Railway Co*¹⁶³⁴ – a company has been charging some regular customers amount less than the standard rate required to be charged for carrying freight. A statute prohibits discrimination among customers and provides that a customer who suffers from preference to other customers may bring legal action before the Railway and Canal Commissioners. A member instituted an action against the company. It was held that the member has no capacity to bring the action. Buckley J @ pg. 377 stated:

"The breach, if there be a breach, of the Act of Parliament is not one which gives rise to any rights as between the corporator and the corporation, but one which gives rise to rights as between the corporation and other customers of the corporation. There is nothing ultra vires in the act which is done by the corporation towards the particular customer of which the corporator can complain; it is an act of which other customers of the corporation may complain."

It is suggested that the above case does not establish a general principle since the statute specifically provides for the persons who can complain to the commissioners. Therefore, where the statute expressly so provides, a member who does not fall into the category of persons given the right under the statute may be unable to take legal action where the company acted contrary to the specific statute. That will not be the case where the act is contrary to the constitution of the company or law which does not have restriction on the persons to bring an action.

¹⁶³⁴ [1902] 1 Ch 369.

Section 218 of Act 992 is subject to section 19 of the Act when it relates to an action for an act beyond the capacity or powers of a company. Section 19 provides that the restriction in a registered constitution of a company does not affect the capacity and powers of the company and acts, contract or transactions done or entered into by the company is not invalid on the only ground that it contravenes any restriction on the capacity of the company. Notwithstanding that the act is deemed valid even though contrary to restrictions in the constitution, section 19(5) permits a member to apply to the court to prohibit by injunction the act, conveyance or transfer of property when done contrary to the restriction in the constitution. Such prohibition by injunction must be equitable and subject to payment of compensation to affected parties for loss suffered.¹⁶³⁵

The right of the member to apply for injunction or declaration is also subject to protections afforded persons who have dealt with the company under the Act. This will include the protection under the presumption of regularity under section 150 of the Act and section 151 of the Act.

Where the illegal or irregular act, transaction or resolution done, entered into or passed by the company also amounts to breach of a duty the director owes to the company under the Act, a member can in addition to the action under section 218, bring an action against the directors under section 200 as discussed above. Further, the member can maintain an action under section 219, if the act done, transaction entered into or resolution passed amount to oppression under section 219 of the Act.

Members who institute an action under section 218 of the Act against the company may be ordered by the court to provide security for the costs of the company and the matter may be heard in chambers if so directed by the Court.

23.3.4 Action against oppression

The Act also provides for what is generally termed as remedy against oppression in section 219 of the Act. The scope of the section goes beyond oppression to cover acts undertaken or proposed in disregard of proper interest, act that unfairly discriminate and acts that are unfairly prejudicial. The section provides for a wider scope of acts against which a legal action can be instituted and provides for a wider scope of available remedies. Further, it is not only a member of a company that can institute a legal action under the section. Debenture holders and the Registrar are also permitted to institute action under the section.

23.3.4.1 Persons that can bring the action under section 219

Section 219 of Act 992 provides that:

¹⁶³⁵ Section 19(6) of Act 992.

“(1) A member or debenture holder of a company or, in a case falling within section 234, the Registrar may apply to the Court for an order under this section on the ground that:

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of the proper interests of those members, shareholders, officers or debenture holders of the company; or”

The Act, therefore, permits three categories of persons to be able to take action under section 219 of the Act. That is the members of the company, debenture holders of the company and Registrar in cases falling under section 234, which relates to findings after an enquiry or investigation. Unlike section 218 action for illegal or irregular activities, the scope of persons is expanded under section 219 of the Act. Members and debenture holders are permitted to bring an action against acts affecting the member or debenture holder in their capacity as member or debenture holder respectively. In addition, the member and debenture holder can bring an action that affects that member or debenture holder in his capacity as an officer of the company. It should be noted that a person who is just an officer of the company cannot bring an action under section 219 of the Act. But where the officer is also a member or debenture holder, acts that adversely affect the person as an officer, not as a member or debenture holder, can be litigated under section 219.

*Aboagye v. Tetevi*¹⁶³⁶ – In this case, the secretary of a company who was also a shareholder of the company brought an application pursuant to sections 217 and 218 of Act 179 [which is the current section 219 of Act 992]. A preliminary objection was raised as to the capacity of the applicant to bring the application. After hearing arguments and submissions the court held @ pg. 219 in part that:

“a member or shareholder who is also a director or secretary or employee can bring an application under section 218 of the Code to protect his interests in the company”

In *Pinamang v. Abrokwa*¹⁶³⁷, even though the court indicated that the plaintiff respondents were unable to establish that the action complained of comes under section 218 of Act 179 [which is now section 219 of Act 992], the court stated that:

“an employee” who was also a member of the company was held competent to bring an application under section 218 of Act 179.”

¹⁶³⁶ [1976] 1 GLR 217.

¹⁶³⁷ [1991] 2 GLR 284.

In *Mahama v. Soli and another*¹⁶³⁸, on the issue of whether the respondents whose action was under section 218 of Act 179 for oppression in relation to their position as directors was proper even though they were also members, the Court of Appeal stated @ pgs. 235-6 per FK Apaloo JA that:

“It was next submitted by counsel for the appellant, that the application brought under section 218 of the Code was not validly brought since the complaints of the respondents related to their position as directors and not as members. It was said therefore that the application ought to be dismissed in limine. We profoundly disagree. Quite apart from being directors, the respondents are also shareholders and are therefore members of the company within the true intendment of section 30(4) of the Code. They are no less entitled to bring this application because in addition to being members, they were thought fit to be appointed directors and fiduciaries of the company...While the complainants must be members or debentureholders, they are entitled to relief even if the act complained of is also oppressive of them as shareholders or officers of the company.”

As noted earlier, the Registrar is permitted to institute an action on behalf of the company where after investigation the Registrar is of the view that the business of the company has been conducted or the powers of the directors are being exercised in a manner oppressive to a part of the members or debenture holders or in disregard of their proper interests as members, shareholders, officers or debenture holders.¹⁶³⁹ The Registrar thus can also institute an action in the name of the company where the act or conduct is oppressive, or in disregard of the interest of a member or debenture holders. However, that action is to be taken after an enquiry by the Registrar¹⁶⁴⁰ or investigation of the affairs of the company by the Registrar¹⁶⁴¹.

23.3.4.2 Scope of acts that can lead to action under the section

Section 219 of Act 992 provides that:

“(1) A member or debenture holder of a company or, in a case falling within section 234, the Registrar may apply to the Court for an order under this section on the ground that:

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of the proper interests of those members, shareholders, officers or debenture holders of the company; or

¹⁶³⁸ [1977] 1 GLR 215 CA.

¹⁶³⁹ Sections 228(2)(a) and 234 of Act 992.

¹⁶⁴⁰ Section 228 of Act 992.

¹⁶⁴¹ Sections 229 and 230 of Act 992.

(b) an act of the company has been done or is threatened or that a resolution of the members, debenture holders or a class of them has been passed or is proposed which unfairly discriminates against, or is otherwise unfairly prejudicial to, one or more of the members or debenture holders."

The ambit of acts covered under section 219 of the Act is also wider and distinct from that of section 218 of the Act. The acts under section 219 of the Act does not need to be illegal or irregular. An act that is not irregular or illegal may give rise to an action under section 219 of the Act. The acts covered under section 219(1) are:

- (a) Oppression – that the affairs of the company are conducted or powers of the directors are exercised in a manner that is oppressive to the members or debenture holders in their capacity as a member, debenture holder or officer of the company.
- (b) Disregard of the proper interest – that the affairs of the company are conducted or the powers of directors are exercised in a manner that is in disregard to the property interest of member or debenture holder in the capacity as a member, debenture holder or officer of the company.
- (c) Unfair discrimination – that the act of the company is done or threatened, or a resolution of the members, debenture holders or a class of members or debenture holders, is passed or proposed which unfairly discriminates against the member or debenture holders in the capacity as member or debenture holder of the company.
- (d) Unfair prejudice – that the act of the company is done or threatened, or a resolution of the members, debenture holders or a class of members or debenture holders, is passed or proposed which is unfairly prejudicial to a member or debenture holder in the capacity as a member or debenture holder of the company.

23.3.4.3.1 Oppression

An act by the company or exercise of powers by directors will be oppressive if the effect of the act on the member or debenture holder in his capacity as a member, debenture holder or officer is harsh and burdensome. The courts have also held that a single act will not constitute oppression but there must be a continuous act or a chain of events which effect is harsh or burdensome on the member or debenture holder in that capacity or as an officer of the company. The plaintiff must, therefore, plead facts and lead evidence to establish a continuing or sequence of events by the defendant, which events together are harsh or burdensome to the plaintiff.

*In re West Coast Dyeing Industry Ltd, In re; Adams v. Tandoh*¹⁶⁴² – in this case, the ambit and application of section 218 was stated by Osei-Hwere J.A. (as he then was) as follows:

"The petitioner has to show that the affairs of the company are being conducted in

¹⁶⁴² Court of Appeal, 7 March 1985; digested in [1984-86] G.L.R.D 131.

a manner oppressive to some part of the members (including himself). This has been interpreted as meaning that there must have been a course of oppressive conduct and one isolated act, even if oppressive will not suffice ... Further, a series of oppressive acts will not be sufficient unless they constitute a chain of events which continue right up to the presentation of the petition."

In *Pinamang v. Abrokwa*¹⁶⁴³ – it was stated that:

"It will be seen that to bring an application under section 218 of Act 179 the applicant must adduce evidence seeking to show a chain of events and occurrences of harsh and burdensome conduct which continued up to the date of the presentation of the petition."

*Mahama v. Soli & Another*¹⁶⁴⁴ – the complaint established against the respondent was that he managed Mencilo & Co. Ltd. as if he were carrying on a sole proprietorship business, refused to attend board or company meetings, used the properties of the company for his own purposes, carried on other businesses which competed with that of the company and improperly utilized or failed to account to the company in furtherance of its business. The issue was whether the facts amount to oppression. The court per Apaloo JA in delivering the judgment stated @ pg. 234 that:

"The question for decision is: on these facts, have the respondents shown that the affairs of Mencilo & Co., Ltd. were conducted in a manner oppressive to them as members or shareholders or in disregard of their proper interests? Either showing entitles the complaining respondents to the relief provided by section 218(2) of the Companies Code. In our judgment, they have shown both. The word "oppressive" in section 218(1) of Act 179 is not a term of art. In Re H. R. Harmer Ltd. [1958] 3 All E.R. 689 at p. 690, C.A. it was said the word must be construed in its ordinary sense and means, burdensome, harsh and wrongful. That the appellant was in sole charge of the affairs of the company was not in dispute.

On the facts which we have found, it is not possible to hold that he conducted the affairs of the company, other than oppressively. Although in terms of voting power, he is a minority shareholder, he arrogated to himself the powers of the board, completely ignored the protests of his co-directors, was anything but open towards them, raised a large loan without reference to his fellow directors, denied his co-directors opportunity of looking at and considering the accounts of the company, attempted illegally to dismiss the external auditors of the company, granted unlimited credit to his own partnership which was in competition with the company, unilaterally withheld the allowance of his fellow directors, obtained and improperly utilised a large import licence granted to the company and asserted sole

¹⁶⁴³ [1991] 2 GLR 284.

¹⁶⁴⁴ [1977] GLR 215 CA.

ownership of a company in which he has less than fifty per cent of the equity shares. In our opinion, more oppressive conduct cannot be imagined. In Re H. R. Harmer Ltd. (supra) it was held that to assume power that one does not possess and to exercise that against the wishes of shareholders who have major beneficial interests but a minority of votes, is prima facie oppression. In the Scottish case of Elder v. Elder and Watson, Ltd. 1951 S.C. 49, Lord Cooper considered that the oppression envisaged by section 210 of the English Companies Act, 1948 (11 & 12 Geo. 6, c. 38), must involve conduct which should, at the lowest, involve a visible departure from the standard of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. In our judgment, the way in which the appellant conducted the affairs of Mencilo cannot be more aptly described."

23.3.4.3.2 Disregard of proper interest of members or debenture holders

Section 219 of Act 992 also permits a member or debenture holder to institute an action under the section where the affairs of the company are conducted or the exercise of the powers of the company are in disregard to the proper interest of the member or debenture holder in his capacity as a member, debenture holder or officer of the company. The phrase in disregard to the proper interest of the member does not necessarily involve the breach of the rights conferred on the member or debenture holder under the Companies Act, 2019 or the constitution of the company. Where the conduct of the affairs of the company or exercise of the corporate power is in disregard to legitimate interest of the member in the conduct of business or exercise of powers, the member or debenture may maintain an action under the section.

*Re a Company (No. 00477 of 1986)*¹⁶⁴⁵ – even though the case was on unfair prejudice, the court drew distinction to the fact that an interest of a member does not only relate to rights in an agreement or constitution of the company but include a legitimate expectation of the member. In this case, the claimants who held all the shares of a company (A Ltd) sold the shares to O plc. The understanding in selling the shares was that the claimants will continue to be employed as directors. When the majority shareholders of O plc dismissed one of the claimants in breach of his services agreement, it was alleged to be unfairly prejudicial to the member. It was held that the interest of a member of a company may also include a legitimate expectation that he will continue to be employed as a director, and the dismissal as a director may be unfairly prejudicial to the member as it disregards the legitimate expectation of being a member.¹⁶⁴⁶

¹⁶⁴⁵ [1986] BCLC 376.

¹⁶⁴⁶ It has been held that this principle is limited to private companies and is not applicable to public companies. That any such interest must be expressed in agreement or the constitution of the company. *Re Blue Arrow plc* [1987] BCLC 585.

In *Mahama v. Soli & Another*¹⁶⁴⁷, *Apaloo JA* stated at pg. 235 that:

“We also think that the appellant conducted the affairs of the company in total disregard of the proper interests of the respondents. They, at least, must expect that the company’s business would be conducted in a manner that will yield profits to the company and enable it to declare dividends eventually. It is now deeply in the red. Their co-operation with the appellant to do business would be pointless otherwise. It must at least, be a disregard of their interests and their proper interests at that, if their foremost fiduciary, the managing director, siphons or places himself in a position in which he can siphon any profits that the company might make to his own private ventures. In our opinion, a case more claimant for relief under section 218(2) of the Companies Code can hardly be conceived.”

23.3.4.3.3 Unfair discrimination

A member of debenture holder may institute legal action under section 219(1) of the Act on the ground that the act of the company is done or threatened, or a resolution of the members, debenture holders or a class of members or debenture holders, is passed or proposed which unfairly discriminates against the member or debenture holders in their capacity as member or debenture holder of the company. The requirement under this ground is that an act, threatened or done, or a resolution, passed or proposed, does not only discriminate against the member or debenture holder in such capacity but does so unfairly. Discrimination alone will not suffice for an action but the discrimination must be unfair to the member or debenture holder instituting the legal action in the capacity as a member, denture holder or officer of the company. The principles discussed under unfair prejudice below are applicable to unfair discrimination. The decision of the court in the case of *O’Neil v. Phillips*¹⁶⁴⁸ is illustrative of what the court considers ‘unfair’. The extract of the case is substantially reproduced under the sub-chapter 23.2.4.3.4 on unfair prejudice below.

23.3.4.3.4 Unfair prejudice

An act of the company, done or threatened, or a resolution of the members, debenture holders or a class of members or debenture holders, passed or proposed, which is unfairly prejudicial to a member or debenture holder in their capacity as a member or debenture holder of the company constitute a ground for an action to be instituted by the member or debenture holder under section 219(1) of the Act. The act or resolution complained about must be both unfair and prejudicial to constitute a ground for an action under the section.

¹⁶⁴⁷ [1977] GLR 215 CA.

¹⁶⁴⁸ [1999] 1 WLR 1092.

In *In Re Saul D Harrison and Sons plc*¹⁶⁴⁹, Neill LJ stated @ pgs. 30 and 31 that:

"The words 'unfairly prejudicial' are general words and they should be applied flexibly to meet the circumstances of the particular case

The conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only of these tests."

Prejudice has been used to relate to 'harm in a commercial sense, not in a merely emotional sense'.¹⁶⁵⁰ Unfair has also been held to relate not only to breach of right but legitimate expectation¹⁶⁵¹ of the member or debenture holder, but not in respect of subjective notion of fairness.¹⁶⁵² The reasonable expectation must be determined based on the understanding between the parties and not just subjective perspective of a party. A leading case that provides a good framework for understanding the scope of unfair prejudice and explain the scope of the legitimate expectation is the case of *O'Neil v. Phillips*¹⁶⁵³.

*O'Neil v. Phillips*¹⁶⁵⁴ – in this case, Phillips owned a company called Pectel Ltd, a construction company. O'Neill started to work for the company in 1983. In 1985, Phillips made O'Neil a director and gave him 25% of the shares based on satisfaction with his performance. Phillips also in an informal chat indicated that he hoped O'Neill could take over the whole management one day and be allowed to draw 50% of the company's profits. This was later done and Phillips retired. Later talked focused on increasing O'Neill's actual shareholding to 50%, but this did not happen. After five years, the construction industry went into decline, and so did the company. Phillips came back in and took business control. O'Neill was demoted to a branch manager of the German operations and his share of the profits withdrawn. O'Neill left the company, started his own competing company in Germany in 1990 and then he filed a petition for unfairly prejudicial conduct against Phillips, firstly, for the termination of equal profit-sharing and, secondly, for repudiating the alleged agreement for the allotment of more shares. The judge rejected the petition on both grounds. There had been no firm agreement for an increase in shareholding, and it was not unfair for Phillips to keep a majority of company shares. Also, it was held that O'Neill suffered nothing in his capacity as a member of the company. His shares were unaffected. It was merely a dispute about his status as an employee. On appeal to the Court of Appeal, O'Neill won his appeal. The Court held that Phillips had created a legitimate expectation for the shares in future. Phillips appealed to the House of Lords. The House of Lord overturned the decision of the Court of Appeal. Lord Hoffman stated as follows:

¹⁶⁴⁹ [1995] 1 BCLC 14.

¹⁶⁵⁰ *Re Unisoft Group Ltd* (No. 3) [1994] 1 BCLC 609 @ pg. 611.

¹⁶⁵¹ *Re a Company* (No. 00477 of 1986) [1986] BCLC 376; *Re Astec (BSR) plc* [1998] 2 BCLC 556.

¹⁶⁵² *O'Neil v. Phillips* [1999] 1 WLR 1092.

¹⁶⁵³ *Ibid.*

¹⁶⁵⁴ [1999] UKHL 24.

"5. "Unfairly prejudicial"

*In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *In re Saul D. Harrison & Sons Plc.* [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in *In re J. E. Cade & Son Ltd.* [1992] B.C.L.C. 213, 227: "The court . . . has a very wide discretion, but it does not sit under a palm tree."*

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

*In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.*

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in section 459 runs parallel to that which

your Lordships' House, in In re Westbourne Galleries Ltd. [1973] A.C. 360, adopted in giving content to the concept of "just and equitable" as a ground for winding up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said, at p. 379:

"The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act [1948] and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

I would apply the same reasoning to the concept of unfairness in section 459. The Law Commission, in its report on Shareholder Remedies (Law Com. No. 246) (1997) (Cm. 3769), para. 4.11, p. 43 expresses some concern that defining the content of the unfairness concept in the way I have suggested might unduly limit its scope and that "conduct which would appear to be deserving of a remedy may be left unremedied. . ." In my view, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under section 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it would be impossible "and wholly undesirable" to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness. ...

19th century English law, with its division between law and equity, traditionally

took the view that while literal meanings might prevail in a court of law, equity could give effect to what it considered to have been the true intentions of the parties by preventing or restraining the exercise of legal rights. So Smith J. speaks of the exercise of the power being valid "in law" but its exercise not being just and equitable because contrary to the contemplation of the parties. This way of looking at the matter is a product of English legal history which has survived the amalgamation of the courts of law and equity. But another approach, in a different legal culture, might be simply to take a less literal view of "legal" construction and interpret the articles themselves in accordance with what Page-Wood V.-C. called "the plain general meaning of the deed." Or one might, as in Continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing. I do not suggest there is any advantage in abandoning the traditional English theory, even though it is derived from arrangements for the administration of justice which were abandoned over a century ago. On the contrary, a new and unfamiliar approach could only cause uncertainty. So I agree with Jonathan Parker J. when he said in In re Astec (B.S.R.) Plc. [1998] 2 B.C.L.C. 556, 588:

"in order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former."

This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In Blisset v. Daniel the limits were found in the "general meaning" of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.

I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon

*which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: non haec in foedera veni. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see *Viridi v. Abbey Leisure Ltd.* [1990] B.C.L.C. 342) and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459. But this form of unfairness is also based upon established equitable principles and it does not arise in this case.*

6. Legitimate expectations.

*In *In re Saul D. Harrison & Sons Plc.* [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company.*

It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case.

7. Was Mr. Phillips unfair?

*The Court of Appeal found that by 1991 the company had the characteristics identified by Lord Wilberforce in *In re Westbourne Galleries Ltd.* [1973] A.C. 360 as commonly giving rise to equitable restraints upon the exercise of powers under the articles. They were (1) an association formed or continued on the basis of a personal*

relationship involving mutual confidence, (2) an understanding that all, or some, of the shareholders shall participate in the conduct of the business and (3) restrictions on the transfer of shares, so that a member cannot take out his stake and go elsewhere. I agree. It follows that it would have been unfair of Mr. Phillips to use his voting powers under the articles to remove Mr. O'Neill from participation in the conduct of the business without giving him the opportunity to sell his interest in the company at a fair price. Although it does not matter, I should say that I do not think that this was the position when Mr. O'Neill first acquired his shares in 1985. He received them as a gift and an incentive and I do not think that in making that gift Mr. Phillips could be taken to have surrendered his right to dismiss Mr. O'Neill from the management without making him an offer for the shares. Mr. O'Neill was simply an employee who happened to have been given some shares. But over the following years the relationship changed. Mr. O'Neill invested his own profits in the company by leaving some on loan account and agreeing to part being capitalised as shares. He worked to build up the company's business. He guaranteed its bank account and mortgaged his house in support. In re H. R. Harmer [1959] 1 W.L.R. 62 shows that shareholders who receive their shares as a gift but afterwards work in the business may become entitled to enforce equitable restraints upon the conduct of the majority shareholder.

The difficulty for Mr. O'Neill is that Mr. Phillips did not remove him from participation in the management of the business. After the meeting on 4 November 1991 he remained a director and continued to earn his salary as manager of the business in Germany. The Court of Appeal held that he had been constructively removed by the behaviour of Mr. Phillips in the matter of equality of profits and shareholdings. So the question then becomes whether Mr. Phillips acted unfairly in respect of these matters.

To take the shareholdings first, the Court of Appeal said that Mr. O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before 4 November and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr. Phillips had agreed in principle, subject to the execution of a suitable document. But this is where I think that the Court of Appeal may have been misled by the expression "legitimate expectation." The real question is whether in fairness or equity Mr. O'Neill had a right to the shares. On this point, one runs up against what seems to me the insuperable obstacle of the judge's finding that Mr. Phillips never agreed to give them. He made no promise on the point. From which it seems to me to follow that there is no basis, consistent with established principles of equity, for a court to hold that Mr. Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be

imposing upon Mr. Phillips an obligation to which he never agreed. Where, as here, parties enter into negotiations with a view to a transfer of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage.

The same reasoning applies to the sharing of profits. The judge found as a fact that Mr. Phillips made no unconditional promise about the sharing of profits. He had said informally that he would share the profits equally while Mr. O'Neill managed the company and he himself did not have to be involved in day-to-day business. He deliberately retained control of the company and with it, as the judge said, the right to redraw Mr. O'Neill's responsibilities. This he did without objection in August 1991. The consequence was that he came back to running the business and Mr. O'Neill was no longer managing director. He had made no promise to share the profits equally in such circumstances and it was therefore not inequitable or unfair for him to refuse to carry on doing so. ...

9. Capacity in which prejudice suffered

The judge, it will be recalled, gave as one of his reasons for dismissing the petition the fact that any prejudice suffered by Mr. O'Neill was in his capacity as an employee rather than as a shareholder. The Court of Appeal's rejection of this reason was, I think, influenced by its view that Mr. O'Neill had been constructively expelled. In a case of expulsion, where the equitable restraint on the exercise of the power is based upon the terms upon which the petitioner became or continued as a member of the company, the prejudice will be suffered in the capacity of a member. It is the terms, agreement, or understanding on which he became associated as a member which generates the restraint on the power of expulsion. But the judge was considering only the prejudice suffered through not getting a half-share in the profits or the additional shares. It is somewhat unreal to deal with the capacity in which prejudice was suffered in these respects when there was no entitlement in law or equity in the first place. But assuming there had been a contractual obligation, I would not exclude the possibility that prejudice suffered from the breach of that obligation could be suffered in the capacity of shareholder. As I have said, the initial gift of 25 shares in 1985 did not in my view change the essential relationship between the parties. Mr. Phillips remained controlling shareholder and Mr. O'Neill remained an employee who had some shares. If at that stage Mr. Phillips had promised another 25 shares and then broken his promise, I do not think that Mr. O'Neill would have suffered prejudice in his capacity as an existing shareholder. I agree with the judge that the case would have been no different if Mr. O'Neill had had no shares and Mr. Phillips had broken a promise to give him 50. On the other hand, once Mr. O'Neill had invested his own money and effort in the company, the

situation may have changed. A promise to give Mr. O'Neill more shares or a larger share in the profits may well have been based not merely upon his position as an employee but on the fact that he already had a stake in the company. As cases like R. & H. Electrical Ltd. v. Haden Bill Electrical Ltd. [1995] 2 B.C.L.C. 280 show, the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed. But the point does not arise because no promise was made."

Per the judgment, the legitimate expectation must be one that is a correlation to the right the claimant has that it will be inequitable to deprive him of without a remedy, and not a subjective entitlement which the defendant cannot have been said to agree to. In addition, the legitimate expectation must affect the claimant who is a shareholder or debenture holder.

The court has also held that the act alleged to be unfairly prejudicial may relate to past conduct,¹⁶⁵⁵ future conduct¹⁶⁵⁶ and isolated acts¹⁶⁵⁷. The courts have held that an action whereby the majority takes financial benefits from the minority will be unfairly prejudicial¹⁶⁵⁸, an act that results in diminishing the value of the shares of shareholder¹⁶⁵⁹, act of mismanagement of the company which reduces the value of the shares¹⁶⁶⁰, or an act that prevents a shareholder from selling shares at the best price¹⁶⁶¹. The conduct complained of must be the conduct of the affairs of a company and not a member.¹⁶⁶² Section 219(1)(b) requires the act to be the act of the company, done or threatened, or a resolution of the members, debenture holders or a class of them, passed or proposed which is unfairly prejudicial to one or more of the members of debenture holders. Under the Companies Act, 2019, the resolution of members or debenture holders which is unfairly prejudicial is a ground for an action for unfair prejudice.

23.3.4.4 Remedies that the court can grant

Subsections (2) and (3) of section 219 of the Act provides for a greater scope of remedies that the court can grant for acts or conducts that are oppressive, in disregard to the proper interest of the member or debenture holder, unfairly discriminates or unfairly prejudice a member or debenture holder. Section 219(2) and (3) of Act 992 provides that:

"(2) Where on the application, the Court is of opinion that either of the grounds set

¹⁶⁵⁵ Re a Company (No. 005287 of 1985) [1986] 1 WLR 281.

¹⁶⁵⁶ Whyte 1984 SLT.

¹⁶⁵⁷ Re Marchday Group plc [1998] BCC 800.

¹⁶⁵⁸ Re London School of Electronics Ltd [1986] Ch 211.

¹⁶⁵⁹ Re Elgindata Ltd [1991] BCLC 959.

¹⁶⁶⁰ Re Macro (Ipswich) Ltd [1994] 2 BCLC 354.

¹⁶⁶¹ Re a Company (No. 008699 of 1985) [1986] BCLC 382.

¹⁶⁶² Re Leeds United Holdings plc [1996] 2 BCLC 545.

out in subsection (1) is established, the Court may, with a view to bringing to an end or remedying the matters complained of, make an appropriate order; and, without limiting the effect of this subsection, the Court may by order,

- (a) direct or prohibit an act or cancel or vary a transaction or resolution;*
- (b) regulate the conduct of the affairs of the company in future; or*
- (c) provide for the purchase of the shares or debentures of any members or debenture holders of the company by other members or debenture holders of the company or by the company itself; and in the case of purchase of shares by the company without regard to the limitations imposed by sections 61 to 65, other than subsections (4), (5) and (6) of section 61.*

- (3) Where an order under this section makes an amendment in or addition to any provisions of the constitution of a company, then, despite anything in this Act but subject to the provisions of the order, the company shall not without the leave of the Court, make a further amendment in or addition to the constitution inconsistent with the provisions of the order."*

Subsection (2) gives discretion to the court to make an appropriate order to remedy a conduct or act that is oppressive, in disregard to the proper interest of a member or debenture holder, unfairly discriminatory or prejudicial to a member or debenture holders. The court, therefore, has wide discretion in respect of the remedial action that can be ordered. Without limiting the wide discretion granted to court, the subsection states the remedies that can be provided to include:

- (a) an order directing an act of a company,
- (b) an order prohibiting a transaction yet to be entered into by the company or resolution yet to be passed by the members, debenture holders or a class of them,
- (c) an order cancelling a transaction entered into by the company or resolution passed by the members or debenture holders or a class of them,
- (d) an order varying a transaction entered into by a company or resolution passed by the members or debenture holders or class of them,
- (e) regulating the conduct of the company in the future,
- (f) an order to purchase the shares or debentures of the member or debenture holder by other members, debenture holders or the company, or
- (g) amendment of the constitution of the company.

The court can make any order depending on the circumstances with the view of remedying the act complained of which is oppressive, in disregard to the proper interest of the member or debenture holder, unfairly discriminatory or prejudicial to the member or debenture holder. Even though not stated in section 219, the courts have also indicated that the order of winding up is available to

remedy acts or conducts under section 219.¹⁶⁶³ The courts are however reluctant to resort to an order of winding up as that signifies the death of the company. It is, therefore, an order of last resort. A number of cases that illustrate the remedies provided for acts amounting to oppression, disregard of proper interest of members, unfair discrimination and unfair prejudice are stated below.

*Vambaris v. Altuna Limited & Another*¹⁶⁶⁴ – the applicant in this case brought an action under section 218 of the Companies Act, 1963 (Act 179) for a declaration that the appointment of the second respondent as a director of the first respondent and his subsequent acquisition of shares in the first respondent were improper. The High Court per Justice Hayfron- Benjamin stated @ pgs. 46-47 that:

“The only question remaining is whether this court can make an order setting aside an improper appointment as a director or an invalid acquisition of shares on an application made under section 218 of the Companies Code, 1963 (Act 179), or this can only be made in an action. The section gives the court wide judicial discretion to make such order as it thinks fit with a view to bringing to an end the matters complained of. Pennycuik J. in In Re Jermyn Street Turkish Baths Ltd. [1970] 1 WLR 1194 at p. 1208 said the judicial discretion given in a similar section under the English Companies At, 1948 (11 & 12 Geo. 6, c. 38), is unlimited. Our Code definitely gives power to the court to direct or prohibit any act or cancel or vary any transaction or resolution: see Section 218(2).

In the circumstances I declare the acquisition of the shares by the second Respondent Mr. Okudjeto improper and set it aside...”

*Okudjeto & Ors v. Irani Brothers & Ors*¹⁶⁶⁵ – even though the judgment was overturned on appeal that the ground has not been established, it indicated the scope of the remedies available to the court. In the case, the applicants, shareholders of the first respondent, commenced the action against the respondents under sections 218 and 220 of the Companies Act 1963 (Act 179) for an order, inter alia, to restrain the respondents from removing the first applicant as a director of the first respondent on the grounds of oppressive conduct. The High Court per Justice Hayfron- Benjamin stated @ pg. 383 that:

“To succeed in an application under section 218 of Act 179 the applicant must establish some oppressive conduct or conduct on the part of the directors (who are responsible for the management) which disregards his interests or some resolution either passed or act done which is discriminatory or otherwise prejudicial to one or more of the members....it is clear from the evidence that an extraordinary general meeting held on 6 April 1972, at the registered offices of the company at which the

¹⁶⁶³ Asafu-Adjaye v. Agyekum [1984-86] 1 GLR 383 at 398 (CA). The Court will order liquidation under section 84(2)(g) of Act 1015 where it is just and equitable to do so. See also Billy v. Kuwor [1991] 1 GLR 522.

¹⁶⁶⁴ [1973] 2 GLR 41.

¹⁶⁶⁵ [1974] 1 GLR 374.

second applicant was represented by the applicant's attorney holding a proxy, it was resolved that the second Applicant was removed from office as a director with effect from 6 April 1972. No representations were received against this resolution." [and at page 388] In the circumstances I make the order dismissing both applications under sections 218 and 220 brought by the Applicants, and make an order at the request of the Respondents and in accordance with the prior request of the Applicants as evidenced by their own letters, directing the company to have been withheld by the Applicants as a result of the purchase the shares of the Applicants at a valuation."

*Asafo-Adjaye & Ors v. Agyekum*¹⁶⁶⁶ – the Respondent was a director and shareholder in a construction company. He brought an action under sections 217 and 218 of the Companies Act, 1963 (Act 179) seeking an injunction to restrain the appellants from holding a meeting that purported to pass a resolution to remove the Respondent as a director of the company. The trial judge held that the respondent had been oppressed in that the directors had acted in such a way that it had become impossible for the respondent to exercise his rights. The Court of Appeal per Edusei, Edward Wiredu and Osei- Hwere JJA, stated @ pg. 394 that:

"There is nothing in the affidavits filed by the Respondent to buttress the ground in section 218(1)(b) and it must be supposed that he relies on section 218(1)(a). It was argued that insofar as the motion seeks for a declaration that the affairs of the company are being conducted in a manner oppressive to him and the other shareholders the motion cannot be entertained because the declaration sought should have been originated by a writ. The argument of the Appellants' counsel on this score is, undoubtedly, attractive. Without the motion setting out the reliefs sought we are inclined to hold that it will, as it were, disclose no cause of action."

*Billy v. Kuwor*¹⁶⁶⁷ – the applicant was an employee of an agricultural company. He was allegedly informed by the respondents that the company had been dissolved, he had been dismissed and his shares forfeited. He applied to the court for an order to wind up the company on the ground that the respondents' actions were oppressive. The High Court per Justice Benin stated @ pg. 531 that:

"I find from the evidence that the respondents have dismissed the applicant as a member and as an employee of the company. This they did without hearing him at all. This act of dismissal, I declare, is wrongful. And in the circumstances of this case whereby the respondents are the only two directors who also have between them 74.29% of the total shareholding of the company as against 25.71% by the applicant, this arbitrary exercise of power I hold is clearly oppressive of the applicant who cannot control their actions even at company member's meetings."

¹⁶⁶⁶ [1984- 86] 1 GLR 382.

¹⁶⁶⁷ [1991] 1 GLR 522.

The traditional remedy in such circumstances is to wind up the company on the ground that it is just and equitable to do so. But it has been observed that the courts are generally reluctant to wind up a company that is solvent and moreover it is a remedy that may severely hurt the remaining shareholders. This is exactly the position in this case, and I think a winding up, even if properly asked for, will not be an appropriate remedy in this instance."

Union Mortgage Bank v. Serbeh-Yiadom¹⁶⁶⁸ – the plaintiff-applicant company brought the action for an order to compel the defendant- respondent-director to sign company forms 3 and 4 as required by section 27(1) of the Companies Code, 1963 (Act 179) or for the other directors to submit the forms to the Registrar-General without the signature of the respondent. The High Court per Justice Akoto-Bamfo stated @ pg. 1027 that:

"I have carefully considered the arguments advanced by both learned counsel. It is not in doubt that the respondent is one of the first directors of the company, neither is it in doubt that the parties have taken steps in establishing the bank, notably among which is the hiring of premises, engagement of staff and obtaining a licence from the Bank of Ghana. It is a mandatory requirement under section 27 of Act 179 that all the directors of the company must sign Forms 3 and 4. The respondent had demonstrated that he has no intention to sign the forms. What are the remedies of the other directors? I am of the view that a court of competent jurisdiction can, in a proper case, in exercise of its inherent jurisdiction, grant the order prayed for. The present case, it is my belief, falls within such a class. The respondent raised a number of issues as regards the conduct of the other directors. According to him, having gone far in the formation of the company, it would be risky for his good name and integrity to be associated with the day to day running of the company. Having regard to the fact that there are irreconcilable differences between them, it is my view that this is a proper case for the other directors to buy out the respondent and steps taken to replace him with another director."

In the event the order is for amendment of the constitution of the company, subsection (3) of section 219 of the Act prohibits the company from making further amendment to the constitution of the company without leave of the court. This is to avoid defeating the purpose of the court's order. An official copy of the order of the court amending the constitution is required to be submitted to the Registrar for registration by the company.¹⁶⁶⁹ The company is liable to pay an administrative penalty of two hundred and fifty penalty units to the Registrar for default in the submission.¹⁶⁷⁰ The court on hearing application under section 219 of the Act may order the applicant to provide security for

¹⁶⁶⁸ [1997-98] 1 GLR 1025.

¹⁶⁶⁹ Section 219(4) of Act 992.

¹⁶⁷⁰ Section 219(5) of Act 992.

cost.¹⁶⁷¹ The court may also direct that the matter be heard in chambers.¹⁶⁷²

23.4 Representative Action

Where members or debenture holders of a company are permitted to take action to assert rights conferred on the member or debenture holder under Act 992, the Act may require the action to be taken as a representative action, not a personal action. Where a member or officer of a company seeks to assert rights conferred under a constitution of a company which affect the member or officer together with other members or officers of a class, the member or officer who intends to take the action must do so in a representative capacity.¹⁶⁷³ A holder of redeemable preference shares who intends to institute an action for redemption of share when the shares become redeemable must bring an action in a representative action.¹⁶⁷⁴ A shareholder or creditor who intends to bring an action for restoration of payment of unlawful dividend by a company or order of injunction to prohibit the payment of the unlawful dividend must bring the action in a representative capacity.¹⁶⁷⁵ An action by a secured debenture holder in a series of debenture must be instituted by the holder as a representative action.¹⁶⁷⁶ An action by a member to enforce liabilities for breach of duties of directors to the company must be instituted in a representative capacity.¹⁶⁷⁷

The requirement in the sections of the Act that the affected person must institute the action in a representative capacity is for the action to be instituted by such person on behalf of that person and all the other members of the class to which the person belong which have been affected by the act complained of. Representative action, therefore, refers to an action by a member of a group on behalf of that person and all other members of the group. The main reason for the requirement is to avoid a multiplicity of actions.¹⁶⁷⁸

Act 992 provides that a representative action must be in accordance with section 205 of the Act. Section 205 of Act 992 provides that:

“Where, under a section of this Act, it is provided that if legal proceedings are instituted by a person, that person shall sue in a representative capacity on behalf of the person and any other member of class,

(a) that person may commence proceedings in that representative capacity without obtaining the consent and approval of any other

¹⁶⁷¹ Section 219(6) of Act 992.

¹⁶⁷² Ibid.

¹⁶⁷³ Section 29(3) of Act 992.

¹⁶⁷⁴ Section 62(3) and (4) of Act 992.

¹⁶⁷⁵ Section 72(3) and (4) of Act 992.

¹⁶⁷⁶ Section 89(4) of Act 992.

¹⁶⁷⁷ Section 200(5) of Act 992.

¹⁶⁷⁸ Gower's Report @ pg. 80.

- member of the class represented and, subject to paragraph (b) of this section, that person shall have the sole conduct of the action and any other member of the class shall not be regarded as a party to the proceedings or liable for the costs of the proceedings;*
- (b) a member of the class represented may at any time before final judgment apply to the Court for leave to be made a party to the proceedings whether as co-plaintiff or otherwise and the Court may grant leave on terms regarding the conduct of the action or otherwise that it considers fit, and if the leave is granted the applicant shall become a party to the proceedings and liable accordingly to have an order for cost made against that applicant;*
 - (c) a judgement given in the action shall bind and inure to the benefit of the members of the class represented, whether or not they have intervened in the proceedings in accordance with paragraph (b) of this section;*
 - (d) the proceedings shall not be dismissed, settled or compromised without the leave of the Court which may order notice of the proposed dismissal, settlement or compromise shall be given to the members of the class represented and any other persons;*
 - (e) the proceedings under this section shall be supplemented by the provisions of section 200; and*
 - (f) this section shall not affect the validity of an agreement between the members of the class represented, relating to contribution towards the costs of the party or parties suing in a representative capacity."*

Representative action requires the member of the affected group to commence the action on behalf of that member and other members of the group. The member instituting the representative action does not require the consent or agreement of the other members to institute the action on their behalf. Even though the representative action is instituted on behalf of the member together with the other members, the other members are not deemed to be a party to proceedings or liable for the cost. The member instituting the action thus has the full conduct of the action and liable for the proceedings. Any of the other members may apply to the court to be made a party to the action either as a co-plaintiff or co-defendant at any time prior to the final judgement. The court may grant leave and such order as the court deem necessary to make the applicant a party. The applicant then becomes a party and liable for the cost of the proceeding.

Judgement given in a representative action is binding on all the members of the class whether they applied to join the action as co-plaintiff or not. The benefit of the judgment must be shared among the members of the class or group. For this purpose, the court may order an enquiry to ascertain the

identity of the members of the affected class or group. Since the action is on behalf of all members of the group, the member who instituted the action is not permitted without the leave of court to dismiss, settle or compromise the action. On application for leave to dismiss, settle or compromise the action, notice must be given to all the other members of the group. Any member may intervene if that member is against the dismissal, settlement or compromise. The court will then make a determination on whether the action can be dismissed, settled or compromised, and make appropriate orders including permitting another member to take over the proceedings if the court opts not to dismiss, settle or compromise the action.

The defendant is permitted to apply to the court to stay proceedings on the basis that the member instituting the representative action participated in the action complained of or it is inequitable for the plaintiff to maintain the action based on the circumstances under which the plaintiff became a member of the affected class or group. The court may order the plaintiff to provide security for payment of costs of the defendant and that the action should be heard in chambers.

Even though the member instituting the representative action does not need the consent or agreement of the other members, it is advisable to seek such agreement especially as it relates to sharing the costs of the proceedings. In practice, even though, the other members may not consent to bear the costs, it may be agreed that such cost is deducted from the judgment amount awarded to the group prior to sharing the amount among the members of the class. Section 205(f) of the Act provides that, the section does not affect the validity of any agreement reached between the members of the class represented in relation to contribution towards the costs of the party suing in the representative capacity.

23.5 Derivative Action

The power to litigate in the name of the company is generally given to the directors.¹⁶⁷⁹ Members are permitted to take action in the name of the company if directors failed to do so.¹⁶⁸⁰ The power is exercised by majority decision of directors or members as the case may be.¹⁶⁸¹ In the event the action is to enforce liabilities against a director or directors for breach of duty, members are permitted to institute an action in a personal capacity or institute an action in the name of the company if the members resolve by ordinary resolution to do so.¹⁶⁸² However, if the member does not intend to take action in the personal capacity of the member, then the member has no avenue to institute an action in the name of the company for wrong committed against the company unless by convincing the other members to pass the ordinary resolution to take legal action in the name of the company.

¹⁶⁷⁹ Section 144(3) of Act 992.

¹⁶⁸⁰ Section 144(5) of Act 992.

¹⁶⁸¹ Section 188(2)(h) and section 200(2) & (3) of Act 992 respectively.

¹⁶⁸² Section 200(1) and (5) of Act 992.

Derivative action has been introduced under the Companies Act, 2019 to permit the individual directors or members to institute an action in the name of the company against a wrongdoer to assert a right of the company. A derivative action is an action brought by a member or director in the name of the company even though the decision is not supported by the majority of the members or directors as the case may be. A member or director who is unable to secure the majority required to institute an action may resort to a derivative action. This is not a personal action as the action is in the name of the company.

In order to avoid members or directors individually, without the approval of the majority of members or directors, instituting proceedings in the name of the company which may not be in the interest of the company, a number of safeguards have been provided which make the court the gatekeeper. The individual member or director must seek permission from the court prior to instituting such derivative action in the name of the company. The Act provides for the factors that the court must consider in determining whether to grant leave and where it intends to grant leave, the grounds on which the court should permit the member or director to institute the derivative action.

Section 201 of Act 992 provides that:

- “(1) Subject to subsection (3), the Court may, on the application of a member or director of a company grant leave to that member or director to*
- (a) bring proceedings in the name and on behalf of the company or subsidiary of the company; or*
 - (b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or a subsidiary of the company, as the case may be.*
- (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court shall have regard to*
- (a) the likelihood of the proceedings that may follow,*
 - (b) the costs of the proceedings in relation to the relief likely to be obtained,*
 - (c) any action already taken by the company or a subsidiary of the company to obtain relief, and*
 - (d) the interests of the company or subsidiary of the company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.*
- (3) Leave to bring proceedings or intervene in proceedings may be granted only where the Court is satisfied that either*
- (a) the company or related company does not intend to bring, diligently*

- continue or defend, or discontinue, the proceedings, as the case may be; or*
- (b) it is in the interests of the company or a subsidiary of the company that the conduct of the proceedings should not be left to the directors or to the determination of the members as a whole.*
- (4) Notice of the application shall be served on the company or a subsidiary of the company.*
- (5) The company or related company*
- (a) may appear and be heard, and*
- (b) shall inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.*
- (6) Except as provided for in this section, a member or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a subsidiary of the company."*

Derivative action, therefore, refers to an action brought by a member or director of a company on behalf of and in the name of the company against wrongful action against the company. Even though the wrong does not affect the member or director directly, the action is instituted by the member or director in the name of the company. It seems unclear whether the member or director can bring an action for any wrongdoing against the company. Section 201 of Act 992 on derivative action does not restrict the scope of the wrongful actions against which the member or director can initiate or intervene as a derivative action. However, section 200(5) of Act 992 which provides for enforcing liabilities against directors, restraining threatened breach of directors' duties and recovery of property from the directors, is the only section that refers to a member instituting action against the directors as derivative action. There is no mention under section 200(5) Act 992 of directors instituting an action as a derivative action.

It is stated that under the English company law, there is an express restriction of derivative claims to claims "*arising from an actual or proposed act or omission involving negligence, default, breach of duty of trust by a director of the company*".¹⁶⁸³ No such restriction is stated under Act 992. In view of the fact that section 200(5) of Act 992 failed to mention directors whilst section 201 of Act 992 permits directors to institute a derivative action, it can reasonably be stated that derivative action under Act 992 is not restricted to section 200(5) of the Act. A derivative action can, therefore, be brought by a member or director for any wrong committed against the company subject to leave of the court. This position is also supported by the fact that section 201 of Act 992 did not refer to section 200(5) of the Act.

¹⁶⁸³ Paul L. Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (2016, Sweet & Maxwell, 10th Ed) at 599.

Section 201(1) of Act 992 permits a member or director who intends to pursue a derivative action to apply to the court for leave. The derivative action may relate to instituting a fresh action in the name of the company or intervene in existing action for the purposes of continuing, defending or discontinuing the action. The derivative action may not only be on behalf of the company for which the person is a member or director but also a subsidiary company. The action can only be instituted subject to the leave of the court. The court is to play a gatekeeping role in ensuring that derivative actions do not lead to an increase in litigation on behalf of and in the name of the company without corresponding benefit to the company.

Subsections (2) and (3) of section 201 of Act 992 provides for factors the court may consider for the grant of the leave and the condition under which the court may grant the order respectively. The subsections provide a guide to the court but do not fetter the discretion to grant leave. Two approaches have been adopted. Subsection (2) of section 201 of Act 992 provides for factors that the court must consider. Subsection (3) provides for the grounds for the grant of the leave.

The first factor is the likelihood of proceedings following the grant of the leave by the court. That is, the court must come to the determination that the member or director is likely to proceed to institute the action or intervene in the action when leave is granted. There is no point in entertaining the application and granting leave if the member or director will not likely proceed with the legal proceeding.

Secondly, the court must compare the cost of the proceedings to the likely benefit from the action. This is a cost-benefit analysis of bringing the action or intervening in the action. This implies that where the costs outweigh the benefits to the company, the court may not likely grant the leave to the member or director to institute the derivative action.

Thirdly, the court must examine any action that the company or subsidiary has taken to vindicate the wrongful action giving rise to the derivative action. The court will have to consider any action taken by the company to seek remedy. This action is not restricted to legal action but anything that the company may have done to seek redress. This may include, among others, a demand letter written to the wrongdoer, ongoing negotiation between the company and the wrongdoer, and any general discussion with the wrongdoer to remedy the alleged wrongful act. A derivative action in essence is the usurpation of the power of the majority of members or directors to take legal action on behalf of the company. The action must not unduly interfere with other measure being taken by the managers of the business. The court must therefore assess the actions taken by the company prior to determining whether to grant the leave to the member or director to proceed with a derivative action.

Lastly, the court must consider whether it is in the interest of the company or subsidiary company

to permit the derivative action. The derivative action by the member or director is not for the personal interest of the member or director but is an action in the name and on behalf of the company. The benefit of the action is that of the company and not the member or director personally. The leave must therefore be granted only when the action is in the interest of the company. Therefore, where a derivative action for instance will damage a business relationship between a company and its major supplier or will adversely affect the market reputation of the company, the leave cannot be granted by the court in that instance since the action will not serve the interest of the company. This is also considered in relation to the cost-benefit analysis that the court must make. It is possible that the member or director may be instituting the action for some personal reason other than the interest of the company. Such action must not be permitted where the court is of the view that the derivative action will not be in the interest of the company.

Four factors must be considered by the court prior to making a determination. The four factors do not strictly limit the discretion of the court since subsection (2) is stated not to limit the application of the power given to the court under subsection (1) to grant leave to a member or director to pursue a derivative action. Even where the court is satisfied after considering the factors in subsection (2) that it is prudent to grant leave, the leave must only be granted when the court is satisfied that either the company or related company will not take or intervene in a legal action, or it is not in the interest of the company for the action to be left to directors or members as a whole. The leave is granted on the ground that the company or related company does not intend to institute legal action or intervene to diligently continue, defend, discontinue or proceed with an action. That is, if the court is of the view that the company, acting through majority of directors or members as the case may be, intends to bring an action or to intervene to diligently continue, defend, discontinue or proceed with an action, the court must not grant leave for a derivative action by a member or director. In the alternative, the court must determine that the interest of the company will not be served by excluding the member or director who applied to the Court for grant of leave for the derivative action. That is, the interest of the company will not be served if the conduct of the proceedings is left to directors to determine or members of the company as a whole, without a particular member or director, usually the member or director making the application for leave to bring the derivative action.

Notice of the application must be served on the company or a subsidiary company. The application cannot be heard or granted by the court if the notice has not been served. Upon the service of the application, the company or subsidiary company, the company or related company has the discretion to appear and be heard by the court. Whether the company appears and is heard or not, section 201(5)(b) of Act 992 mandates the company to inform the Court on whether the company intends to initiate legal action in relation to the matter that the member or director has made the application for leave for a derivative action. In the case of an existent action in which the member or director has made the application to intervene, the company or related company must inform the

company whether the company or related company intends to continue, defend or discontinue the action as the case may be. This is important as one of the requirements for the court to grant leave for a derivative action is that the company or subsidiary does not intend to initiate the action or continue, defend or discontinue the action.

The section reconfirms the position that the decision to institute an action in the name of the company remains that of the majority of the directors of the company voting to do so, and failing that, members by ordinary resolution can do so. The addition introduced by the section is to permit a member or director through a derivative action, to initiate action in the name or on behalf of the company or intervene in the name or on behalf of a company. This is especially the case where the member or director cannot get the majority to consent to the action.

The cost to be incurred by the member or director in bringing the derivative action after leave is granted may be borne by the company if the court so directs on the application of the member. Section 202 of Act 992 provides that:

“The Court shall, on the application of the member or director to whom leave was granted under section 201 to bring or intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise, or discontinuance approved under section 201, shall be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs.”

Since the section indicates that the order as to who bears the costs must be made on an application, it follows that where no such application was made by the member or director to whom the court has granted leave to bring a derivative action, the member or director will bear the costs. However, if the application is made, the Court is required to order that the costs or reasonable costs for the derivative action should be borne by the company unless the court considers that it would be unjust or inequitable for the company to bear the costs.

23.5.1 Powers of the court in derivative action

Where a derivative action has commenced either by a member or director initiating or intervening in an action, the court has powers to make orders as indicated in section 203 of the Act. Section 203 of Act 992 provides that:

“The Court may,

- (a) at any time, make any order it considers fit in relation to proceedings brought by a member or a director or in which a member or director intervenes, as may be, with leave of the Court under subsection (3) of section 201, and*

- (b) *without limiting the generality of this section,*
- (i) *make an order authorizing the member or any other person to control the conduct of the proceedings;*
 - (ii) *give directions for the conduct of the proceedings;*
 - (iii) *make an order requiring the company or the directors to provide information or assistance in relation to the proceedings; or*
 - (iv) *make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid, in whole or part, to former and present members of the company or a subsidiary of the company instead of the company or the related company."*

Per section 203 of the Act, the court retains the power to make orders after the grant of leave when the member or director initiates the derivative action or intervenes in an existing action. The court is given the discretion to make such orders as it thinks fit in relation to the proceedings. Without limiting the generality of the discretion, the court may make an order in relation to authorizing a member or any other person to control the conduct of the action and give directions on the conduct of the action. In view of the fact that directors retain the corporate powers and are in control of the company, and may frustrate the conduct of the action, the court has the power to order the directors to make available information that may assist the member or director conducting the action. In addition, the court may order the directors to provide the required assistance to the member or director conducting the proceedings. The conduct of the action initiated by the member is for the benefit of the company. However, the court can order that any amount to be paid by the defendant be paid to the former and present members of the company.

Since the court retains the power to give orders for the conduct of the derivative action, section 204 of the Act provides that the derivative action cannot be settled, compromised or discontinued without approval of the Court.

23.6 Self-help remedy - remedy of buy-out

Act 992 has also provided an option in the nature of a remedy to shareholders who may not agree with decisions lawfully taken by the company on specific matters listed under section 220 of the Act. That is, where there is a special majority decision taken by the shareholders on stated matters, a dissenting shareholder may request the company to buy out the shares of the shareholder. A shareholder, therefore, has within his or her control a self-help remedy that can be exercised in the event of disagreement on specific matters stated under section 220 of the Act. Sections 220 to 227 regulate the buy-out option available to a shareholder of a company. Section 220 of Act 992 provides

that:

- “(1) Despite sections 64 and 65, a member may require a company to purchase the shares of that member where members of a company by special resolution resolve to*
- (a) amend the constitution of the company with a view to varying or dispensing with the business activities or objects of the company;*
 - (b) approve*
 - (i) a major transaction under section 145;*
 - (ii) an arrangement, compromise, merger or division of the company under Part T of Chapter Two of this Act; or*
 - (iii) variation of class rights under section 50.*
- (2) A sale and distribution in pursuance of a special resolution under subsection (1) is binding on the company.*
- (3) A member of the company is entitled to have the shares of that member bought under the provisions of this Act, only if that member voted wholly against the resolution for matters specified in subsection (1).*
- (4) A special resolution pursuant to paragraph (a) and paragraph (b) (i), (ii) and (iii) of subsection (1), may only be rescinded by a special resolution.*
- (5) For the purposes of*
- (a) subsection (2), if within one year from the date of the passage of the special resolution, the company has been unable to carry out the proposed objects or any of the business activities specified in paragraph (b) of subsection (1), a member is entitled to apply to have the respective shares reinstated; and*
 - (b) this section, a “special resolution” is deemed to include, in the case of variation of class rights, the prior written consent of the holders of at least three-fourths of the issued shares of the class of shares affected.”*

The grounds for a request for buy-out by a shareholder as provided under the Act are that the company has passed a special resolution to amend the constitution of the company to alter its business, enter into a major transaction, merger, amalgamation, compromise, division or variation of the right of a class of shareholders that the shareholder is part. The shareholder must have voted against the special resolution. Such a dissenting shareholder can request that the company buys out his shares. However, where the company does not proceed with the intended act after the passage of the special resolution, the shareholder is entitled to apply for reinstatement of his shares. The special resolution passed by the company which trigger the request from the shareholder may be rescinded by the company by another special resolution. When rescinded, the company is not under obligation to buy out the shares.

Section 221 of Act 992 provides for the procedure for the request of buy-out and options available to a company on such request. Section 221 of Act 992 provides that:

- “(1) A member of a company who requires the company to purchase the shares of that member under section 220 shall, within fourteen days of the passage of the resolution at a meeting of the members of the company, give written notice to the company requiring the company to purchase those shares.*
- (2) On receipt of the notice, the Board shall*
- (a) arrange for the purchase of the shares by the company;*
 - (b) arrange for some other person to purchase the shares;*
 - (c) arrange for the resolution to be rescinded in accordance with subsection (4) of section 220; or*
 - (d) apply to the Court for an order exempting the Board from the purchase of the shares of the member.*
- (3) The Board shall within twenty-eight days upon receipt of the notice give written notice to the member of the decision of the Board.”*

The procedure for the buy-out commences with a notice from the shareholder to the company requesting for the buy-out. The notice is required to be sent within fourteen days after the passage of the special resolution. The company upon receipt of the notice has one of four options. The company may arrange to buy the shares of the shareholder; arrange for another person to buy the shares; cancel the written resolution which triggers the request from the shareholder; or apply to the court for an exemption from the requirement to buy out the shares. The decision on the option is to be made by the Board which must then give written notice of the decision to the shareholder within fourteen days of receipt of the notice from the shareholder.

In the event that the company opt to buy out the shares of the shareholder, the company must determine the price and notify the shareholder. Section 222 of Act 992 provides that:

- “(1) Where the Board of agrees under paragraph (a) of subsection (2) of section 221 to the purchase of the shares by the company, it shall within seven days of issuing notice under subsection (3) of section 221,*
- (a) state a fair and reasonable price as at the close of business on the day before the day the resolution is passed for the shares to be acquired;*
 - and*
 - (b) give written notice of the price to the member,*
- (2) A member who considers that the price stated by the Board is not fair and reasonable, shall forthwith, but at any rate, not later than fourteen days after receipt of the notice, give written notice of the objection to the company.*
- (3) Where the member agrees to the price stated by the Board without objection, the company shall, on the date the company and the member agree, or in the absence*

of any agreement, as soon as practicable, purchase all the shares at the stated price."

The company is to determine and inform the shareholder of a fair and reasonable price for the purchase of the shares. In order for the special resolution that triggered the request for the buy-out not to affect the value of the shares, the Act provides that the date of determination of the price is the day before the passage of the resolution. The company must notify the shareholder of the price within seven days of notice indicating that the company will buy the shares. The shareholder may object to the price. The only ground for such objection is that the price is unfair and unreasonable. However, where the shareholder agrees to the price, the company must proceed with the buy-out as soon as is practicable or at the time agreed with the shareholder.

Where the shareholder objects to the price in the notice from the company, a fair and reasonable price must be determined in accordance with section 223 of the Act. Section 223 of Act 992 provides as follows:

- "(1) Where a member raises an objection to the price of shares stated by the board of directors under subsection (2) of section 222, the company shall*
- (a) pay to the member concerned, a provisional price in respect of each share equal to the price stated by the Board of directors, and*
 - (b) refer the matter to an auditor to determine a fair and reasonable price for the shares within seven days.*
- (2) Where the payment of the provisional price is made, the member concerned shall take the steps required to transfer the shares to the company.*
- (3) Where after fourteen days, the auditor is unable to determine a fair and reasonable price for the shares,*
- (a) the member concerned and the Board shall each appoint an arbitrator;*
 - and*
 - (b) the member and the Board shall agree on an umpire.*
- (4) The company shall bear the costs for the appointment of an arbitrator under subsection (3).*
- (5) Where the member and Board are unable to agree on the appointment of a third arbitrator as umpire, the Court may appoint the umpire.*
- (6) A reference to arbitration under this section, shall be deemed to be a submission to arbitration in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).*
- (7) The arbitrator shall expeditiously determine a fair and reasonable price for the shares on the day before the date on which the members determined by special resolution authorizing the respective action under subsection (1) of section 220 excluding any appreciation or depreciation directly or indirectly induced by the*

action or the proposal.

- (8) The price determined by the arbitrator shall be binding on the company and the member concerned.*
- (9) Where the price of shares to be determined are listed on a Stock Exchange or traded on a stock market, the arbitrator shall determine the price for the shares as being the price at which shares of that kind are traded on the Stock Exchange or stock market as at the close of business on the day before the date on which the members determined by special resolution for the authorizing of the respective action excluding any appreciation or depreciation directly or indirectly induced by the action or the proposal unless a price is determined in accordance with this subsection would be clearly unfair, in all the circumstances to the member concerned.*
- (10) Where the price determined in accordance with a provision of this section*
 - (a) exceeds the provisional price, the company shall immediately pay the outstanding balance to the respective member; or*
 - (b) is less than the provisional price paid, the company may recover from the respective member the excess paid.*
- (11) The arbitrator may award interest on any balance payable or in excess to be repaid under subsection (10) at the rate that the arbitrator thinks fit, having regard to whether the provisional price paid or the reference to arbitration, as the case may, was reasonable."*

The section provides a mechanism for the determination of the fair and reasonable price of the shares in the event that the shareholder objects to the price fixed by the company. The company is required to pay the price communicated to the shareholder which has been objected to by the shareholder as a provisional price pending the determination under the section. The shareholder is also required to take steps to transfer the shares to the company. The first stage in the determination of the price is to refer the determination to the auditor of the company. The referral must be made within seven days. The auditor is given fourteen days to make the determination. If the auditor fails to make a determination within the fourteen days, the matter is to be referred for determination by arbitration. The referral for arbitration can also be done in instances where the shareholder or the board of directors disagrees with the determination of the fair and reasonable price by the auditor since the determination by the auditor is not stated to be final under the section.

The shareholder and the Board must each appoint one arbitrator and both the shareholder and the Board must appoint a third arbitrator who will be the umpire. The arbitration must, therefore, be done by a panel of three arbitrators. The reference is a reference for arbitration under the Alternative Dispute Resolution Act, 2010 (Act 798). The price determined by the arbitrator is final and binding on all the shareholder and the company. In the determination of the price, the base date is the day

before the special resolution that triggered the request for the buy-out. Therefore, any appreciation or depreciation in the price of the shares from the day of the ordinary resolution is not to be taken into account. In the event that the shares are traded on the Stock Exchange or the stock market, the price is the price at which the shares are traded a day before the special resolution that triggered the request for buy-out. Any appreciation or depreciation resulting from the day of the special resolution is not to be included. Where the price determined is above the provisional price the company is to pay the difference with interest as determined by the arbitrator. In the event the price determined is less than the provision price, the company is to recover the excess from the shareholder with interest as determined by the arbitrator.

Rather than opt to buy out the shares of the shareholder upon the request by the shareholder, the company may arrange for another person to purchase the shares. Section 221(2) of Act 992 provides that ***“(1) On receipt of the notice, the Board shall (b) arrange for some other person to purchase the shares”***. Where the Board opts for such mode of buy-out, section 222 becomes applicable provided the company indemnifies the shareholder for any loss incurred as a result of the purchaser failing to purchase at the price nominated or determined by the arbitrator. Section 225 of Act 992 provides that:

- “(1) Section 222 shall apply to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with paragraph (b) of subsection (2) of section 221 subject to necessary modification.***
- (2) Every holder of shares that are to be purchased in accordance with the arrangement shall be indemnified by the company in respect of loss suffered by reason of the failure by the person who has agreed to purchase the shares to purchase them at the price nominated or fixed by arbitration, as the case may be.”***

Where the Board does not buy-out the shares of the shareholder, are unable to arrange for another person to purchase the shares and do not rescind the special resolution that triggers the request for buy-out, the company must make application to the court for exemption from the buy-out of the shares. The company, therefore, does not have the discretion to simply refuse to buy out the shares where a request for buy-out has been lawfully made by the shareholder under sections 220 and 221 of the Act. The company may apply to the court for exemption on the ground of insolvency under section 224 or grounds stated under section 227. Section 224 of Act 992 provides that:

- “(1) A company shall apply to the Court for an order exempting the company from obligation to purchase the shares of the company where***
 - (a) a notice is given to the company under section 221;***
 - (b) the Board has resolved that the purchase by the company of the shares to which the notice relates would result in the company becoming insolvent as defined in the First Schedule; and***

- (c) the company has following reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with paragraph (b) of subsection (2) of section 221.*
- (2) Where the Court is satisfied that the purchase of the shares would result in the company becoming insolvent, the company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with paragraph (b) of subsection (2) of section 221, the Court may make*
 - (a) an order exempting the company from the obligation to purchase the shares;*
 - (b) an order suspending the obligation to purchase the shares; or*
 - (c) any other order that the court considers fit, including an order referred to in subsection (2) of section 227."*

The application is to be made by the company. The company must establish that the purchase will lead to insolvency of the company and the company has unsuccessfully made reasonable effort to get another person to purchase the shares. Once the company is able to satisfactorily establish these two conditions, the court is required to exempt the company from buy-out or suspend the buy-out or make orders available under section 227.

Section 227 of Act 992 provides that:

- "(1) A company to which a notice has been given under section 221, may apply to the Court for an order exempting the company from the obligation to purchase the shares to which the notice relates, on the grounds that*
 - (a) the purchase would be disproportionately damaging to the company;*
 - (b) the company cannot reasonably be required to finance the purchase;*
 - or*
 - (c) it would not be just and equitable to require the company to purchase the shares.*
- (2) On an application under this section, the Court may make an order to relieve the company in whole or in part and on the terms the Court considers fit from the liability to purchase the shares if in the circumstances, including lapse of time, the Court considers it equitable to do so.*
- (3) An order of the Court under subsection (2) may include*
 - (a) setting aside a resolution of the members;*
 - (b) directing the company to take, or refrain from taking, any action specified in the order; or*
 - (c) requiring the company to pay compensation to the members affected."*

The grounds under section 227 are wider in scope than that under section 224 which only relates to

insolvency. Under section 227, the company may apply on the grounds that the buy-out would disproportionately damage the company or it is not reasonable for the company to finance the purchase or it is not just and equitable for the company to be required to purchase the shares. In addition, the company does not need to show in an application for exemption under section 227, unlike section 224, that it has unsuccessfully made effort to arrange for another person to purchase the shares of the shareholder requesting the buy-out. Upon satisfaction with the evidence provided in proof of any of the above grounds, the court may relieve the company, wholly or partly, from the requirement to purchase the shares. The orders the court may make include setting aside the special resolution of the members, directing the company to take action or refrain from taking action specified by the court, or require the company to pay compensation to the shareholder.

Section 220(5)(a) of the Act provides that if the company is unable, within a year of the special resolution, to undertake the major transaction, the arrangement, compromise, merger or division approved by the special resolution that triggered the request of the shareholder for buy-out, the shareholder is entitled to apply for reinstatement of the shares. Section 226 of the Act provides for the reinstatement of the share. Section 226 of Act 992 provides that:

- “(1) Where a former member wishes for shares to be reinstated pursuant to subsection (5) of section 220, the former member shall give written notice to the company within twenty-eight days after the one year period requiring the repurchase of the shares by that former member.*
- (2) On the receipt of the notice, the Board shall within seven days notify the former member in writing if the Board agrees to the purchase and indicate a specific date for payment of the price of the shares.*
- (3) Within seven days after receipt of a notice under subsection (2), the former member shall make payment for the shares at the purchase price of the shares at the time that former member received payment for those shares.*
- (4) The former member who applied to the company for reinstatement of shares is entitled to receive the correlative dividends or other distributions made during the one year period.*
- (5) When payment for the shares is made by the former member under subsection (3), the company shall*
- (a) forthwith deliver to that former member an executed instrument of transfer of the shares together with any relevant share certificate; or*
- (b) take the necessary steps required to transfer the shares to that former member.”*

The former shareholder is therefore permitted to apply for reinstatement of the shares that the company purchase from the shareholder under the buy-out, where the special resolution approving alteration of the authorised business, major transaction, amalgamation, merger, compromise or

division has not been implemented within one year. The former shareholder is to make application to the company for the reinstatement through a request to repurchase the shares. The Board is to indicate agreement to the request by the former shareholder within seven days of the request. The Board is not mandatorily required to agree. The reinstatement, therefore, seems to be at the discretion of the Board. The section does not require the Board to indicate any reason for refusing the request. Since it is at the discretion of the Board of directors who are to act in the best interest of the company, the yardstick for the determination would be if it is in the interest of the company to agree to the reinstatement. If the Board agrees to the request of the shareholder and notifies the shareholder within seven days, the price payable is the price at which the buy-out was done by the company. The shareholder is required to pay the purchase price within seven days of receiving notice from the Board agreeing to the application for reinstatement. Upon the payment, the company is to proceed with the transfer by delivering an executed share transfer instrument and share certificate to the former shareholder.

23.7 Administrative Remedies – Inspection and Investigation of Companies

The Registrar of Companies is mandated to register and regulate companies in accordance with the Companies Act, 2019.¹⁶⁸⁴ It is, therefore, within the mandate of the Registrar to ensure compliance with the Act. In order to ensure such compliance, the Act empowers the Registrar to take measures that enforce compliance. Breach of the provisions of the Act imposes administrative penalties on persons responsible for compliance with the requirements. In addition, the Registrar has power to implement administrative measures either on its own or through the court. The exercise of the administrative measures serves as administrative remedies for corporate wrongs. There are, therefore, administrative remedies available for corporate wrongs committed by persons who exercise powers conferred on them by the Companies Act, 2019. The administrative measures include the power of the Registrar to:

- (a) conduct an enquiry into the affairs of the company,
- (b) appoint an inspector to investigate the affairs of the company,
- (c) conduct investigation by itself, and
- (d) take actions available upon discovering wrongful acts on concluding enquiry or investigation.

23.7.1 Enquiries by the Registrar

The Registrar is mandated to conduct enquiries into the affairs of the company under section 228 of the Act. The enquiry relates to the request for the production of documents for inspection by the Registrar or provision of information to the Registrar. Section 228 of Act 992 provides that:

“(1) In order to ensure that the provisions of sections 127 to 137 regarding the maintenance and auditing of accounts are being duly complied with, the

¹⁶⁸⁴ Section 353 of Act 992.

Registrar may by written order call on a company to produce for the inspection of the Registrar all or any of the books of the company.

(2) Where it appears to the Registrar that there are circumstances suggesting, in relation to a company, that

(a) a provision of this Act is not being complied with, or

(b) a document which the company is required to send to the Registrar under this Act does not disclose a full and fair statement of the matters to which the document purports to relate, or

(c) the business of the company is being conducted with intent to defraud creditors of the company or the creditors of any other person or otherwise for a fraudulent or unlawful purpose, or

(d) the business of the company is being conducted or the powers of the directors are being exercised in a manner oppressive to a part of the members or debenture holders or disregard of their proper interests as members, shareholders, officers or debenture holders, or

(e) person concerned with the formation or the management of the affairs of the company have in connection with the formation or management been guilty of a breach of duty towards the company or members of the company, or

(f) the members of the company have not been given the information with respect to its affairs that the member might reasonably expect,

the Registrar may by written order call on the company to produce for the inspection of the Registrar all or any of the books of the company or to furnish in writing the information or explanation that the Registrar may specify in the order."

The subsection first empowers the Registrar to make an order, which must be in writing, for the company to provide books of account of the company or any other book to the Registrar for inspection. The Registrar may also by written order require the company and officers to provide written information or explanation required by the Registrar. The grounds upon which the Registrar may make the order are broad enough to cover all maladministration of the company by those in charge of administration of the company. The ground for an order to produce the books of account expressly relate to ensuring that the company is in compliance with the requirement to maintain and audit accounts in accordance with sections 127 to 137 of Act 992. For the production of books generally or providing written information or explanation as requested by the Registrar, the grounds cover reasonable suspicion on the part of the Registrar that:

- (i) the Act is not being complied with;
- (ii) document sent to the Registrar does not disclose a full and fair statement required;
- (iii) business of the company is being undertaken to defraud others;
- (iv) the conduct of the business or exercise of powers of directors are oppressive or in

disregard to the proper interest of members or debenture holders as provided under section 219;

- (v) person concerned with formation or management are in breach of their duties to the company; or
- (vi) members have not been given the required information in respect to the affairs of the company reasonably expected by members.

On any of the above grounds, the Registrar may by a written order, request for the production of the book as well as information or explanation by the company. The Registrar may make the order on any of the above grounds on his own accord or when notified or prompted by any person. Where the Registrar makes the order, the company or any past or present officer who have the power to produce the book or provide the information must do so within the time indicated by the Registrar in the written order. Section 228(3) of Act 992 provides that:

“(3) Where the Registrar makes an order under subsection (1) or (2), the company shall comply with the order within the time specified in the order, and the persons who are or have been officers of the company shall so far as it lies within their power, produce the books or furnish the information or explanation.”

Default in complying with the written order from the Registrar attracts an administrative penalty of two hundred and fifty penalty units from either the company or each officers, past or current, who are in default, or both the company and officer.¹⁶⁸⁵ Notwithstanding the imposition of administrative penalty, if the company and officers default from providing the book, information or explanation, the Registrar is entitled to proceed to appoint an inspector to investigate the affairs of the company.

23.7.2 Investigation of affairs of a company

The Registrar can conduct investigations into the affairs of the company or appoint an inspector to investigate the affairs of the company. In all instances, the appointment of the inspector is done by the Registrar. However, the appointment can be done by the Registrar pursuant to a court order, special resolution of the members requesting for the appointment, or the Registrar appointing an inspector on his own accord but limited to investigating ownership of shares and debentures.

(a) Appointment by the court

Section 229 of Act 992 deals with the appointment of an inspector by the Registrar pursuant to a court order. Section 229 provides that:

“(1) The Court may order the Registrar to appoint one or more inspectors to investigate the affairs of a company and to report on the affairs to the Registrar

¹⁶⁸⁵ Section 228(4) of Act 992.

in the manner that the Court directs,

- (a) on a report by the Registrar after enquiries by the Registrar in accordance with section 228;*
- (b) on the application of the Registrar; or*
- (c) on the application of not less than one hundred members, or of members holding not less than one-tenth of the issued shares, or of members not less than one-tenth in number of the total members."*

The Registrar is the one responsible for the appointment of the inspector, and not the court. The appointment of the inspector by the Registrar is, however, subject to the court order. Even though the Registrar appoints the inspector pursuant to a court order, the inspector is to report to the Registrar and not the court. For the court to give an order to the Registrar to appoint one or more inspectors, it requires that someone has made an application to the court for the order. There are two persons who can apply to the court for an order directed to the Registrar to appoint an inspector. That is the Registrar and members of the company. The Registrar may apply to the court either when the company or its officers default in providing the book, information or explanation required under section 228 of the Act, or on any other reason. For an application by members, the Act specifies qualifications related to the number of members or percentage of issued shares held by the member. The Act permits any one hundred members of a company to apply to the court for an order directed at the Registrar to appoint one or more inspector. This will only be applicable to public companies. Alternatively, members holding ten percent of the issued shares or who constitute ten percent of the total number of members of the company can apply to the court for an order directed at the Registrar to appoint an inspector.

In the event of members applying to the court, additional requirements must be complied with in relation to the application. Section 229 of Act 992 provides that:

"(2) Where the application is made under paragraph (c) of subsection (1),

- (a) the application shall be supported by the evidence that the Court requires for the purpose of showing that the applicants have good reason for requiring the investigation;*
- (b) the Court may, before ordering the appointment of an inspector, require the applicants to give security to an amount determined by the Court for payment of the costs of the investigation; and*
- (c) at least fourteen days previous notice of the application shall be given to the Registrar who shall be entitled to be represented at the hearing and to give evidence and call witnesses."*

The member or members who met the qualification requirement in making an application to the court must provide evidence to support the application showing there is a good reason to appoint

an inspector. The Court may order the members to provide security for the costs of the investigation as determined by the Court. The members must also give notice of at least fourteen days to the Registrar prior to the application. The Registrar and the company are entitled to be represented and present evidence and call witnesses at the hearing of the application. The Registrar may oppose the application and present evidence why the court should not order the appointment of an inspector.

On application by the Registrar or members for an order of the court for the Registrar to appoint an inspector, at least fourteen days prior notice of the application must be given to the company.¹⁶⁸⁶ The company is entitled to be represented at the hearing and to give evidence and call witnesses.¹⁶⁸⁷

(b) Appointment of inspector pursuant to a special resolution

The Registrar is also mandated to appoint an inspector where the members of a company passed a special resolution requesting the Registrar to do so. Section 230 of Act 992 provides that:

“The Registrar shall appoint one or more competent inspectors to investigate the affairs of a company and to report on the affairs to the Registrar in the manner that the Registrar directs if the company by special resolution declares that the affairs ought to be investigated by an inspector appointed by the Registrar.”

Under this section, the Registrar has no discretion where the members passed a special resolution requesting for investigation of the affairs of the company by an inspector appointed by the Registrar. The inspector is to report to the Registrar and not to the members.

(c) Appointment by the Registrar on the Registrar’s own accord

The Registrar may also appoint an inspector without being ordered by the Court or by special resolution of the members of the company, but on the Registrar own accord. Section 236 of the Act provides that:

“(1) Where it appears to the Registrar that there is reasonable cause to investigate the ownership of any shares in or debentures of a company, or where the directors of a company so request in writing, the Registrar may carry out the investigation or by written order appoint one or more inspectors to carry out the investigation in a manner provided by this section.”

The subsection permits the Registrar to appoint an inspector on her own accord where it appears to the Registrar that there is reasonable cause to investigate the ownership of shares in or debentures of the company. The appointment by the Registrar on the Registrar’s own accord is limited to the

¹⁶⁸⁶ Section 229(3) of Act 992.

¹⁶⁸⁷ Ibid.

purpose of investigating the ownership of shares in or debentures of a company. The Registrar may on her accord decide there is a reasonable ground to investigate or the directors of a company may request the Registrar to investigate the ownership of the shares in or debentures of the company. Per section 236(1) of the Act, the directors may request for an investigation of ownership of shares in or debentures of the company, not the appointment of an inspector. The decision on whether to conduct the investigation by herself or appoint the inspector to investigate, or not to proceed with the investigation is that of the Registrar. The directors may, therefore, request for an investigation of ownership of shares or debentures. The Registrar decides whether to conduct the investigation by herself or appoint an inspector.

23.7.2.1 Proceeding with Investigation

Once an inspector is appointed, the inspector is to conduct investigation into the affairs of the company and report to the Registrar. The inspector may also investigate the affairs of an associated company if the inspector finds it necessary. Section 231 of Act 992 provides that:

“Where an inspector appointed under section 229 or section 230 to investigate the affairs of a company finds it necessary for the purposes of the investigation to investigate also the affairs of any other body corporate which is or has at any relevant time been an associated company, the inspector may do so, and shall report on the affairs of the other body corporate so far as the inspector considers the results of the investigation relevant to the investigation of the affairs of the first mentioned company.”

The inspector has the power to also investigate the affair of companies that are associated companies of the company under investigation. However, the investigation in this instance is limited to the relevance of the findings on the associated company to that of the company under investigation. The import of the section is that the use of this power must not be regarded as a full investigation of the associated companies but limited to investigations of matters that are relevant to the investigation of the company over which the inspector is appointed.

The inspector in the conduct of his investigation has the power to request for books and documents in the custody of officers and agents of the company and can examine on oath the officers and agents of the company. Section 232 of Act 992 provides that:

- “(1) The officers and agents of the company and the officers and agents of any other body corporate whose affairs are investigated by virtue of section 231*
- (a) shall produce to the inspectors the books and the documents of or relating to the company or the other body corporate which are in the custody or power of those officers and agents, or*
 - (b) shall otherwise give to the inspectors the assistance in connection*

with the investigation which the officers and agents are reasonably able to give.

- (2) An inspector may examine on oath the officers and agents of the company or other body corporate in relation to the business of the company or that other body corporate and may administer an oath accordingly."**

In the conduct of the investigation, the officers and agents of a company under investigation and other associated body corporates that the inspector finds necessary to investigate under section 231, must provide books and documents within their custody or power to the inspector. The officers and agents must also provide the required assistance for the conduct of the investigation by the inspector. The inspector has the power to examine the officers and agents under oath, and for that purpose can administer the oath.

It is mandatory for the officers and agents to produce books and documents in their custody or which they have the power to produce to the inspector. In addition, the officers and agents must answer questions put them by the inspector in relation to the affairs of the company. Section 232 of Act 992 provides that:

"(3) Where an officer or agent of the company or other body corporate,

(a) destroys or refuses to produce to the inspectors a book or document which is the duty of that officer or agent under this section so to produce, or

(b) refuses to answer a question which is put to that officer or agent by the inspectors with respect to the affairs of the company or other body corporate,

the inspector may certify the facts in writing to the Court, and the Court may inquire into the case, and after hearing the witnesses who may be produced against or on behalf of the alleged offender, and after hearing the statement which may be offered in defence, punish the offender, where found liable, as if the offender has been guilty of contempt of the Court."

An officer or agent who destroyed or refused to produce books and documents, or answer questions put to him, is to be referred to the High Court which must enquire into the matter. The enquiry involved hearing witnesses called by both the inspector to prove the refusal or destruction, and those called by the officer or agent in defence of the allegation. If the Court is satisfied that the allegations have been proved, the officer or agent is guilty of contempt of the Court. Contempt is a quasi-criminal offence and the officer or agent can be committed to prison for the contempt. Officers for the purposes of the section includes past and present officers and agents include lawyers and bankers of the company under investigation, and any relevant associated body corporate.¹⁶⁸⁸

¹⁶⁸⁸ Section 232(7) of Act 992.

In the event the person relevant for the investigation is not an officer or agent of the company or relevant body corporate, the inspector has no power to examine such person under oath. However, the inspector can apply to the court and the court may order the person to attend and be examined under oath before the court. Section 232(4) of Act 992 provides that:

“(4) Where an inspector considers it necessary for the purposes of the investigation that a person whom the inspector does not have a power to examine on oath should be so examined, the inspector may apply to the Court and the Court may order that person to attend and be examined on oath before the Court on a matter relevant to the investigation.”

A person who appears for such examination may be questioned by the Court. The inspector may also take part in the examination or be represented by a lawyer. The person can also appear with his or her lawyer. The Court is to examine the person and permits the person to be questioned on matters relevant to the investigation of the inspector. Record of the questions and answers must be read to or by the person and signed by the person. Section 232(5) of Act 992 provides that:

“(5) On examination,

- (a) the inspector may take part personally or be represented by a legal practitioner,*
- (b) the Court may put the questions that the Court considers appropriate to the person examined, and*
- (c) the person examined shall answer the questions that the Court may put or allow to be put to that person who may at his personal cost employ a legal practitioner, who shall be at liberty to put to that person questions that the Court may consider just for the purpose of enabling that person to explain or qualify an answer given by that person, and notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may be used in evidence against that person.”*

The Court may order cost in favour of the person being examined.¹⁶⁸⁹ That cost will be treated as expenses of the investigation.¹⁶⁹⁰

For the purposes of enquiries and investigation under sections 228 to 236 of the Act, lawyers and bankers are not to disclose privileged information or customers information other than of the body corporate respectively. Section 237 of Act 992 provides that:

“Sections 228 to 236 do not required disclosure to the Registrar or to an inspector appointed by the Registrar,

- (a) by a legal practitioner of privileged communication made to the legal practitioner in that capacity except as regards the name and address*

¹⁶⁸⁹ Section 232(6) of Act 992.

¹⁶⁹⁰ Ibid.

- of the client, or*
(b) *by the bankers of a body in their capacity as bankers of the body corporate of information relating to the affairs of any of their customers other than the body corporate."*

Upon conclusion of the investigation, the inspector is required to prepare and submit a written printed report to the Registrar.¹⁶⁹¹ The Registrar may also require submission of interim reports.¹⁶⁹² Upon receipt of the report, the Registrar may print and publish the report unless the Registrar determines it is not in the public interest to do so.¹⁶⁹³ A copy of the report may be made available to the company,¹⁶⁹⁴ the court where the inspector was appointed pursuant to a court order,¹⁶⁹⁵ or the members where the investigation was demanded by a special resolution of the members¹⁶⁹⁶. Any other person who is a member or creditor of the body corporate dealt with by the report may request and on payment of a reasonable charge obtain a copy of the report.¹⁶⁹⁷

23.7.3 Proceedings after investigation

Section 234 of Act 992 provides for actions that the Registrar may take after an enquiry or upon receipt of the report of an investigation from an inspection. Section 234 of Act 992 provides that:

"Where as a result of information obtained in accordance with section 228, or as a result of a report made under section 233, it appears to the Registrar that:

- (a) a person may have committed an offence for which the person is criminally liable, the Registrar shall refer the matter to the Attorney-General for necessary action;*
- (b) a company ought to be wound up or that application should be made to the Court to wind up the company, if the Registrar thinks it just and equitable to do so, or may apply to the Court under section 219;*
or
- (c) proceedings ought in the public interest to be brought by a company against a director or former director of a company under section 200 or against a person to recover property, damages or compensations to which a body corporate is entitled, the Registrar may bring proceedings for that purpose in the name of the company or body corporate but, subject to section 235 shall indemnify the company or*

¹⁶⁹¹ Section 233(1) and (2) of Act 992.

¹⁶⁹² Section 233(1) of Act 992.

¹⁶⁹³ Section 233(3) of Act 992.

¹⁶⁹⁴ Paragraph (a) of section 233(3) of Act 992.

¹⁶⁹⁵ Paragraph (c) of section 233(3) of Act 992.

¹⁶⁹⁶ Paragraph (d) of section 233(3) of Act 992.

¹⁶⁹⁷ Paragraph (b) of section 233(3) of Act 992.

body corporate against the costs or expenses incurred by the company or body corporate in connection with those proceedings.”

The Registrar is thus required to take any of the following actions where the enquiries or report of the investigation established the bases which the Registrar determines to require such action:

- (a) refer the matter to the Attorney-General if it appears a person may have committed a crime.
- (b) apply to the court to wind up a company.
- (c) institute an action under section 219 if it appears that the affairs of the company or exercise of the powers of directors have been oppressive or in disregard to the proper interest of a member or debenture holder in the capacity as a member, debenture holder or officer of the company.
- (d) institute an action in the name of the company or relevant body corporate under section 200 against directors and any person who knowingly act with the directors to breach duties imposed on directors to enforce liabilities against the director and any such person, to restrain the threatened breach of directors’ duties, or to recover property of the company from such persons.

The Registrar is required to indemnify a company or body corporate for costs or expenses incurred by the company or body for action instituted by the Registrar in the name of the company or body corporate under section 200. The requirement of indemnification is, however, subject to section 235 which provides for recovery of expenses of the investigation by the Registrar.

Expenses incurred by the Registrar must, at first instance, be borne by the Registrar. However, such expenses are recoverable in accordance with section 235 of the Act. Section 235 of Act 992 provides that:

“(1) The expenses of, and incidental to, an investigation by the Registrar under section 228 or by inspectors appointed by the Registrar under section 229 or 230 shall be defrayed in the first instance by the Registrar, but the following persons are, to the extent mentioned, liable to repay the Registrar:

- (a) a person who is convicted on a prosecution instituted by virtue of paragraph (a) of section 234, or who is ordered to restore property or pay damages or compensation in proceedings brought by virtue of paragraph (c) of section 234 may in the same proceedings be ordered to pay the expenses to the extent specified in the order;***
- (b) a body corporate in whose name proceedings are brought by virtue of paragraph (c) of section 234 is liable to the amount or value of any sums of money or property recovered by the body corporate as a result of those proceedings, and the expenses shall be a first charge on those sums or property; or***

- (c) a body corporate dealt with by the report of an inspector appointed under section 229 or 230 and the applicants, other than the Registrar, for the investigation where the inspector was appointed under section 229 is liable to the extent that the Registrar shall direct.*
- (2) The report of an inspector may, if the inspector deems fit, and shall if the Registrar so directs, include a recommendation as to the directions which the inspector considers appropriate to be given under paragraph (c) of subsection (1).*
- (3) For the purposes of this section, the costs or expenses incurred by the Registrar in connection with proceedings brought under paragraph (b) or (c) of section 234 shall be treated as expenses of the investigation giving rise to the proceedings.*
- (4) As between the person specified in paragraphs (a), (b) and (c) of subsection (1) of this section, liability to repay the Registrar shall be borne, to the extent to which these persons are respectively liable under the paragraphs specified, in the first instance by those liable under paragraph (a), by those liable under paragraph (b), and finally by those liable under paragraph (c)."*

The expenses incurred in taking actions after an enquiry or on the report of the investigation, other than reporting to the Attorney-General, are part of the expenses of investigation. The expenses are repayable to the Registrar by either a person who has been prosecuted and convicted pursuant to the referral by the Registrar to the Attorney-General. The expenses may also be recovered from assets or damages ordered to be paid to the company as a result of action instituted in Court by the Registrar. A body corporate dealt with by a report of investigation submitted by an inspector appointed by a process initiated by members is liable to repay the Registrar the expenses of the investigation as directed by the Registrar. The order of recoverable is, first, from a person convicted pursuant to the criminal prosecution, followed by the amount recovered from damages paid or property restored to the company, and lastly by the body corporates dealt with in the report submitted by the inspector whose appointment is initiated by members in a manner directed by the Registrar.

23.7.4 Investigation of ownership of shares and debentures

The Registrar is also empowered to investigate the ownership of shares in or debentures of a company. The Registrar may undertake the investigation by itself or by appointing an inspector to undertake the investigation. This may be done where the Registrar believes there is reasonable cause to do so or where so requested by the directors in writing. Section 236 of Act 992 provides that:

- “(1) Where it appears to the Registrar that there is reasonable cause to investigate the ownership of any shares in or debentures of a company, or where the directors of a company so request in writing, the Registrar may carry out the*

investigation or by written order appoint one or more inspectors to carry out the investigation in a manner provided by this section."

Section 236 of the Act provides the manner in which the Registrar or the appointed inspector may carry out the investigation. Section 236 of Act 992 provides that:

"(2) The Registrar or an inspector appointed by the Registrar may require a person whom the Registrar or the inspector has reasonable cause to believe,
(a) to be or to have been interested in those shares or debentures, or
(b) to act or to have acted in relation to those shares or debentures as the agent or adviser of a person interested in those shares or debentures,
to give the Registrar or inspector information which that person has or can reasonably be expected to obtain as to the present and past interests in those shares or debentures and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to the shares and debentures.

(3) For the purposes of this section, a person has an interest in a share or debenture if that person has a right to acquire or dispose of the share or debenture, or an interest in or right to vote in respect of the share or debenture, or if the consent of that person is necessary for the exercise of any of the rights of other persons interested in the share or debenture, or if other persons interested in the share or debenture can be required or are accustomed to exercise their rights in accordance with the instructions of that person."

In the conduct of the investigation, the Registrar or appointed inspector, as the case may be, may require from any person who is or was interested in the shares or debentures, or who is acting or has acted as adviser or agent to a person interested in the shares or debentures to provide information in relation to the shares or debentures. The information to be provided relate to past and present interests in the shares, the name and addresses of persons interested in the shares and persons who act or have acted in relation to the shares and debentures.

A person is or was interested in the shares or debentures if the person has a right to acquire the shares or debentures, right to vote in relation to the shares or debentures, the consent of the person is required for exercise by any person interested of rights in the shares or debentures, or if persons interested in the shares or debenture is accustomed to exercising their rights on the instructions of that person.

A person who refuses to give information or who gives false information commits an offence and is liable on summary conviction to a fine between three hundred and twenty-five penalty units and seven hundred and fifty penalty units, or terms of imprisonment between three months and six

months, or both fine and terms of imprisonment.¹⁶⁹⁸

The purpose of investigation under section 236 of Act 992 is to determine the rightful owner of shares in or debentures of a company. If the Registrar is unable to obtain information on those shares or debentures as a result of the unwillingness of persons to provide information, the Registrar may make an order subjecting the shares or debentures to restrictions until further orders.¹⁶⁹⁹ The restriction the Registrar can impose are provided in subsection (6) of section 236 of Act 992. Section 236(6) of Act 992 provides that:

- “(6) Where shares or debentures are directed to be subject to the restrictions imposed by the direction referred to in subsection (5),*
- (a) a transfer of those shares or debentures or of the right to be issued with those shares or debentures and an issue of those shares or debentures is void;*
 - (b) voting rights shall not be exercisable in respect of those shares or debentures;*
 - (c) further shares or debentures shall not be issued in respect of those shares or debentures or in pursuance of an offer made to the holders of those shares or debentures; and*
 - (d) except in liquidation, a payment shall not be made of the sums of money due from the company on those shares or debentures.*
- (7) Where the Registrar makes an order directing that shares or debentures shall be subject to the restrictions, or refuses to make an order directing that they shall cease to be subject to those restrictions, a person having an interest in the shares or debentures may apply to the Court and the Court may direct that the shares or debentures shall cease to be subject to those restrictions or any of them.*
- (8) A person who,*
- (a) exercises or purports to exercise a right to dispose of shares or debentures which, to the knowledge of that person, are for the time being subject to the restrictions or any of them, or of a right to be issued with those shares or debentures,*
 - (b) votes, whether as holder or proxy, or appoints a proxy to vote in respect of shares or debentures which, to the knowledge of that person are for the time being subject to the restriction, those voting rights shall not be exercisable in respect of those shares or debentures, or*
 - (c) being the holder of shares or debentures fails to notify of the restrictions any other holder or proxy for a holder whom that holder does not know to be aware of the restriction,*

¹⁶⁹⁸ Section 236(4) of Act 992.

¹⁶⁹⁹ Section 236(5) of Act 992.

commits an offence and is liable on summary conviction to a fine of not less than three hundred and twenty-five penalty units and not more than seven hundred and fifty penalty units or to a term of imprisonment of not less than three months and not more than six months or to both the fine and imprisonment, and where shares or debentures in a company are issued in contravention of the restriction, the company and every officer of the company that is in default is liable to a fine of not more than seven hundred and fifty penalty units."

The section permits the Registrar to issue restrictions in the relation to the shares and debentures where the person concerned is unwilling to provide information to the Registrar. Where imposed, the shares or debentures cannot be transferred, voting rights cannot be exercised in relation to the shares or debentures, further shares or debentures cannot be issued in relation to those shares, and payment cannot be in relation to those shares or debentures except in liquidation. A person aggrieved by the restriction may apply to the Court and the Court may remove, vary or maintain the restriction. A contravention of the restriction is an offence attracting a punishment of a fine or imprisonment or both. The prosecution of an offender must be with the consent of the Attorney-General.¹⁷⁰⁰

Where the investigation is carried out by an inspector rather than the Registrar itself, the inspector shall submit a report to the Registrar in writing.¹⁷⁰¹ The Registrar upon receipt of the report may provide a copy of the report or disclose the content to anyone the Registrar think fits.¹⁷⁰² The expenses of the investigation of ownership of shares or debentures are to be borne by the Registrar.¹⁷⁰³ The exception provided to lawyers and bankers not to disclose privileged information or information on other customers respectively applies in an investigation of ownership of shares and debentures.¹⁷⁰⁴

¹⁷⁰⁰ Section 236(9) of Act 992.

¹⁷⁰¹ Section 236(10) of Act 992.

¹⁷⁰² Section 236(11) of Act 992.

¹⁷⁰³ Section 236(12) of Act 992.

¹⁷⁰⁴ Section 237 of Act 992.

24.0 ADMINISTRATION & LIQUIDATION

Introduction

Once a company is incorporated it becomes a separate legal person and enjoys perpetual succession.¹⁷⁰⁵ The right of perpetual succession means the company continues in existence notwithstanding that the members or officers cease to be members or officers of the company through death or other means. However, companies do encounter problems or may seek to end their business or object for any number of reasons or be forced to cease to exist. For the company to cease to exist, the law provides for a formal process that must be followed which must take the interests of the stakeholders of the company into account. The process of bringing the life of a company to an end is the process of liquidation. Liquidation involves winding up and dissolution. Winding up requires dealing with the affairs of the company before the company ceases to exist. This will include the company bringing its relationships with third parties to an end, performing obligations owed to third parties, as best as possible, and dispose of suits against the company. In general terms, the company must go through the winding up of its affairs. After the completion of the winding up, the company is dissolved. Liquidation thus involves the winding-up of the company, followed by the dissolution of the company. The Registrar has the power in one instance to dissolve a company without winding up. The term liquidation is sometimes used interchangeably with winding up. However, winding up refers to the formal process of gathering the assets of the company, realizing the assets, and payment and discharge of the debts and liabilities of the company by a liquidator. The liquidation may be voluntary (that is private liquidation) or compulsory (that is official liquidation).

One of the reasons, arguably in majority of instances, for compulsory liquidation of a company is insolvency or where the company has a negative net worth. That is the inability of the company to satisfy its liability as and when the liabilities fall due. A company has a negative net worth where the total value of the assets of a company is less than the total liabilities of the company. The law also recognises that it is not in all instances that an insolvent company or a company with negative net worth should be liquidated and has provided for a process of managing a financially distressed company to ensure it continues in existence. The process is referred to as administration of a company. Administration can, therefore, be compared to “nursing” a person (company) back to health (financial health) from sickness (insolvency or having negative net worth), whilst liquidation refers to ending the life of the company.

This chapter deals with the three processes affecting a company:

- (a) Administration of companies is dealt with under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015);

¹⁷⁰⁵ *Salomon v. Salomon & Co. Ltd* [1895-9] All ER 33; [1897] AC 22.

- (b) Private or voluntary liquidation is dealt with under the Companies Act, 2019 (Act 992); and
- (c) Official or compulsory liquidation is dealt with under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015).

24.1 ADMINISTRATION

Administration is the process whereby an administrator is appointed to take over the business and assets of a company that is insolvent or have a negative net worth, to manage and restructure the business for the company to become solvent and have a positive net worth. In other words, it is the process of nursing a financially distressed company back to financial health. An administrative process is, therefore, applicable to an insolvent company or a company that has a negative net worth.¹⁷⁰⁶ A company is insolvent for the purposes of administration if the company is unable to pay its debt or obligations when the debt falls due.¹⁷⁰⁷ A company has a negative net worth where the total liabilities, including contingent and prospective liabilities, of the company exceed the total assets of the company.¹⁷⁰⁸ It is only in these two instances that a company may be subject to administration. A company may also adopt administration as a pre-emptive measure prior to the company becoming insolvent. The Act permits a company to appoint an administrator where the directors resolve that the company is likely to become insolvent.¹⁷⁰⁹

Administration of a company leads to a restructuring of the debts of the company and restraint on the right of creditors to institute actions against the company. This offers an opportunity for the company to operate its business whilst it discharges the restructured liabilities in a manageable manner.

Administration involves a three-stage process to revive an insolvent company or a company that has a negative net worth. The first stage is the appointment of an administrator to undertake the administration. This signifies the commencement of the administration. Administration thus commences with the appointment of the administrator. The second stage is the conduct of the administration. The conduct of the administration entails the takeover of control of the business and property of the company, investigation of the affairs of the company, the conduct of the business of the company for the benefit of the creditors, shareholders and employees, all by the administrator. The administrator exercises the powers of the company and performs the functions of the officers of the company. The administrator must call meetings of creditors. The deliberations at the meetings of the creditors are to lead to the execution of a restructuring agreement between the company and creditors. The third stage is the post-administration stage. That is the restructuring stage which

¹⁷⁰⁶ Section 1(2) of Act 1015.

¹⁷⁰⁷ Section 169 of Act 1015.

¹⁷⁰⁸ Ibid.

¹⁷⁰⁹ Section 3(7) of Act 1015.

entails the implementation of the restructuring agreement by the restructuring officer.

The essence of the administration process is to enable the law restrains the creditors of the company from enforcing obligations against the company in a manner that disables the business of the company. The administration offers an opportunity to bring in an independent appointed person, administrator, to take control of the business and property of the company in financial distress, renegotiate an agreement with creditors collectively, resulting in the execution of a restructuring agreement, to create room for the company to operate to discharge the obligations to the creditors in a more manageable manner that also enables the company to continue to operate as a going concern.¹⁷¹⁰ The restraints on the rights of creditors by the law offer ‘breathing space’ to the company to be able to operate whilst at the same time discharging the obligations to creditors in a much manageable manner.

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) regulates the administration of a company in Ghana. Exempted from the scope of application of the Act are companies carrying on the business of banking, insurance or any other business which has special legislation having a rescue provision.¹⁷¹¹ Per Act 1015, administration of a company is defined as *“a process of enabling the rehabilitation of a company that is financially distressed beginning when an administrator is appointed to perform duties necessary to achieve the objects laid out in subsection (1) of section 1 and ending as set out in the subsection (2) of section 2”*. Subsection (1) of section 1 of Act 1015 provides the objects to be achieved by the administration as:

- (a) the administration of the business, property and affairs of a distressed company in a manner that provides an opportunity for the company to as much as possible continue in existence as a going concern;
- (b) the temporary management of the affairs, business and property of a distressed company;
- (c) the placing of a temporary freeze on the rights of creditors and other claimants against a distressed company;
- (d) the development and implementation of a restructuring plan which results in a better return for the creditors and shareholders of the company than would result from the immediate winding-up of a distressed company.

In short, administration of a company is a process where creditors are not permitted to enforce liabilities against a company, liquidation is stayed, and an administrator is appointed to administer the business and assets of the company to revive the company for the benefit of both the creditors

¹⁷¹⁰ In *Re Harris Simons Construction Ltd* [1989]1 WLR 368 (Chancery Division), the court discussed the circumstances under which the court should appoint an administrator especially in relation to whether the company is likely to achieve the purposes stated in law for administration.

¹⁷¹¹ Section 1(3) of Act 1015.

and shareholders.¹⁷¹² Rather than liquidate the company or permit creditors to proceed against the assets of a company, the company is offered protection by the law and an administrator is appointed to manage the affairs of the company to make the insolvent company solvent and increase its assets over its liabilities.

As stated, there are three stages in the administration of a company in Ghana under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015). The first step is the appointment of an administrator. Second, the conduct of administration which includes investigation of the affairs of the company by an administrator; the takeover of the business and property of the company by the administrator; conduct of the business and exercise the powers of the company by the administrator; and the administrator calls meetings with creditors to negotiate restructuring agreement. Third, the post-administration or restructuring stage, which is the implementation of executed restructuring agreement and proceedings relating to the restructuring agreement. The Corporate Insolvency and Restructuring Act, 2020 provides key requirements that must be satisfied at each stage of the administration process.

24.1.1 Appointment of an administrator

Act 1015 permits any natural person qualified under the Act to be appointed an administrator subject to obtaining the prior written consent of the person.¹⁷¹³ A person appointed an administrator must be a qualified insolvency practitioner as provided under the Act and does not fall into the category of persons incapable of acting as an administrator in accordance with section 155 of the Act.¹⁷¹⁴ A person qualifies as an insolvency practitioner if:

- (a) the person is a chartered accountant, lawyer or banker in good standing with the Institute of Chartered Accountant, Ghana Bar Association or Chartered Institute of Banker respectively;
- (b) that person is certified as a restructuring and insolvency practitioner; and
- (c) has a professional indemnity insurance to indemnify for act or omission in the performance of duties of an administrator.

A person qualified as provided above is incapable of being appointed an administrator of a company if the person:

- (a) is a minor,
- (b) is a body corporate,
- (c) has been declared an undischarged bankrupt,
- (d) is declared by a court of competent jurisdiction to be of unsound mind,
- (e) is a subject of disqualification under the Companies Act on grounds of fraudulent trading,

¹⁷¹² See the case of *Re Harris Simon Construction Ltd* [1989]1 WLR 368.

¹⁷¹³ Section 3(1) and (4) of Act 1015.

¹⁷¹⁴ Section 3(2) of Act 1015.

- (f) is disqualified under the Companies Act from holding an office,
- (g) has been convicted within the last five years of an offence under this Act or a crime involving dishonesty or moral turpitude,
- (h) is disqualified from acting as a liquidator, administrator, receiver, trustee or supervisor under Act 1015 or any other enactment,
- (i) is subject to a disciplinary proceeding or punishment under any law,
- (j) is a creditor of the company or associated company, or
- (k) is a person who over the last two years is a shareholder, director, auditor or receiver of the company or associated company.

A person with the qualification above but who falls into the listed category is deemed incapable or ineligible to act as an administrator. A qualified person must give prior written consent prior to the appointment and that consent must not have been withdrawn.¹⁷¹⁵ The consent must be filed with the Registrar.¹⁷¹⁶

Under section 3(5) of Act 1015, the appointment of an administrator may be made by:

- (a) the company,
- (b) the liquidator, where the company is in liquidation,
- (c) a person holding a charge over the whole or substantially the whole of the property of the company or a receiver appointed by that person, or
- (d) the High Court.

Creditors of a company in administration may appoint a replacement administrator upon removing an administrator or when an administrator dies, resigns or is disqualified.¹⁷¹⁷ A company is permitted to appoint an administrator only when the company is insolvent or likely to become insolvent in the opinion of the directors voting by resolution.¹⁷¹⁸ The appointment is done by the directors.¹⁷¹⁹ A company or secured creditor cannot appoint an administrator of a company in liquidation.¹⁷²⁰ However, a private liquidator of a company in private liquidation may appoint an administrator if the liquidator thinks the company is insolvent.¹⁷²¹

The appointment of an administrator by the company, liquidator or person holding a charge or secured creditor must be in writing stating the date of the appointment and the ground of

¹⁷¹⁵ Section 3(3)(a) of Act 1015

¹⁷¹⁶ Section 3(3)(b) of Act 1015.

¹⁷¹⁷ Section 3(6) of Act 1015.

¹⁷¹⁸ Section 3(7)(a) of Act 1015.

¹⁷¹⁹ Section 3(7)(b) of Act 1015.

¹⁷²⁰ Section 3(8) and (11) of Act 1015.

¹⁷²¹ Section 3(10) of Act 1015.

appointment.¹⁷²²

The Court may appoint an administrator on application by a creditor, liquidator if the company is in liquidation, or the Registrar.¹⁷²³ The grounds upon which the Court may appoint an administrator on application by any of the listed persons are:

- (a) the company is or may become insolvent;
- (b) the company and the assets may likely survive as a going concern if an administrator is appointed;
- (c) administration offer a better advantage at realizing the assets of the company and any related company than winding-up;
- (d) administration provide more advantageous means of realisation and expeditious settlement of duties and liabilities owed by any person to the company or any related company; or
- (e) it is just and equitable to do.¹⁷²⁴

Companies that are insolvent or likely to be insolvent can be placed under administration. The Act seeks to widen the scope of access to administration to encourage companies to make use of administration not only as a curative measure but also as a preventive one.

One or three administrators may be appointed and where three administrators are appointed, the majority is to act except as indicated in the instrument of appointment.¹⁷²⁵ The remuneration of the administrator is fixed by a committee of creditors as set up under Act 1015 or by the Court, upon application by the administrator, officer, creditor or shareholder of the company.¹⁷²⁶

A vacancy may occur when the administrator dies, resigns, is disqualified or removed by the Court or creditors.¹⁷²⁷ Creditors may remove an administrator by a resolution and may by the same resolution appoint a replacement administrator.¹⁷²⁸ The resolution can only be passed if a notice of intention to remove the administrator is given to the company and the administrator not less than fourteen days before the meeting, and the administrator is heard.¹⁷²⁹ The Court may remove an administrator upon application by a creditor, the liquidator if the company is in liquidation or the Registrar.¹⁷³⁰ The appointer of the administrator may fill the vacancy.¹⁷³¹ The directors may, by

¹⁷²² Section 3(10) of Act 1015.

¹⁷²³ Section 3(12) of Act 1015.

¹⁷²⁴ *Ibid.* See also the case of *Re Harris Simon Constructions Construction Ltd* [1989]1 WLR 368.

¹⁷²⁵ Section 4 of Act 1015.

¹⁷²⁶ Section 5 of Act 1015.

¹⁷²⁷ Section 6 of Act 1015.

¹⁷²⁸ Section 7(2)(b) and (c) of Act 1015.

¹⁷²⁹ Section 7(3) of Act 1015.

¹⁷³⁰ Section 7(2)(a) of Act 1015.

¹⁷³¹ Section 8(1) of Act 1015.

resolution, appoint an administrator to fill a vacancy.¹⁷³²

The administration of a company commences upon the appointment of the administrator. Section 2(1) of Act 1015 provides that *“(1) The administration of a company begins when an administrator is appointed.”* The Act provides for specific timelines for specific acts by the administrator. In doing so, the Act indicates that administration commences from the time of appointment of the administrator.

24.1.2 Administration proceedings by the administrator

Upon the appointment of the administrator, the administrator is to conduct an investigation into the affairs of the company and take control of the business and assets of the company.¹⁷³³ The purpose of the investigation is for the administrator to determine whether the company must execute a restructuring administration, end the administration or be liquidated. As part of the investigation, the administrator must obtain statements from the directors relating to the affairs of the company.¹⁷³⁴ The administrator has the same powers as a liquidator to access information.¹⁷³⁵ The administrator may require anyone to submit a statement which must be verified by an attached affidavit as provided under section 108 of Act 1015. Persons who refuse to provide information are liable on summary conviction to a fine for each day of the default.¹⁷³⁶ A person who provides a false statement indicating the person is a creditor, member or a contributory of the company, commits an offence and is liable on summary conviction for perjury upon application by the administrator.¹⁷³⁷

The administrator must continue to carry out the business of the company for benefit of the creditors, employees and shareholders of the company.¹⁷³⁸ The administrator also has the power to terminate or dispose of the whole or part of the business of the company or dispose of any of the assets of the company.¹⁷³⁹ The administrator has the power to perform any function and may exercise any power that the company or any officer of the company could perform or exercise if the company were not to be in administration.¹⁷⁴⁰ Act 1015 require the administrator to prepare and file financial statements and reports relating to the administration.¹⁷⁴¹ The financial statements and reports must also be

¹⁷³² Section 8(2) of Act 1015.

¹⁷³³ Section 10(1) of Act 1015.

¹⁷³⁴ Section 17 of Act 1015.

¹⁷³⁵ Section 18 of Act 1015.

¹⁷³⁶ Section 108(5) of Act 1015

¹⁷³⁷ Section 108(7) of Act 1015

¹⁷³⁸ Section 10(1)(c) of Act 1015.

¹⁷³⁹ Section 10(1)(d) of Act 1015.

¹⁷⁴⁰ Section 10(1)(e) of Act 1015.

¹⁷⁴¹ Section 10(2) of Act 1015.

submitted to the directors of the company.¹⁷⁴² The financial statements and reports must be prepared and filed for each six months at a time for the duration that the administration continues with the final financial statement submitted when the administrator vacates office.¹⁷⁴³

24.1.3 Powers of the administrator

In the performance of the administration, the administrator is given the following powers under section 11 of Act 1015.

- (a) The power to perform the functions and duties stated in the Act.
- (b) The power to take legal action or intervene in legal action in the name of the company to continue, discontinue and defend legal actions in the name of the company.
- (c) The power to carry on the business of the company.
- (d) The power to appoint another person to perform functions under the Act.

The administrator in the exercise of the powers and performance of the duties under the Act is an agent of the company.¹⁷⁴⁴ It has been held that the administrator owes a duty to the company.¹⁷⁴⁵ Action to be taken by the administrator in relation to the company must be done in the name of the company.¹⁷⁴⁶

24.1.4 Consequences of administration

Upon the commencement of administration, Act 1015 provides for the following consequences:

- (a) The directors, even though remain directors of the company, cannot exercise the powers, perform functions or administer the business of the company without the prior written consent of the administrator or as permitted by the Act.¹⁷⁴⁷
- (b) The administration does not affect employment contracts of employees. However, the administrator may give notice of termination of such contracts within twenty-one days after the appointment of the administrator or an extended period given by the Court.¹⁷⁴⁸ Part of restructuring the business of the company may include labour rationalisation. The administrator is, therefore, permitted to terminate employment contracts but must do so within twenty-one days or an extended period granted by the court.
- (c) A transaction or dealing with the company by the company or other person on behalf of the company that affects the assets of the company is void unless the transaction or dealing was

¹⁷⁴² Ibid.

¹⁷⁴³ Ibid.

¹⁷⁴⁴ Section 11(3) of Act 1015.

¹⁷⁴⁵ *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760.

¹⁷⁴⁶ Section 11(4) of Act 1015.

¹⁷⁴⁷ Section 12 of Act 1015.

¹⁷⁴⁸ Section 13 of Act 1015.

entered into by the administrator or with the consent of the administrator, or subject to a court order. This does not cover payments by bank in the ordinary course of business in good faith without notice of the administration.¹⁷⁴⁹

- (d) An owner or lessor of property cannot without the leave of the court, take possession of the property or recover the property that was used or occupied by the company or is in possession of the company.¹⁷⁵⁰
- (e) Shares shall not be transferred or right or liabilities of shareholders altered unless approved by the administrator or pursuant to a court order.¹⁷⁵¹
- (f) A person is not permitted to enforce a charge over the assets of a company in administration except with leave of the court.¹⁷⁵²
- (g) A person cannot commence or continue an action in Court against the company or in relation to the property of the company, except with leave of the Court on terms stated by the Court.¹⁷⁵³
- (h) A person cannot commence or proceed with enforcement process against the company or property of the company unless subject to leave of the Court and on terms stated by the Court.¹⁷⁵⁴
- (i) Any officer of the Court cannot take action to sell the property of the company under execution process or pay to any other person other than the administrator amount received from the sale of property of the company, seized on execution, or money received as a result of the attachment of a debt due to the company.¹⁷⁵⁵ The officer is not to attach a debt due to the company.¹⁷⁵⁶
- (j) A guarantee in respect of the liability of the company given by a director of the company or a spouse or relative of a director or a related company, cannot be enforced against the director, spouse, a relative or related company at the time the company is in administration without leave of the Court.¹⁷⁵⁷
- (k) A receiver or any other person who enters into possession or control of a property or exercise any power in order to enforce the right of the owner or lessor of the property prior to administration is not affected by the administration. The receiver or person may continue to exercise the power.¹⁷⁵⁸

¹⁷⁴⁹ Section 14 of Act 1015.

¹⁷⁵⁰ Section 31 of Act 1015.

¹⁷⁵¹ Section 15 of Act 1015.

¹⁷⁵² Sections 30, 37 and 52 of Act 1015.

¹⁷⁵³ Section 32 of Act 1015.

¹⁷⁵⁴ Section 33 of Act 1015.

¹⁷⁵⁵ Section 34 of Act 1015.

¹⁷⁵⁶ *Ibid.*

¹⁷⁵⁷ Section 35 of Act 1015.

¹⁷⁵⁸ Section 38 of Act 1015.

24.1.5 Meeting with creditors

A critical part of the administration is for the administrator to reach an agreement with creditors on restructuring the business of the company to enable the company to continue as a going concern and satisfy the liabilities due to the creditors. The creditors are, therefore, integral to the administration process. It is for this reason that the creditors have the power to remove an administrator and appoint a replacement administrator, as well as play a critical role in the administration process as provided under Act 1015. This is a fair trade-off given that creditors are restrained from proceeding against the assets of the company in order to satisfy the debts and liabilities. This affects both secured and unsecured creditors.

The administrator is to have two critical meetings with the creditors – the first meeting of creditors and the watershed meeting.¹⁷⁵⁹ This does not prevent the administrator from holding other meetings with the creditors.¹⁷⁶⁰ It is the responsibility of the administrator to call the meetings of creditors or class of creditors.¹⁷⁶¹ The meetings are called by a notice in writing.

At the meeting, matters put up for determination must be decided by the votes of creditors or class of creditors holding fifty-one percent of the value of the total debt owed to the creditors or class of creditors present in person or proxy and voting or voting by postal vote.¹⁷⁶² The meeting is chaired by the administrator or a person appointed by the administrator.¹⁷⁶³ The administrator has a casting vote in the event of a deadlock.¹⁷⁶⁴

The administrator also has the discretion to determine that rather than meet creditors of the company in administration alone, to have a joint meeting with creditors of the company and creditors of related companies.¹⁷⁶⁵ The meeting of the creditors of related companies must be called by written notice and is subject to the consent of every creditor.¹⁷⁶⁶ Subsection (7) of section 20 of the Act provides that the written notice to the creditors of the related company must indicate:

- (a) the postal, electronic, business and residential address of the administrator,
- (b) the name of the related company,
- (c) that the creditors have the right to object to the meeting by notice to the address indicated within a period stated in the notice, and
- (d) that failure to object indicates agreement to the meeting.

¹⁷⁵⁹ Section 20(1) of Act 1015.

¹⁷⁶⁰ *Ibid.*

¹⁷⁶¹ *Ibid.*

¹⁷⁶² Section 20(2) of Act 1015.

¹⁷⁶³ Section 20(3)(a) of Act 1015.

¹⁷⁶⁴ Section 20(3)(b) of Act 1015.

¹⁷⁶⁵ Section 20(4) of Act 1015.

¹⁷⁶⁶ Section 20(6) of Act 1015.

The creditor is taken to have consented if the creditor has not objected within the time and manner indicated in the written notice. In a joint meeting, creditors can only vote on resolutions that relate to the administration of a company in which that person is a creditor.¹⁷⁶⁷

As indicated, two meetings are mandated under the Act for the administration of the company and these meetings must be held by the administrator as part of the administration process.

24.1.5.1 First meeting

Act 1015 requires the administrator to call the first meeting within ten days after the appointment of the administrator.¹⁷⁶⁸ The meeting must be called within ten days of the appointment of the administrator.¹⁷⁶⁹ The first meeting is to establish a committee of creditors and determine whether to replace the administrator.¹⁷⁷⁰ The meeting must be called by the administrator giving notice to the creditor as well as publishing the same in a daily newspaper of national circulation.¹⁷⁷¹ This must be done not less than seven days to the meeting, which means it must be done within three days of the appointment of the administrator.¹⁷⁷² At the meeting, the administrator must also table an interest statement which must disclose whether the administrator or a firm in which the administrator is a partner has a relationship with the company or any officer, shareholder or creditor of the company.¹⁷⁷³

As indicated, the two matters to discuss at the first meeting is the replacement of the administrator and the constitution of a committee of creditors. The committee of creditors is to advise the administrator about matters relating to the administration, receive and consider reports by the administrator, and approve the remuneration and terms of engagement of the administrator.¹⁷⁷⁴ The function of the committee of creditors is limited to advising the administrator. The committee is not to give directions to the administrator.¹⁷⁷⁵ Act 1015 provides that the members of the committee of creditors cannot be less than three or more than five in number.¹⁷⁷⁶ It is advisable to have an odd number of creditors, three or five and not four, for the purpose of decision making by the committee. A person cannot be a member of the committee of creditors unless the person is a creditor, agent of

¹⁷⁶⁷ Section 20(5) of Act 1015.

¹⁷⁶⁸ Section 21(1) of Act 1015.

¹⁷⁶⁹ Section 21(2) of Act 1015.

¹⁷⁷⁰ Ibid.

¹⁷⁷¹ Section 21(3) of Act 1015.

¹⁷⁷² Section 21(4) of Act 1015.

¹⁷⁷³ Section 21(5) of Act 1015.

¹⁷⁷⁴ Section 22(1) and (2) of Act 1015.

¹⁷⁷⁵ Section 22(3) of Act 1015.

¹⁷⁷⁶ Section 23(2) of Act 1015.

a creditor under a power of attorney, or so authorised in writing by a creditor.¹⁷⁷⁷

24.1.5.2 Watershed meeting

An administrator is to convene a watershed meeting within twenty-eight days after the date of appointment of the administrator or any extended period granted by the Court upon application by the administrator.¹⁷⁷⁸ The watershed meeting is to determine whether to bring the administration to an end by executing a restructuring agreement or put the company into official liquidation. Section 169 of Act 1015 provides that:

““watershed meeting” means a meeting of creditors called by the administrator to decide the future of a company and, in particular, whether the company and the creditors should execute a restructuring plan or wind-up the company”.

The watershed meeting must be held within seven days of the notice calling for the meeting and within twenty-eight days after the appointment of the administrator or extended period granted by the Court.¹⁷⁷⁹ The watershed meeting is to be convened by a written notice given to the creditors of the company and published in a newspaper of national circulation.¹⁷⁸⁰ This must be done not less than seven days to the date of the meeting.¹⁷⁸¹ Section 24(7) of Act 1015 states that the notice must be accompanied by:

- (a) a report of the administrator on the business, affairs and financial statements of the company, and other matters material to the decisions of the creditors,
- (b) a statement of the administrator on whether it is in the interest of the creditors to execute a restructuring agreement, end the administration or put the company into liquidation, and
- (c) where it is proposed for a restructuring agreement to be entered into, the details of the agreement.

The directors of the company may attend the watershed meeting but are not to answer any question at the meeting.¹⁷⁸² The directors may be excluded from attending the watershed meeting by the administrator or by the resolution of the creditors.¹⁷⁸³ A director or directors may also not attend if the director has a reason not to attend.¹⁷⁸⁴ Where the directors attend the meeting, the directors are to leave the meeting when creditors pass a resolution requiring the directors to do so.¹⁷⁸⁵

¹⁷⁷⁷ Section 23(1) of Act 1015.

¹⁷⁷⁸ Section 24(1), (2) and (3) of Act 1015.

¹⁷⁷⁹ Section 24(8) of Act 1015.

¹⁷⁸⁰ Section 24(5) of Act 1015.

¹⁷⁸¹ Section 24(6) of Act 1015.

¹⁷⁸² Section 24(10) of Act 1015.

¹⁷⁸³ Section 24 (9) and (10) of Act 1015.

¹⁷⁸⁴ Section 24(10) of Act 1015.

¹⁷⁸⁵ Section 24(11) of Act 1015.

In essence, the watershed meeting is to decide whether to proceed with the proposed restructuring or end the administration. In the event that the creditors opt to proceed, then a decision must be made on a restructuring agreement, the detailed terms of which must be provided by the administrator for discussion of the creditors at the watershed meeting.¹⁷⁸⁶ At the watershed meeting, the creditors may resolve that the company execute a restructuring agreement or end the administration.¹⁷⁸⁷ The decision must be by a vote of fifty-one percent of the creditors voting in person or by proxy or by postal vote.¹⁷⁸⁸

A creditor or administrator dissatisfied with the outcome of the first or watershed meeting may apply to the Court for the appropriate order.¹⁷⁸⁹

24.1.6 Restructuring Agreement and related matters

Where the administrator is of the view that it will be in the interest of the creditors to execute a restructuring agreement, the terms must be submitted as part of the items to discuss at the watershed meeting.¹⁷⁹⁰ Section 169 of Act 1015 provides that *“restructuring agreement” means the agreement that is executed by a company and the creditors of the company to provide for payments towards the debts of the creditors*. The restructuring agreement is to set out the restructured terms under which the company will discharge the debts and liabilities owed to the creditors in a manner that enables the company to continue to operate. The administration process is to enable the company to restructure its debt obligations to avoid creditors enforcing obligations against the company in a manner that impedes the company in carrying on its business. It also prevents the creditors from taking action to liquidate the company. The renegotiated terms on which the debts and liabilities of the company to the creditors will be discharged are set out in the restructured agreement.

The restructuring agreement is to be prepared by a restructuring officer.¹⁷⁹¹ Under the Act, the administrator is the restructuring officer unless the creditors resolved to appoint another person as the restructuring officer, who must also be qualified as an insolvency practitioner under the Act.¹⁷⁹² Creditors can therefore appoint a person other than the administrator as a restructuring officer provided the person is qualified as provided under the Act. Creditors may also fill a vacancy in the office of restructuring officer, or the appointment may be made by the Court.¹⁷⁹³ The qualification of

¹⁷⁸⁶ Section 24(7)(b) of Act 1015.

¹⁷⁸⁷ Section 28(1) of Act 1015.

¹⁷⁸⁸ Section 28(2) of Act 1015.

¹⁷⁸⁹ Section 28(2) of Act 1015.

¹⁷⁹⁰ Section 24(7)(c) of Act 1015.

¹⁷⁹¹ Section 44(1) of Act 1015.

¹⁷⁹² Section 39((1) of Act 1015.

¹⁷⁹³ Section 40 of Act 1015.

a restructuring officer is the same as that of an administrator.¹⁷⁹⁴

The restructuring officer is permitted under the Act to sell existing shares of the company subject to the consent of the shareholders or the court.¹⁷⁹⁵ Such action may be opposed by a shareholder, creditor or Registrar when the administrator makes the application to the court.¹⁷⁹⁶ In the event of such opposition, the administrator may apply to the court for direction if the restructuring officer intends to issue the shares notwithstanding the opposition.

The restructuring officer must prepare the restructuring agreement which must be approved by the directors of the company and the creditors. The terms of a restructuring agreement are submitted for consideration at the watershed meeting.¹⁷⁹⁷ A restructuring agreement is an agreement to be entered into by the creditors and the company that sets out the terms of the restructuring indicating the concessions that creditors may want to make, the terms of satisfying the liabilities of creditors, sources of payment of creditors, when the agreement terminates and other terms and conditions relevant to the restructuring. Section 44(2) of Act 1015 provides that the restructuring agreement must specify:

- (a) who the restructuring officer is;
- (b) funding of the restructuring agreement;
- (c) the property of the company that will be available to pay creditors;
- (d) whether the property is owned by the company at the time when the company executes the agreement;
- (e) the nature and duration of any moratorium period for which the agreement provides;
- (f) the extent to which the company will be released from the liabilities of the company;
- (g) the conditions for the agreement to come into operation;
- (h) the circumstances in which the agreement terminates;
- (i) the order in which the proceeds of realisation of the property of the company will be distributed among the creditors who are bound by the agreement; and
- (j) the day, on or before which claims of the creditors must have arisen if the claims are to be admissible under the restructuring agreement which shall not be later than the day when the administration began.

The agreement is also deemed to contain matters required in sections 2 to 78 of Act 1015 unless expressly excluded.¹⁷⁹⁸ The agreement must also include post-commencement financing.¹⁷⁹⁹ Post-Commencement Financing refers to funds obtained primarily through borrowing by the company

¹⁷⁹⁴ Section 39(2) of Act 1015.

¹⁷⁹⁵ Section 42 of Act 1015.

¹⁷⁹⁶ *Ibid.*

¹⁷⁹⁷ Sections 24(7)(c) and 28 of Act 1015.

¹⁷⁹⁸ Section 44(3) of Act 1015.

¹⁷⁹⁹ Section 44(4) of Act 1015.

at the time of administration or restructuring under Act 1015 for its operation. A restructuring agreement takes effect when executed by the company and the restructuring officer.¹⁸⁰⁰ Act 1015 requires the restructuring agreement to be executed within twenty-one days after the watershed meeting has approved the restructuring agreement or any extended period granted by the Court before the expiration of the twenty-one days after the approval at the watershed meeting.¹⁸⁰¹ The execution of the agreement by the company is subject to approval by the resolution of the directors.¹⁸⁰² However, failure to approve the agreement by resolution does not limit the functions and powers of the administrator of the company.¹⁸⁰³ Where the restructuring agreement is approved by the creditors by ordinary resolution, but the company fails to do so within the deadline for execution, the administrator must apply to the Court to convert the administration into official liquidation.¹⁸⁰⁴

Upon execution, the agreement is binding on the creditors, the company, officers and shareholders of the company, and the restructuring officer.¹⁸⁰⁵ The agreement is binding on creditors including secured creditors in relation to claims that arise on or before the day specified in the agreement.¹⁸⁰⁶ A secured creditor cannot enforce a claim unless permitted in the agreement and the secured creditor voted for the resolution approving the entry into the agreement, or pursuant to a court order.¹⁸⁰⁷ An owner or lessor cannot exercise right in relation to the property unless permitted in the agreement and the owner or lessor voted for the resolution approving the entry into the agreement, or pursuant to a court order.¹⁸⁰⁸ A person who is bound by the restructuring agreement is prohibited from applying or continuing with an application to appoint a liquidator of the company, commence or continue proceedings against the company or the property of the company except with leave of court, or commence or continue with enforcement process against the property of the company except with leave of the court.¹⁸⁰⁹

The Court has the power to permit a secured creditor to realise or otherwise enforce a secured charge or an owner or lessor to recover or exercise rights over the property.¹⁸¹⁰ The Court may permit the realisation by the secured creditor, or the recovery or exercise of rights by owner or lessor if the Court is satisfied that the purpose of the restructuring agreement will not be adversely affected and

¹⁸⁰⁰ Section 45(1) of Act 1015.

¹⁸⁰¹ Section 45(2) of Act 1015.

¹⁸⁰² Section 45(3) of Act 1015.

¹⁸⁰³ Section 45(4) of Act 1015.

¹⁸⁰⁴ Section 48 of Act 1015.

¹⁸⁰⁵ Section 49 of Act 1015.

¹⁸⁰⁶ Section 50(1) of Act 1015.

¹⁸⁰⁷ Section 50(2) of Act 1015.

¹⁸⁰⁸ Section 50(2) of Act 1015.

¹⁸⁰⁹ Section 51 of Act 1015.

¹⁸¹⁰ Section 52(1) of Act 1015.

to order otherwise will prejudice the interest of the secured creditor, or the owner or lessor.¹⁸¹¹ The restructuring agreement releases the company from debt as provided in the agreement and where the creditor concerned is bound by the agreement.¹⁸¹² The release does not however affect the liability of a guarantor of the debt or person who has indemnified the creditors against default by the company in relation to the debt.¹⁸¹³

The Court has the power to rule on the validity of restructuring agreement on application by the restructuring officer, shareholder or creditor of the company, or the Registrar.¹⁸¹⁴ Creditors may vary a restructuring agreement by resolution.¹⁸¹⁵ A creditor may also apply to the Court to cancel the variation of the agreement by the creditors.¹⁸¹⁶ Creditors may terminate a restructuring agreement by a resolution passed at a meeting of creditors for that purpose.¹⁸¹⁷ The ground for passing the resolution is that a material breach of the agreement has occurred.¹⁸¹⁸ The creditors may at the same meeting pass ordinary resolution to wind-up the company where notice of the meeting so proposed.¹⁸¹⁹

The Court may also terminate a restructuring agreement on application by the company, a creditor, the restructuring officer or any person with interest in the termination of the agreement.¹⁸²⁰ Section 57(1) and (2) of Act 1015 provides that the Court may terminate the agreement on any of the following grounds. Where:

- (a) information breach has occurred. That is, giving false or misleading information about the business, property, affairs or financial circumstances of the company to the administrator or creditors, or report given to creditors for the watershed meeting, or omission of material information from that report,¹⁸²¹
- (b) material breach of the agreement by a person bound by the agreement,
- (c) giving effect to the agreement will lead to injustice or undue delay,
- (d) the implementation of the agreement, a provision in the agreement or a proposed act under the agreement will be oppressive, unfairly prejudicial or unfairly discriminatory to one or more creditors,
- (e) the implementation of the agreement, a provision in the agreement or a proposed act under

¹⁸¹¹ Section 52(3) of Act 1015.

¹⁸¹² Section 53(1) of Act 1015.

¹⁸¹³ Sections 53(2) and 35 of Act 1015.

¹⁸¹⁴ Section 54(1) and (2) of Act 1015.

¹⁸¹⁵ Section 55(1) of Act 1015.

¹⁸¹⁶ Section 55(2) of Act 1015.

¹⁸¹⁷ Sections 56(1)(b) and 59 of Act 1015.

¹⁸¹⁸ Section 59(1) of Act 1015.

¹⁸¹⁹ Section 59(2) of Act 1015.

¹⁸²⁰ Section 56(1)(a) of Act 1015.

¹⁸²¹ Section 57(4) of Act 1015.

- the agreement will be contrary to the interest of the company as a whole, or
(f) the agreement is terminated for some other reason.

The Court must take into account the effect of the termination of the agreement on third parties prior to making an order for termination.¹⁸²²

The restructuring agreement is to regulate the conduct of the affairs of the company in relation to the payment of the debts and liabilities of the creditors. It essentially restructures the payment obligations of the company to the creditors in a manner that permits the business of the company to be undertaken without creditors taking legal actions that adversely affect the operations of the company. The company remains liable to discharge obligations under the restructuring agreement.

24.1.7 Termination of administration

Once an administrator is appointed, the company is under administration until the administration is terminated in manners permitted under Act 1015. Under section 2(2) and (3) of the Act, an administration terminates when one of the following occurs:

- (a) the execution of the restructuring agreement between the company and the restructuring officer.
- (b) the creditors of the company resolve that the administration should end. Creditors may resolve at the watershed meeting that administration should end.
- (c) the creditors of the company resolve at the watershed meeting to appoint a liquidator by a resolution passed at the meeting,
- (d) the creditors of the company vote to terminate a restructuring agreement and appoint a liquidator.¹⁸²³
- (e) the court orders for the termination of administration on the ground that the company is solvent, the provisions on administration of the company are not being complied with or any other sufficient reason. The administration will terminate on the date indicated in the order or where no date is stated, the date the order is made.¹⁸²⁴
- (f) The expiration of the date of the watershed meeting without an application for an extension made to the Court or the grant of extension upon application. The watershed meeting is to be held within twenty-eight days after the appointment of the administrator unless extended by the Court upon application.
- (g) The company fails to execute a restructuring agreement within twenty-one days after the watershed meeting has approved the agreement unless extended by the Court upon application before the expiration of the initial twenty-one days.

¹⁸²² Section 57(3) of Act 1015.

¹⁸²³ Section 56 of Act 1015.

¹⁸²⁴ Section 64(2) of Act 1015.

(h) The Court appoints a liquidator.

Where the administration is terminated, creditors and other third parties may proceed with claims against the company in accordance with rights conferred under the respective agreements and applicable laws. Persons entitled to take actions relating to the winding-up of the company are permitted to do so or the administrator may convert the administration into liquidation in accordance with the Act.

24.1.8 Liability of administrator

Act 1015 provides for the liabilities of the administrator for acts undertaken in administration and debts incurred. In relation to transactions undertaken by the administrator, Act 1015 provides that the administrator is liable for debts incurred in the performance of duties and functions of the administrator, and the exercise of powers of the administrator for the purpose of funding the company, any services rendered, or any property hired, leased or occupied.¹⁸²⁵ The liability is applicable notwithstanding any agreement to the contrary.¹⁸²⁶ The imposition of these liabilities does not affect the rights of the administrator against the company or any other person.¹⁸²⁷

The administrator is liable for rent and other payments accrued commencing fourteen days after administration begins during which the company continues to use or occupy, or is in possession of the property and ending on when administration ends or non-use notice¹⁸²⁸ is given by the administrator.¹⁸²⁹ The accrued liability may also end when an enforcement action is taken in relation to the property as permitted by the Court.¹⁸³⁰ Notwithstanding the liabilities stated to be on the administrator, the administrator is not deemed to have adopted the agreement and be liable under the agreement.¹⁸³¹ This section does not affect the liability of the company for rent or other payment due under the agreement.¹⁸³²

24.1.9 Power of the Court in administration of a company

The Court is given wide powers in the administration of a company under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015). Under the Act, the Court is given general powers to make

¹⁸²⁵ Section 61(2) of Act 1015.

¹⁸²⁶ Section 61(3) of Act 1015.

¹⁸²⁷ *Ibid.*

¹⁸²⁸ Section 60 of Act 1015.

¹⁸²⁹ Section 61(5) of Act 1015.

¹⁸³⁰ *Ibid.*

¹⁸³¹ Section 61(6) of Act 1015.

¹⁸³² Section 61(7) of Act 1015.

any order the Court considers appropriate in relation to the administration of a company.¹⁸³³ This includes orders to end administration. An application to the court for a relevant order under section 64 of Act 1015 may be made by the company, creditor, the administrator, the restructuring officer, the Registrar or any other person with an interest in the administration.¹⁸³⁴ Officers, shareholders and relevant regulators may qualify as persons with an interest in the administration of a company.

Without limiting the general powers of the Court, the Act provides that the Court can make orders relating to the protection of creditors;¹⁸³⁵ meeting of creditors;¹⁸³⁶ the validity of the appointment of an administrator and restructuring officer;¹⁸³⁷ give directions to administrators and restructuring officer upon application;¹⁸³⁸ supervise the administrator and restructuring officer;¹⁸³⁹ provide remedies for defaults of administrator and restructuring officer;¹⁸⁴⁰ vacation of office of administrator and restructuring officer;¹⁸⁴¹ rule on the validity of restructuring agreement;¹⁸⁴² prohibit persons from being an administrator or restructuring officer of a company;¹⁸⁴³ remuneration of administrator¹⁸⁴⁴ and restructuring officer¹⁸⁴⁵; grant of leave to secured creditors to proceed with enforcement and realisation of property of a company in liquidation;¹⁸⁴⁶ termination of restructuring agreement;¹⁸⁴⁷ and other instances under the Act.

24.1.10 Notices required in administration

A company in administration is required under Act 1015 to issue a number of notices at various stages of the administration process. The essence of the notice is to give publicity to the administration and dealings of the administrator. A notice of appointment must be lodged with the Registrar upon the appointment of the administrator with a requirement for the Registrar to publish same in the Companies Bulletin as well as in a daily newspaper of national circulation.¹⁸⁴⁸ Notice of execution of restructuring agreement must also be sent to each creditor, a copy filed with the

¹⁸³³ Section 64(1) of Act 1015.

¹⁸³⁴ Section 64(3) and (3) of Act 1015

¹⁸³⁵ Section 65 of Act 1015.

¹⁸³⁶ Section 25 of Act 1015.

¹⁸³⁷ Section 66 of Act 1015

¹⁸³⁸ Section 67 of Act 1015.

¹⁸³⁹ Section 68 of Act 1015,

¹⁸⁴⁰ Section 69 of Act 1015.

¹⁸⁴¹ Section 70 of Act 1015.

¹⁸⁴² Section 54 of Act 1015.

¹⁸⁴³ Section 71 of Act 1015.

¹⁸⁴⁴ Section 5(2) of Act 1015.

¹⁸⁴⁵ Section 41(2) of Act 1015.

¹⁸⁴⁶ Sections 33, 37 and 52.

¹⁸⁴⁷ Section 57 of Act 1015.

¹⁸⁴⁸ Section 72 of Act 1015.

Registrar and publication made in the Companies Bulletin and daily newspaper of national circulation.¹⁸⁴⁹ Similarly, notice of failure to execute a restructuring agreement or termination by creditors of restructuring agreement must be given and published.¹⁸⁵⁰ Any document issued or signed by or on behalf of the company that is evidence of creation of a legal obligation on the company must have after the name of the company the words “in administration”.¹⁸⁵¹

A breach of any of the provisions on notice does not affect the validity of anything done unless otherwise stated by the Court.¹⁸⁵²

24.1.11 Protection of creditors

Administration restricts the right of creditors of a company to enforce liabilities against a company. Creditors cannot commence or continue with legal actions against the company once administration of the company commences upon the appointment of an administrator, including restriction on creditors from enforcing charges against the property of the company. However, there are a number of mechanisms in the administration process that are to protect the interest of creditors including the following:

- (a) Creditors have control over the administration process by the provisions that give power to the creditors to replace an administrator. In addition, creditors act through the committee of creditors constituted by the creditor to receive reports and advise the administrator.
- (b) Creditors also decide whether to proceed with administration at the watershed meeting. Notwithstanding the opinion of the administrator, the decision to enter into a restructuring agreement is that of the creditors. At the meeting, creditors can choose to end the administration. Where the creditors end the administration, the creditors can resolve to appoint a liquidator to proceed with the liquidation of the company, or the creditors can each choose to take action against the company to recover debts from the company.
- (c) Creditors are not bound to restructure debts or release the company from liability unless agreed in the restructuring agreement.¹⁸⁵³
- (d) After passing a resolution at the watershed meeting that the restructuring agreement be executed, a secured creditor is permitted to apply to the Court to enforce a charge.¹⁸⁵⁴
- (e) The Court is also given the power, on the application of the Registrar or a director of a company, to make orders the court considered necessary to protect the interests of the creditors of the company in administration.¹⁸⁵⁵

¹⁸⁴⁹ Section 73 of Act 1015.

¹⁸⁵⁰ Section 74 and 75 of Act 1015.

¹⁸⁵¹ Section 76 of Act 1015.

¹⁸⁵² Section 78 of Act 1015.

¹⁸⁵³ Section 53(1) of Act 1015.

¹⁸⁵⁴ Section 52(1) of Act 1015.

¹⁸⁵⁵ Section 65 of Act 1015.

LIQUIDATION OF COMPANIES

Incorporation brings a company into existence whilst liquidation brings a company to an end. Liquidation refers to the process of bringing the business of the company to an end. Liquidation involves the winding up of the company and the dissolution of the company. Winding up refers to the gathering of assets of the company, realizing the assets, using the proceeds to pay off the liabilities of the company, and distribution of remaining assets to shareholders, or for a company limited by guarantee, transfer to another company with a similar object. There are two types of liquidation or winding up – private or voluntary liquidation and official or compulsory liquidation. Private or voluntary liquidation is regulated by the Companies Act, 2019 (Act 992) with reference to Corporate Insolvency & Restructuring Act, 2020 (Act 1015). Official or compulsory liquidation is regulated by Corporate Insolvency & Restructuring Act, 2020 (Act 1015).

24.2 PRIVATE LIQUIDATION

Private or voluntary liquidation refers to the voluntary liquidation by the members without the compulsory orders of the Registrar or the Court. The members of the company voluntarily decide to bring the business or objects of the company to an end. Under the Companies Act, 2019, private or voluntary liquidation applies only to solvent companies. Private liquidation thus refers to bringing the life of a company to an end based on the decision of the members, and not pursuant to the order of the court or the Registrar. A solvent company refers to a company that is able to pay its debt as the debts fall due.¹⁸⁵⁶ In relation to private liquidation, the company must be able to pay all its liability within twelve months from the commencement of the private liquidation or the time indicated in the affidavit of solvency by directors.

24.2.1 Steps involved in private liquidation

There are four main steps in private liquidation of a company.

- (a) Step one – enquiries and declaration of affidavit of solvency by the directors of the company upon discussion of bringing of life of the company to an end.
- (b) Step two – passage of a special resolution by members of the company to liquidate the company and appointment of a liquidator for the liquidation. This must be done not later than five weeks after the declaration of the affidavit of solvency.
- (c) Step three – winding up of the company by the liquidator which entails gathering the assets of the company, realizing the assets, discharge of the debts and liabilities of the company, and distribution of net assets of the company to shareholders. This must be done within twelve months of the commencement of the winding up.
- (d) Step four – dissolution of the company by the Registrar. That is, the striking off of the name

¹⁸⁵⁶ First Schedule of Act 992.

of the company from the register of companies. This is done after the Registrar is satisfied that the winding up by the liquidator is completed.

The steps do not happen in a vacuum. The members may have proposed the voluntary liquidation of the company to trigger the first step. This may also occur if the company has completed the business or object for which it was incorporated. The agreement between the members may have expired or terminated. In practice, the first step may be triggered by the decision of the members or the decision may be pursuant to the recommendation of the directors. Once the decision is made, the first step must be the determination of the solvency of the company.

24.2.2 Affidavit of solvency

Private liquidation applies to only solvent companies. The solvency of the company is evidenced by a declaration of affidavit of solvency by the directors. The declaration of affidavit of solvency is, therefore, required when there is a proposal to put the company into private liquidation. Prior to the directors swearing to the affidavit, the directors must make an enquiry and be satisfied with the declaration to be made in the affidavit which is to the effect that the company is able to pay its debts and liabilities in full within a period of twelve months from the commencement of the winding up. Section 275 of Act 992 provides that:

“(1) Where it is proposed to wind up a company by way of a private liquidation, the directors of the company or, in the case of a company having more than two directors, the majority of the directors shall, at a meeting of the directors, make an affidavit to the effect that they have made a full enquiry into the affairs of the company, and that, having done so, they have formed the opinion that the company will be able to pay its debts and liabilities in full within a period of not more than twelve months from the commencement of the winding up that may be specified in the affidavit.

(2) An affidavit made under subsection (1) does not have effect for the purposes of this Act unless,

(a) it is made within five weeks immediately preceding the date of the passage of the resolution for the winding up of the company by way of private liquidation and is delivered to the Registrar for registration on or before that date; and

(b) it embodies a statement of the assets and liabilities of the company at the latest practicable date before the making of the affidavit.

(3) A director of a company who makes an affidavit under this section without having a reasonable grounds for the opinion that the company will be able to pay its debts and liabilities in full within the period specified in the affidavit, commits an offence and is liable on summary conviction to a fine of not less

than three hundred and twenty-five penalty units and not more than seven hundred and fifty penalty units or to a term of imprisonment of not less than six months and not more than one year or to both the imprisonment and the fine.

- (4) Where the company is wound up in pursuance of the resolution for the winding up of the company by way of private liquidation passed within the period of five weeks after the making of the affidavit, but the debts and liabilities of the company are not paid or provided for in full within the period stated in the affidavit, it shall be presumed, until the contrary is proved, that the director did not have reasonable ground for the opinion stated in the affidavit."*

The directors are therefore to have reasonable grounds for the declaration in the affidavit that the company is able to pay its debts and liabilities. The directors are required to make full enquiry into the affairs of the company based upon which they must have come to that conclusion. The affidavit of solvency is valid for the purpose of private liquidation where two conditions are satisfied. First, per the special resolution passed, the members resolved to put the company into private liquidation. The special resolution must be passed within five weeks after the making of the affidavit. The affidavit of solvency must be delivered to the Registrar for registration within the five weeks. Second, attach to the affidavit is the statement of the assets and liabilities of the company at the latest practicable date.

A director commits an offence if the director makes the affidavit without having reasonable ground to believe in the declaration. On summary conviction, the director is liable to pay a fine or serve a term of imprisonment or both. It is presumed that the director has no reasonable ground for the opinion if the company is not able to pay its debts and liabilities at the time indicated in the affidavit unless the director proves otherwise.

24.2.3 Special resolution by members

The decision to put a company into private liquidation must be taken by the members of the company. The Act requires the decision to be taken by a special resolution. Sections 276 and 278 of the Act provides for special resolution of the members to put the company into private liquidation. The special resolution is passed within five weeks after the declaration of solvency. Section 276 of Act 992 provides that:

- "(1) A company may be wound up by way of private liquidation if,*
(a) the company resolves by special resolution that it shall be wound up
by way of private liquidation, and
(b) before the date of the resolution, an affidavit declaring that the
company is solvent is made in accordance with section 275.

- (2) The private liquidation commences at the time of the passing of the resolution.**
(3) Where a company passes a resolution for private liquidation, the company shall, within fourteen days after the passage of the resolution, send to the Registrar a copy of the resolution and the Registrar shall publish the resolution in the Companies Bulletin."

Section 278(1) of Act 992 provides that:

- "(1) The resolution for the private liquidation of a company shall include the appointment as a liquidator of a person named in the resolution and the resolution is not valid for the purposes of this Part unless the person named has previously consented in writing to the appointment."**

A decision of members to liquidate a company through private liquidation must be by a special resolution. Prior to the passage of the resolution, two conditions must be satisfied – the directors must make an affidavit of solvency and the company must have received the written consent of the liquidator to be appointed. Affidavit of solvency, for the purpose fulfilling this condition, must not be made more than five weeks prior to the special resolution. The special resolution must resolve at least two actions – resolve the liquidation of the company through private liquidation and resolve for the appointment of the person named in the special resolution as the liquidator of the company. The written consent of the liquidator is required prior to the appointment. In that respect, the consent must be received prior to the passage of the special resolution which appoints the liquidator. The liquidation commences at the time of passage of the special resolution. The resolution must be delivered to the Registrar and the Registrar must publish the resolution.

Billy v. Kuwor and Another¹⁸⁵⁷ - the applicant and respondents were shareholders of the company. The applicant was an employee of the company but not a director. Respondents were both directors and shareholders. The applicant was informed that the company had been dissolved, that he had been dismissed and his shares forfeited. The applicant instituted the action seeking inter alia, for an order for winding up of the company under section 247 of the Companies Act 1963. It was held that the applicant is not a director who could initiate a winding up of a company through a private liquidation. The court per Benin J stated @ pgs. 527 to 528 that:

"I shall begin with the winding up order sought. This was brought under section 247 of Act 179. Apparently section 247 of Act 179 deals with private liquidation. And it provides for the mode of going about this. Without doubt the applicant herself not being a director cannot proceed under this section. It is only the directors who may fulfil the obligations imposed by the section. Again, the conditions precedent to the winding up by private liquidation has not been fulfilled in this case. These are contained in section 248(1) and (2) of Act 179, namely.

¹⁸⁵⁷ [1991] 1 GLR 522.

- (a) *the company should pass a special resolution that the company be wound up by private liquidation;*
- (b) *before such special resolution is passed by the company, at least two directors (if the company has only two) or where there are more than two a majority of them shall have declared the solvency of the company in an affidavit at least five weeks before the passing of the resolution; and*
- (c) *the copy of the resolution should be sent to the Registrar of Companies within fourteen days.*
- (d) *It seems therefore that none of these conditions having materialised the action for winding up under section 247 of the Code, is not properly before the court."*

24.2.4 The liquidator and winding up

The third step in the private liquidation process is to be undertaken by the liquidator. The liquidator undertakes the winding up of the company. The liquidator is the person appointed by the special resolution of the company to undertake the winding up. The Act provides that *"liquidator" means the person appointed to wind up a body corporate*¹⁸⁵⁸. A liquidator appointed in private liquidation must first give consent prior to the appointment. The company may appoint more than one liquidator.¹⁸⁵⁹ The liquidator is responsible for the winding up of the company. In the event of a vacancy where the liquidator dies, resigns or cease to be a liquidator, the members in a general meeting may fill the vacancy.¹⁸⁶⁰ The general meeting may be called for the purpose by a member or a continuing liquidator if there is more than one liquidator.¹⁸⁶¹ The Court may, on application by a member of the company or the Registrar, remove a liquidator and appoint another liquidator.¹⁸⁶² The court may also appoint a liquidator if, for sufficient cause, a liquidator is not acting.¹⁸⁶³ The company or Court must give notice to the Registrar of the removal or appointment of the liquidator and the same must be published by the Registrar in the Company Bulletin.

The members in a general meeting must determine the remuneration payable to the liquidator appointed by the members. The Court must determine remuneration for a liquidator appointed by the Court. Section 279 of Act 992 provides that:

"For the purposes of a private liquidation, the company shall, in general meeting, fix the remuneration to be paid to a liquidator appointed for the purpose of

¹⁸⁵⁸ First Schedule of Act 992.

¹⁸⁵⁹ Section 283(2) of Act 992.

¹⁸⁶⁰ Section 278(2) of Act 992.

¹⁸⁶¹ Ibid.

¹⁸⁶² Section 278(3) of Act 992.

¹⁸⁶³ Ibid.

liquidation and where the appointment of a liquidator is made by the Court the remuneration of the liquidator shall be fixed by the Court."

24.2.5 Disqualification of liquidators

Act 992 provides that the following persons are disqualified from being appointed a liquidator in private liquidation of a company under section 280:

- (a) an infant;
- (b) a person found by a court of competent jurisdiction to be a person of unsound mind;
- (c) a body corporate;
- (d) a person convicted, whether in Ghana or elsewhere, of an offence involving fraud or dishonesty, or of an offence in connection with the promotion, formation or management of a body corporate. The person may, however, be eligible for appointment if ten years have elapsed after completing the sentence; and
- (e) An undischarged bankrupt or any other person subject to insolvency proceedings under Insolvency Act, 2006 (Act 708).

A director and auditor of the company in liquidation are not eligible to be appointed as liquidator of that company.¹⁸⁶⁴ Any appointment of a disqualified person or person not eligible is void.¹⁸⁶⁵ Other than a person disqualified due to mental incapacity, a disqualified person who acts as a liquidator commits an offence and is liable on summary conviction to a fine between three hundred and fifty penalty units and seven hundred penalty units.¹⁸⁶⁶ In the event of a natural person, the punishment may be a term of imprisonment between two to five years alone or in addition to a fine.¹⁸⁶⁷

It should be noted that the Corporate Insolvency & Restructuring Act, 2020 (Act 1015), which deals with administration and official liquidation of corporate entities including companies provides at section 95(2) of Act 1015 that ***"(2) A person shall not be appointed a liquidator if that person is not qualified under section 155 to be an insolvency practitioner."*** However, it seems a liquidator appointed under Act 992 does not need to be an insolvency practitioner as provided under Act 1015. This is because section 154 of Act 1015 did not include liquidator appointed under the Companies Act, 2019 within the meaning of the definition of an insolvency practitioner. Section 154(1) of Act 1015 provides that:

"(1) Insolvency practitioner means

- (a) a receiver under the Companies Act, 2019 (Act 992);***
- (b) a manager under the Companies Act, 2019 (Act 992);***

¹⁸⁶⁴ Section 280(3) and (4) of Act 992.

¹⁸⁶⁵ Section 280(5) of Act 992.

¹⁸⁶⁶ Section 280(6) of Act 992.

¹⁸⁶⁷ Ibid.

- (c) *an administrator under this Act;*
- (d) *a restructuring officer under this Act; or*
- (e) *a trustee in bankruptcy under the Insolvency Act, 2006 (Act 708)."*

The express reference to receiver and manager under Act 992 without reference to the liquidator under Act 992 must be interpreted to mean exclusion from the definition of an insolvency practitioner, a liquidator under Act 992. This is the application of the *expressio unius est exclusio alterius* rule. That is the express mention of one or more things of a particular class may be regarded as impliedly excluding others. The express mention of receiver and manager, all reference to a person appointed to take action against a company not able to pay its debt, impliedly excludes liquidator appointed under Act 992 who also falls within the same group. Perhaps, the reason for the exclusion may be the fact that private liquidation under Act 992 applies to only solvent companies. Therefore, the stringent qualification required of an insolvency practitioner is dispensed with in relation to the liquidator under Act 992.

24.2.6 Status and powers of liquidator

An appointed liquidator in a private liquidation stands in a fiduciary relationship with the company in the same manner as a director of the company. The duties and powers conferred on directors are applicable to the liquidator of a company. Section 281 of Act 992 provides that:

"A liquidator appointed for the purposes of a private liquidation stands in a fiduciary relationship to the company as if that liquidator were a director of the company and accordingly sections 190 to 217 shall, with necessary modifications, apply."

On the appointment of a liquidator, the powers of the board of directors are vested in the liquidator. As such, the liquidator has the same powers as the powers of the board of directors except as restricted under the Companies Act, 2019 and Corporate Insolvency & Restructuring Act, 2020. Section 282 of Act 992 provides that:

"On the appointment of a liquidator for the purposes of a private liquidation, the powers of the board of directors shall vest in the liquidator and the powers and authority of every director shall cease, except in so far as

- (a) the company in general meeting or the liquidator sanctions their continuance; or*
- (b) it is necessary to enable the directors to prepare statements and accounts of the company."*

The powers of a liquidator in private liquidation are, therefore, the same as the powers of a director. The powers of the liquidator in private liquidation must, however, be exercised in relation to the

winding up of the company. Section 283 of Act 992 provides that the specific powers that a liquidator may exercise are the same as that of a liquidator in official liquidation as provided in the Corporate Insolvency & Restructuring Act, 2020 (Act 1015).

Section 97 of Act 1015 lists the powers conferred on an official liquidator. Extensive powers are given to a liquidator for the purpose of winding up a company. Per section 97 of Act 1015, the specific powers of the liquidator include power to:

- (a) bring or defend an action or any other legal proceeding in the name and on behalf of the company;
- (b) carry on the business of the company to the extent beneficial for the winding up;
- (c) appoint legal practitioner or other professional to assist the liquidator in the winding up;
- (d) pay any class of creditors in full;
- (e) make a compromise or an agreement, with creditors or persons claiming to be creditors who have present or future claims, certain or contingent, ascertained or unascertained damages against the company or whereby the company may be rendered liable subject to Act 992;
- (f) make a compromise on calls and liabilities, debts and liabilities capable of resulting in debts, present or future claims, certain or contingent, ascertained or possible only as damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory, or any other debtor or person attributing liability to the company and the questions relating to or affecting the assets or the winding up of the company on the terms that may be agreed.
- (g) take security for the discharge of the calls, debts, liabilities or claim and give complete discharge in respect of any of them;
- (h) sell the property and things in an action of the company, through a public or private contract, with power to transfer the property or those things to a person or company;
- (i) do the acts and execute, in the name of and on behalf of the company, the agreements, receipts and any other documents and for that purpose use, when necessary, the seal of the company;
- (j) prove and rank the claims in the bankruptcy and insolvency of a contributory for a balance against the estate of the contributory, and may receive dividends in the bankruptcy or insolvency regarding the balance, as a separate debt due from the bankrupt or insolvent and proportionately with the other separate creditors;
- (k) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company in the course of the business of the company;
- (l) raise the requisite money on the security of the assets of the company;
- (m) take out letters of administration of a deceased contributory and perform in the name of the liquidator or do any other act necessary to obtain payment for money due from the contributory or the estate of the contributory which cannot conveniently be done in the

- name of the company, and in those cases, the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator; and
- (n) do any other act necessary for winding up the affair of the company and distribution of the assets of the company.

Per reference to section 97 of Act 1015 by the Companies Act, 2019, a liquidator under Act 992 for private liquidation is vested with the corporate powers to take all necessary actions relating to the winding up of the company.

*Union Maritime et Commerciale v. Rabensteiner and another*¹⁸⁶⁸. Amissah JA stated @ pg. 506 that –
“According to section 255(1) of the Code, the liquidator in a private liquidation may exercise all the powers of the liquidator in an official winding up under the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). Under section 9(1) of Act 180, the liquidator in an official winding up under the Act has power to bring or defend any action or other legal proceedings in the name and on behalf of the company. Thus the liquidator in a private liquidation has the same power.”

A liquidator in private liquidation thus has the powers so stated under section 97 of Act 1015 for the purpose of private liquidation.¹⁸⁶⁹ The Court is also given the same powers as conferred on the Court in official liquidation. Such powers are stated in section 98 of Act 1015 which include the power to:

- (a) make appropriate orders upon application of any person aggrieved by an act done by the liquidator in the performance of the function of the liquidator;
- (b) order a person who has failed or refused to comply with the requirement by the liquidator under the Act, upon application by the liquidator; and
- (c) give direction where the liquidator applies to the Court for directions when in doubt on matters connected with the functions of the liquidator.

A liquidator is permitted to apply to the Court for directions in the matters relating to the winding up of the company as it relates to the performance of the functions or exercise of the powers of the liquidator. Section 283(4) of Act 992 provides that:

“(4) The liquidator may apply to the Court for directions in relation to a matter arising in connection with the performance of the functions of office or to exercise all or any of the powers which the Court might exercise if the company were being wound up under the [Corporate Insolvency & Restructuring Act, 2020 (Act 1015)] and on that application, the Court may give appropriate directions or make an appropriate order.”

¹⁸⁶⁸ [1968] GLR 504.

¹⁸⁶⁹ Section 283(1) of Act 992.

The Court is thus permitted upon application by a liquidator for directions to give direction that the Court has the powers to give if the company was being liquidated as official liquidation.

24.2.7 Conduct of the winding up

The winding up covers four main actions by the liquidator: (a) gathering and realizing the assets of the company; (b) settlement or discharge of the debts and liabilities of the company; (c) distribution of net assets to shareholders and for a company limited by guarantee transfer to another company pursuant to a resolution of the members; and (d) preparation of required accounts and providing the accounts to members of the company at general meetings.

The liquidator must gather the assets of the company. This covers taking inventories of the assets. Where there is not enough cash in hand and bank to pay off liabilities, the liquidator may sell the assets either through public auction or private contracts. The gathering of the assets also covers recovering debts owed to the company and receiving any receivables due to the company. The liquidator may take legal action or intervene in any legal action for this purpose. The liquidator must also settle the liabilities of the company. In so doing, he may request for proof of debt and rank creditors. Debts cover present and future debts, certain and contingent debts, including damages that may arise. The liquidator in a private liquidation must be able to settle all liabilities of the company. In that respect, the ranking may be for the simple purpose of determining orderly payment of the debt and not for the priority of payment. However, it is possible the assets of the company may not be enough to settle the liabilities in which case section 286 of Act 992 must be complied with by the liquidator.

Upon the satisfaction of debt and liabilities of the company, the liquidator is to distribute the net assets among the shareholder in accordance with rights attached to the shares held by the shareholders. However, members of a company limited by guarantee are prohibited from distribution of net assets as the constitution of such company must necessarily provide against such distribution.¹⁸⁷⁰ Liquidators can, therefore, only distribute net assets where the company is one with shares. For a company limited by guarantee, the net assets must be transferred to another company with a similar object.¹⁸⁷¹

The liquidator is required to maintain specific accounts relating to the liquidation as provided in section 284 of Act 992.

¹⁸⁷⁰ Section 27(3)(b)(iii) of Act 992.

¹⁸⁷¹ *Ibid.*

24.2.8 Effect or consequences of private liquidation

Upon commencement of liquidation by the special resolution passed by the member, a number of consequences are triggered under the Companies Act, 2019. That is, once the winding up commences, which is when the special resolution is passed, a number of consequences follow. The consequences or effect of private liquidation on the company are as follow:

- (a) The company must cease to carry on business from the date of the commencement of the winding up except to the extent the carrying on the business is beneficial for the winding up. Section 274(2) provides that *“(2) The company shall, from the commencement of the winding up cease to carry on business except so far as may be required for the beneficial winding up of the company, but the corporate state and corporate powers of the company shall continue until the company is dissolved.”* Whilst the company is to cease to carry on business, the company maintains its capacity as a separate legal entity under the Act. A breach of this requirement attracts a fine upon summary conviction.
- (b) For the purpose of notifying everyone that the company in liquidation may be dealing with, it is required that all invoices, order or business letters issued by or on behalf of the company or by officers with the capacity to do so must contain a statement that the company is in liquidation. Section 274(3) of Act 992 provides that *“(3) Where a company is being wound up by way of a private liquidation, any invoice, order or business letter issued by or on behalf of the company or a liquidator of the company or a receiver or manager of a property of the company, which is a document in or on which the name of the company appears, shall contain a statement that the company is being wound up under this Part.”* A breach of this requirement attracts a fine upon summary conviction.
- (c) For the purposes of complying with the requirement of statements, accounts and reports of the company, the financial year for a company, upon the commencement of private liquidation, is deemed to end a day before the date of the special resolution putting the company into winding up and appointing the liquidator. Section 277 of Act 992 provides that:
 - “(1) For the purposes of section 127 to 143, the final financial year of a company in liquidation under this Part ends immediately before the date of the commencement of the winding up, and, subject to subsection (2), the provisions of those sections shall continue to apply to the preparation, auditing and dispatch of the statements, report referred to in those sections.*
 - (2) For the purposes of subsection (1)*
 - (a) a copy of the documents referred to in section 128 shall be sent to the liquidator appointed in accordance with section 278 as*

well as to every member and debenture holder of the company in accordance with section 128; and

(b) a copy of those documents shall be sent to the persons referred to in paragraph (a) within three months after the date of commencement of the winding up."

(d) From and related to the above, section 277 provides that upon the commencement of the winding up, the directors of the company are to prepare the required financial statements, accounts and reports for submission to the liquidator, members and debenture holders within three months of the commencement of the winding up.

(e) The powers of the directors cease upon the commencement of the liquidation by the passage of the special resolution by the member. The directors are rendered *functus officio*. The power of the board of directors is vested in the liquidator. The directors can only exercise the powers of the board subject to the consent of the members in a general meeting or as permitted by the liquidator. The directors can also exercise the powers if necessary for the preparation of the statements and accounts of the company. Section 282 of Act 992 provides that:

"On the appointment of a liquidator for the purposes of a private liquidation, the powers of the board of directors shall vest in the liquidator and the powers and authority of every director shall cease, except so far as

(a) the company in a general meeting or the liquidator sanctions their continuance; or

(b) it is necessary to enable the directors to prepare statements and accounts of the company."

Union Maritime et Commerciale v. Rabensteiner and another¹⁸⁷² - The plaintiff brought an action against the defendants in their capacity as liquidators of Tropical Woods Ltd. While the action was pending, the name of the Tropical Woods Ltd was struck off the register of companies as having been dissolved. An application was successfully brought for the restoration of Tropical Woods Ltd under section 260(2) of the Companies Code, 1963. The plaintiff later obtained a judgment in default of appearance against the defendants. Tropical Woods Ltd independently applied to have that judgment set aside on the ground that as the defendant's name was restored, the right plaintiff was the company acting through the directors and not the liquidators. It was held that the liquidators were the proper persons to be sued as at the time of the judgment, the liquidator was the only person with power to act for the company. The applicant could act through the liquidators but not independently of them. Amissah JA stated @ pg. 506 that:

"Section 254 of the Companies Code, 1963 (Act 179), says that on the appointment of a liquidator for the purposes of a private liquidation, which this indeed was, all

¹⁸⁷² [1968] GLR 504.

the powers of the board of directors shall vest in the liquidator and the powers and authority of every director shall cease. The only saving in the directors' powers is in so far as the company in general meeting or the liquidator sanctions their continuance. They could also exercise powers so far as is necessary to prepare statements and accounts of the company. According to section 255(1) of the Code, the liquidator in a private liquidation may exercise all the powers of the liquidator in an official winding up under the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). Under section 9(1) of Act 180, the liquidator in an official winding up under the Act has power to bring or defend any action or other legal proceedings in the name and on behalf of the company. Thus the liquidator in a private liquidation has the same power. The liquidators in this case were therefore the proper persons against whom the action should have been brought."

24.2.9 Books and accounts in private liquidation

The liquidator is required to keep proper records and accounting records in relation to his activities. Section 284 of Act 992 provides that:

- "(1) The liquidator in a private liquidation shall keep:*
- (a) proper records and accounting records with respect to the*
 - (i) acts and dealings of the liquidator,*
 - (ii) conduct of the winding up, and*
 - (iii) receipts and payments by the liquidator; and*
 - (b) a distinct account of the trading so long as the liquidator carries on the business of the company."*

The liquidator must, therefore, keep two sets of account relating to winding up activities and trading activities. Where the winding up exceeds a year, the liquidator must, at the end of the first year from commencement of the winding up and each subsequent year, summon a general meeting of the company.¹⁸⁷³ The meeting can also be summoned anytime within three months of the end of the year or any extended time granted by the Registrar.¹⁸⁷⁴ The liquidator shall lay before the meeting the account kept by the liquidator and send a copy to the Registrar.¹⁸⁷⁵

Upon completion of the liquidation, the liquidator is to prepare and deliver a final account on the winding up and the result of the trading carried out, and the disposal of the property of the company.¹⁸⁷⁶ The liquidator must convene a meeting to lay before the company the accounts and

¹⁸⁷³ Section 284(2) of Act 992.

¹⁸⁷⁴ Ibid.

¹⁸⁷⁵ Ibid.

¹⁸⁷⁶ Section 284(3) of Act 992.

provide explanation on the accounts.¹⁸⁷⁷ Copies of the account must be sent to the Registrar within twenty-eight days of the general meeting and a statement of the holding of the meeting and the date of the meeting.¹⁸⁷⁸ If there is no quorum, the statement shall mention the meeting was duly convened and a quorum was not present at the meeting.¹⁸⁷⁹ The books, account and records must be kept in the form prescribed by the Registrar and must give a true and fair view of matters recorded.¹⁸⁸⁰ The accounts, books and records must be audited by an auditor.¹⁸⁸¹ The auditor may be dispensed with, if the liquidator or one of the liquidators, if more than one, is qualified as an auditor of a public company and the members passed a special resolution to dispense with the auditor.¹⁸⁸² The general meetings of members convened by the liquidator must be, as far as possible, in accordance with the Act and the constitution of the company.¹⁸⁸³ The liquidator is to preserve the books and records for five years.¹⁸⁸⁴ Delivery of the documents under this section can be made in hard copies or electronically, supported by evidence.¹⁸⁸⁵ A liquidator who breaches the requirements for accounts, books and records commits an offence and is liable on summary conviction to pay a fine.¹⁸⁸⁶

24.2.10 Bank account for liquidation

The liquidator is to open and maintain a private liquidation account with a bank nominated by the members. Section 285 of Act 992 provides that:

- “(1) The liquidator shall open the private liquidation account with a bank nominated by the company in a general meeting for the purposes of the private liquidation.*
- (2) The receipts and payments by or on behalf of the liquidator in respect of the company shall be credited or debited, to the private liquidation account.”*

The bank with whom the private liquidation account is opened must be nominated by the members in a general meeting. All receipts and payments in relation to the liquidation must be made in and from this account. The Act permits payment to that account for loss suffered by an estate due to the liquidation upon application to the Court by an interested party.

¹⁸⁷⁷ Ibid.

¹⁸⁷⁸ Ibid.

¹⁸⁷⁹ Section 284(5) of Act 992.

¹⁸⁸⁰ Section 284(6) of Act 992.

¹⁸⁸¹ Section 284(7) of Act 992.

¹⁸⁸² Section 284(8) of Act 992.

¹⁸⁸³ Section 284(9) of Act 992.

¹⁸⁸⁴ Section 284(10) of Act 992.

¹⁸⁸⁵ Section 284(12) of Act 992.

¹⁸⁸⁶ Section 284(11) of Act 992.

24.2.11 Reversion of the private liquidation

Until the dissolution of the company, the private liquidation may be cancelled. The members are permitted to change their minds and choose to continue to operate the company as a going concern. Section 287 of Act 992 permits application to the Court for a stay of the liquidation proceedings any time before dissolution. Section 287 of Act 992 provides that:

“(1) At any time during the course of a private liquidation and before the dissolution of the company, the company in general meeting may, by special resolution, resolve that, subject to the confirmation of the Court, the liquidation proceedings shall be stayed.

(2) After the passing of the special resolution

(a) an application may be made to the Court by the liquidator or a member of the company; and

(b) the Court may, and subject to terms and conditions that the Court deems fit, order that

(i) the liquidation be stayed,

(ii) the liquidator be discharged, and

(iii) the directors be permitted to resume the management of the company.”

The reverse of the private liquidation must commence with a special resolution that resolved that the liquidation proceedings must be stayed. Upon passing that special resolution, an application must be made to the Court for the confirmation of the special resolution. The special resolution is one that is subject to confirmation by the court. The Court may, subject to terms determined by the Court to be appropriate, order the liquidation stayed, discharged the liquidator and permit directors to resume management of the company. The applicant must deliver a written notice of the application to the Registrar, directors of the company and to liquidator at least twenty-eight days before the hearing of the application.¹⁸⁸⁷ The Registrar, a director, liquidator, member or creditor of the company is each entitled to appear at the hearing, call witnesses and give evidence.¹⁸⁸⁸ An official copy of the order confirming the resolution must be submitted to the Registrar for registration and publication in the Companies Bulletin.¹⁸⁸⁹ The liquidation shall cease and the company shall continue as a going concern from the date of the publication subject to the terms or conditions of the order.¹⁸⁹⁰

¹⁸⁸⁷ Section 287(3) of Act 992.

¹⁸⁸⁸ Section 287(4) of Act 992.

¹⁸⁸⁹ Section 287(5) of Act 992.

¹⁸⁹⁰ *Ibid.*

24.2.12 Insolvency in private liquidation

Private liquidation is only permitted where the company is solvent and has a positive net worth. This is required to be confirmed by the directors through the declaration in the affidavit of solvency prior to the passing of the special resolution by the members to put the company into private liquidation and appoint the liquidator. The directors must form an opinion based on reasonable ground and must attach a statement of the assets and liabilities of the company to the affidavit of solvency. It may sometimes happen that upon the commencement of the winding up by the liquidator, it is discovered that the company is insolvent. That is, the company is unable to pay its debts and liabilities in full. There may be many reasons for this. The directors may not have undertaken proper enquiry prior to the declaration of the affidavit of solvency. The assets listed may be overvalued. The liquidator may have failed to realise the assets. There may be additional liabilities not declared.

Section 286 of Act 992 states what must be done in that instance. Section 286 of Act 992 provides that:

- “(1) Where in a private liquidation the liquidator is at any time of the opinion that the company may not be able to pay its debts in full within the period stated in the affidavit made under section 275, the liquidator shall forthwith give notice of that fact, together with a statement of the liabilities and assets of the company to the Registrar.*
- (2) The notice and statement shall be in the prescribed form.*
- (3) The Registrar, whether or not makes an order under [section 85 of the Corporate Insolvency & Restructuring Act, 2020 (Act 1015)], shall register both the notice and the statement and cause a copy of the notice to be published in the Companies Bulletin and the liquidator shall proceed in the same manner, so far as the provisions are applicable, as a liquidation under an order of the Court pursuant to the [Corporate Insolvency & Restructuring Act, 2020 (Act 1015)].*
- (4) Where the liquidator fails to comply with this section, the liquidator is liable to pay to the Registrar, an administrative penalty of seven hundred and fifty penalty units.”*

The liquidator upon discovering that the company in private liquidation will not be able to pay its debts in full as indicated in the affidavit, notify the Registrar and submit a statement of the assets and liabilities of the company. The Registrar must register the notice and publish the same. More importantly, the Registrar is to make an order converting the private liquidation into an official liquidation. The liquidator is required in that instance to proceed with the liquidation as an official liquidation in accordance with the Corporate Insolvency & Restructuring Act, 2020 (Act 1015). A private liquidation under the Companies Act, 2019 is, therefore, converted to official liquidation under Act 1015. Failure on the part of the liquidator in private liquidation to notify the Registrar of

the insolvency upon forming the opinion that the company will not be able to pay its debts in full within the period indicated, makes the liquidator liable to pay an administrative penalty to the Registrar.

The Corporate Insolvency & Restructuring Act, 2020 (Act 1015) also permits the liquidator in private liquidation, other than notifying the Registrar to convert the private liquidation to official liquidation, to convert the private liquidation into administration of the company by appointment of an administrator under Act 1015.¹⁸⁹¹ It is suggested that in converting private liquidation to administration, the liquidator must be of the opinion that the objects of administration as provided under section 3(12) of Act 1015 will be achieved. That is, the company may become solvent; the survival of the company and assets as a going concern are reasonably capable of being achieved in the event of the appointment of an administrator; a more advantageous realisation of the assets of the company may be achieved; a more expeditious settlement of a duty or liability owed by any person to the company may be achieved; or it is just and equitable to do so.

24.2.13 Dissolution and restoration

Dissolution follows the winding up of a company and is the last stage of the liquidation process. Dissolution signifies the death of the company. The Registrar dissolves the company once satisfied that the winding up of the company is complete. Section 288 of Act 992 provides that:

- “(1) Where the Registrar is satisfied that the winding up of the company is complete, the Registrar shall strike the name of the company off the register and publish the record of the strike off in the Companies Bulletin.*
- (2) The company is dissolved as at the date of the publication of the notification in the Companies Bulletin.”*

Dissolution is, therefore, the process where the Registrar strikes the name of the company from the register and publish the same in the Companies Bulletin. From that date, the company no longer exist except in the event of the restoration. The Act permits the name of the company to be restored within two years after the dissolution. Section 288 of Act 992 provides that:

- “(3) Where a company is dissolved, the Court may*
- (a) at any time within two years after the date of the dissolution, and*
 - (b) upon an application made for the purpose by the Registrar or by the liquidator of the company or by a former officer, member, or creditor of the company or a person claiming through or under any of them, make an order, on the terms that the Court considers fit, declaring the dissolution void and ordering the name of the company to be restored to the register.*

¹⁸⁹¹ Section 3(9) of Act 1015.

- (4) An official copy of an order made under subsection (3) shall be delivered to the Registrar for registration and the Registrar shall publish the copy of the order in the Companies Bulletin and the name of the company shall be restored to the register.***
- (5) Where registration and publication under subsection (3) takes effect, the company shall be deemed to have continued in existence as if it had not been dissolved, and for the purposes of a period of limitation the period between dissolution and restoration shall not be counted.***
- (6) The Court may by the order give the directions and make the provisions that seem just for placing the company and any other person in the same position as nearly as may be as if the name of the company had never been struck off."***

Restoration refers to the revival of the company. Restoration can only be done by Court order on an application brought before the Court within two years after the dissolution of the company. No restoration can be done if no application is made within two years. The application can be made by the liquidator, Registrar, a former officer, member or creditor of the company or a person claiming through any of them. The section does not indicate the grounds upon which the application must be made or the grounds upon which the Court must grant the order of restoration. It is also not automatic that the order of restoration must be made by the Court upon application. There must be valid grounds which indicate it is in the interest of justice for the order to be made. The order of restoration means the dissolution of the company is void and the name must be restored on the register of companies.

Where the order is made, an official copy must be delivered to the Registrar for publication. Upon publication, the company is revived and continued in existence. In determining the period of limitation for any action, the period between the dissolution and restoration is not to be counted. There may be many reasons for a person to apply for the restoration of a company. The main reason however is either to pursue an action against the company or to institute an action in the name of the company.

The Court has the powers, in making an order for restoration, to do so on terms the Court deems fit. In addition, the Court is to give directions and make provisions that seem just to place the company and any other person in the same position as nearly as possible as if the company was not dissolved. This has been interpreted to mean, the company must be placed in the position that it was immediately before the dissolution. That is, the position the company was in upon the completion of the winding up without having been dissolved.

*Union Maritime et Commerciale v. Rabensteiner and another*¹⁸⁹² – Amissah JA stated @ pgs. 506-7 as follows:

“While the action was pending, the liquidators informed the Registrar of Companies that they had completed their winding up. This of course, could not have been correct because at that time there was this action outstanding against them. The registrar, exercising his powers under section 260(1) of the Code [now section 288(1) of Act 992] struck the name of the company, Tropical Woods Ltd., off the register of companies. He could only do that if he was satisfied that the winding up was in fact complete. And I am sure had he been aware that this action against the liquidators of the company was still pending, he would not have exercised his powers under the subsection. Section 260(2) [now section 288(3) of Act 992] takes care of such situations. For it enables the name of the company to be put back on the register in certain circumstances. Where the company has been dissolved the court may, at any time within two years after the date of the dissolution, on an application being made by the registrar or the liquidator of the company or other specified persons, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void and ordering the name of the company to be restored to the register. An application was made under this subsection and the name of the company was restored. The court’s order was made on 13 February this year and the company found its name back on the register on 28 March. As I said at the beginning, judgment was given against the liquidators on 10 April.

The question for consideration is the effect of the restoration. Mr. Annan for the applicant has argued that it meant only one thing, that the company was restored with full powers back into the hands of its directors. The liquidators became functus officio when they informed the registrar that they had completed the winding up. Their powers did not revive with the restoration of the company. But I think the argument is wrong. Had the registrar not struck off the company’s name for a start, the liquidators would have been the persons in control of it. Thus where the dissolution is taken to be void the company should be put back where it was immediately before the abortive dissolution. This is borne out by section 260(3) [now section 288(5) of Act 992] which provides that where the name of the company is restored to the registrar “the company shall be deemed to have continued in existence as if it had not been dissolved except that for the purposes of any period of limitation time shall not be deemed to run during the period between dissolution and restoration.” In effect the company picks up the threads of its existence from the time immediately before it was dissolved. As regards the final provision in subsection (4) [now section 288(6) of Act 992] that “The Court may by the order give such directions and make such provisions as seem just for placing the company and

¹⁸⁹² [1968] GLR 504.

*all other persons in the same position as nearly as may be as if the name of the company had never been struck off," I am unable to accept Mr. Annan's argument that it compels the court to give directions on the placing of persons in the same position as before in each case. Since section 27 of the Interpretation Act, 1960 (C.A. 4), the expression "may" has never imported such compulsion. It has merely granted a discretionary power. Thus it all depends on the circumstances. The court may in certain cases be asked and may agree to the ordinary directors of the company being put back in control of the company. In such cases no doubt it would make the appropriate orders. But it need not in every case make an order directing who should be in control of the company. Where it makes no such order, either because it is not asked for, or the circumstances do not justify its making, the position must be, as I have said, that the company is put back in the same place as it was immediately before the void dissolution. Liquidators who were in control immediately before the company was supposed to have ceased to exist resume their control. To continue to describe them as *functus officio* is quite incorrect because the law says that what terminated their office is deemed never to have taken place."*

24.2.14 Dissolution without winding up

The Act permits limited instances where a company may be dissolved without first winding up or going through a full winding up. These limited instances cover situations where the company is not carrying on business or is not in operation, or where a liquidator is winding up the company but has not completed the winding up. Section 289 of Act 992 provides as follows:

- "(1) Where the Registrar, by reference to personal knowledge, or on information supplied by any officer, member or creditor of a company, has reasonable cause to believe that the company is not carrying on business or is not in operation, the Registrar may by written communication to the company enquire whether the company is carrying on business or is in operation.*
- (2) Where the Registrar does not receive an answer to the written communication, within two months of the communication, the Registrar may send to the company a second written communication referring to the first written communication, stating that an answer has not been received by the Registrar, and that if an answer is not received to the second written communication within two months from the date of the second written communication, a notice will be published in the Companies Bulletin with a view to striking the name of the company off the register.*
- (3) Where the Registrar receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within the specified time after sending the second written communication receive an answer to the second*

written communication, the Registrar may publish in the Companies Bulletin and send to the company by written communication a notice that at the expiration of three months from the date of that notice the name of the company shall, unless cause is shown to the contrary, be struck off the register and the company shall stand dissolved.

- (4) Where a company is being wound up and the Registrar has reasonable cause to believe that a liquidator is acting but is not satisfied that the winding up is complete, the Registrar may publish in the Companies Bulletin and send to the company and to the last known place of business of the person last known to have acted as liquidator, a notice as is provided in subsection (3).*
- (5) At or after the expiration of the time specified in the notice, the Registrar shall, unless cause is shown, strike the name of the company off the register and shall publish the notice of that fact in the Companies Bulletin and on that publication in the Companies Bulletin the company shall stand dissolved.*
- (6) For the purposes of subsection (5), the liability of every director or other officer and member of the company shall continue and may be enforced as if the company had not been dissolved; but the subsection does not affect the power of the Court to order the winding up of the company."*

The section permits the Registrar to wind up a company without dissolution when a company is not carrying on business or in operation, or where a liquidator is acting but has failed to complete the winding up. The Registrar may act on his or her own information or on information provided by another person. Per the section, the process for dissolution without winding up takes a minimum of seven months. Four steps are required within the seven or more months to dissolve a company. The steps are:

- (a) A first notice is issued by the Registrar to the company enquiring whether a company is carrying on business or is in operation. The first notice must indicate that the Registrar must receive a response within two months of the date of the notice.
- (b) A second notice is sent to the company, after the expiration of the two months without a response to the first notice, stating that no response has been received to the first notice and that if no written response is received to the second notice, a publication will be made in the Companies Bulletin, after two months from the date of the second notice, for the purpose of dissolving the company.
- (c) A publication is made in the Companies Bulletin and a third notice is sent after the two months if no response is received to the second letter or if a response indicates the company is not carrying on business or is not in operation. The third letter is to indicate that if no reason is given why the company should not be dissolved within three months, the company will be dissolved.
- (d) After the three months, if no response is received and no reason is given why the company

should not be dissolved, the Registrar strikes the name of the company from the register and makes a publication in the Companies Bulletin to that effect. The company is dissolved from the date of the publication.

In the event the company is in liquidation and a liquidator is acting but has not completed the winding up, the third letter must be sent to the liquidator and the company is dissolved after the three months. The Act preserves the liabilities of every director, officer and member of the company. Therefore, notwithstanding the dissolution, the directors, officers and members can be held liable for a breach of an obligation owed to the company or any other person in their capacity as director, officer or member of the company. The Court also retains the power to order the winding up of the company.

A company dissolved without winding up may also be restored by the order of the Court. Section 288 of Act 992 provides that:

“(7) When the name of a company is struck off the register under this section, at any time within twelve years after the publication in the Companies Bulletin in accordance with subsection (5), the Court may, on the application made for this purpose by a liquidator or by a former officer, member or creditor of the company, or by a person claiming through or under any of them, make an order on the terms that the Court considers fit, declaring the dissolution void and ordering the name of the company to be restored to the register and subsection (3) shall apply as if the order was one made under this section.”

Where the company is dissolved without winding up or without completion of the winding up, the application for restoration must be made to the Court not later than twelve years from the date of the dissolution. The application must be made by a liquidator, former officer, member or creditor of the company, or any person claiming through them. The order of restoration granted by the Court will render the dissolution void and the name of the company restored on such terms as the Court deems appropriate.

Section 289(8) of Act 992 lists the persons that the notice or written communications must be sent to. Section 289(8) of Act 992 provides as follows:

“(8) A notice or written communication to be sent under this section to a company
(a) may be addressed to
(i) the company at the registered office of the company,
(ii) a company at the last known place of business of the company if an office has not been registered, or
(iii) the care of an officer of the company, or
(b) may be sent to the person or each of the persons who subscribed to

the incorporation of the company addressed to that person at the address mentioned in the subscription to the incorporation of the company or to the Registrar if there is no officer of the company whose name and address are known."

24.3 OFFICIAL LIQUIDATION

Official liquidation refers to a compulsory liquidation of a company pursuant to an order of the Court or the Registrar through the appointing of an official liquidator. The Corporate Insolvency & Restructuring Act, 2020 (Act 1015) governs the official liquidation of companies and other body corporates. Section 169 of Act 1015 provides that *"official liquidation", in relation to a company, means the winding up of a company carried out by the Registrar of Companies who is the official liquidator"*. Official liquidation is, therefore, carried out the by Registrar as an official liquidator. The official liquidator undertakes the official winding up in accordance with the provisions of Act 1015. Act 1015, however, permits creditors of a company to nominate and appoint a liquidator of the company.¹⁸⁹³ A person nominated and appointed as a liquidator by the creditors in official liquidation, other than the Registrar, must be qualified as an insolvency practitioner under the Act and must give prior consent before the appointment.¹⁸⁹⁴

Official liquidation must be pursuant to an order of the Registrar or the Court. In that sense, official liquidation is also referred to as compulsory liquidation in that it is by the order of the Registrar or Court, and not just by agreement of members of the company. However, official liquidation may also be initiated by a special resolution of the company that indicates that the liquidation should be undertaken as an official liquidation rather than as a private liquidation. However, the Registrar is required to undertake the liquidation even with the special resolution of the company resolving the official liquidation of the company.

Another distinction between private and official liquidation is that private liquidation is limited to solvent companies whilst official liquidation is applicable to insolvent companies. This seems to be reflected in Act 1015 when it provides that the purpose of official winding up is to maximize the realisation of the assets of the insolvent company. This position is not entirely true since official winding up applies to solvent companies. Members of a solvent company may, in passing a special resolution to liquidate the company, opt for the solvent company to be liquidated through official liquidation. This may be the case where, for example, the directors failed or refused to make an affidavit of solvency. The Court may order the liquidation of solvent companies that are carrying on unlawful business, ultra vires business, operating for an illegal purpose, and on the ground that it is

¹⁸⁹³ Section 95(1) of Act 1015.

¹⁸⁹⁴ Section 95(2) and (3) of Act 1015.

just and equitable.¹⁸⁹⁵ Admittedly, official liquidation in most instances applies to insolvent companies. However, the legal possibility exists to liquidate a solvent company through official liquidation.

As indicated, the process of official liquidation is governed by Act 1015. The Act provides for the modes of official liquidation, the duties and powers of the official liquidator, rights of and limitation on creditors, members and officials of the company, and related matters. The Act provides that the purpose of provisions of the Act on official liquidation is to provide for the official winding up of a company and other body corporates in a manner that results in the maximization of the realisation of assets of the insolvent company and the distribution of moneys realised and net assets in an equitable manner to all stakeholders.

24.3.1 Mode of official liquidation

Section 81 of Act 1015 provides that the official winding up of a company may be commenced in five ways:

- (a) special resolution of the company;
- (b) petition addressed to the Registrar;
- (c) petition to the Court;
- (d) conversion of private liquidation to official liquidation and
- (e) conversion of administration or restructuring of a company to official liquidation.

24.3.1.1 Conversion from administration

A company in administration may be converted to official liquidation at the watershed meeting or during restructuring, or upon the termination of a restructuring agreement. An application may be made to the Court to convert the administration to official liquidation. Under section 24 of Act 1015, the creditors at the watershed meeting can decide to end the administration and appoint a liquidator of the company.¹⁸⁹⁶ Creditors may on termination of a restructuring agreement for material breach, pass an ordinary resolution to appoint a liquidator to officially wind up the company.¹⁸⁹⁷ Section 80 of Act 1015 provides that:

- “(1) A liquidator may be appointed for a company in administration*
(a) by the Court, on an application under section 86;
(b) by resolution of the creditors at a watershed meeting; or
(c) at a meeting convened under section 58 to consider the termination of
a restructuring agreement.”

¹⁸⁹⁵ Section 84(2) of Act 1015.

¹⁸⁹⁶ Also see section 26 of Act 1015.

¹⁸⁹⁷ Sections 58 and 59 of Act 1015.

There are three instances where the administration of a company may be converted to liquidation. Two of the instances are within the control of the creditors. First, where creditors at the watershed meeting under section 26 of Act 1015 pass a resolution to put the company into liquidation rather than execute a restructuring agreement. Second, where the creditors terminate a restructuring agreement under section 59 and by ordinary resolution appoint a liquidator to liquidate the company. The third instance is not within the control of creditors, but pursuant to an order of the Court. Section 86 of Act 1015 provides that:

- “(1) The Registrar may by an application to the Court, make a winding up order to convert the administration of a company into an official winding up when the administrator gives notice that the administration has been converted into official liquidation.*
- (2) A statement in the prescribed form on the assets and liabilities of the company shall accompany the notice.*
- (3) For the purpose of this section, proceedings taken on an administration are validly taken unless the Court otherwise directs.”*

The Registrar is only required to apply to the Court upon receiving notice from the administrator that the administration is to be converted to official liquidation. The order of the Registrar to then convert an administration into liquidation is subject to the application of the Court. Upon such application, the steps to be taken by the Court are provided under section 80 of Act 1015. Section 80 of the Act provides as follows:

- “(2) The Court may adjourn the hearing of the application under section 86 for the appointment of a liquidator for a company in administration where the Court is satisfied that, it is in the interest of the creditors of the company for the company to continue in administration rather than be placed in liquidation.*
- (3) The Court shall not appoint a liquidator of a company in administration where the Court is satisfied that it is in the interest of the creditors of the company for the company to continue in administration rather than have a liquidator appointed.*
- (4) The appointment by the Court of a liquidator for a company that is in administration ends the administration.”*

Both subsections (2) and (3) emphasize that administration can only be converted to liquidation if it is not in the interest of the creditors of the company for the company to continue with the administration. The preference of the subsections is for the continuation of administration. The application for the conversion of the administration to liquidation must therefore establish that it is not in the interest of the creditors of the company for the company to continue with the administration. The requirement is not to establish that it is in the interest of the creditors of the company to liquidate, but rather that administration is not in the interest of the creditors of the

company. If it is in the interest of the creditors to continue with administration, the Court may adjourn the hearing of the application or refuse to appoint a liquidator. If the order is made to convert the administration to liquidation, the order terminates the administration.

Upon the appointment of a liquidator for a company in administration, the administrator must submit a copy of the report of the administrator to the Registrar or provide an update on the report.

¹⁸⁹⁸Where there is no administrator or restructuring officer, the directors of the company must submit the report or provide the updates.¹⁸⁹⁹

24.3.1.2 Conversion from private liquidation

A private liquidation may be converted to official liquidation where the liquidator in private liquidation determines that the company is insolvent. That is, the company will not be able to pay its debts and liabilities within the period indicated in the affidavit of solvency. The liquidator in private liquidation is to notify the Registrar by notice together with a statement of assets and liabilities of the company in the prescribed form under section 286 of Act 992. The Registrar must publish the notice and statement in the Companies Bulletin.¹⁹⁰⁰ Under section 85 of Act 1015, the Registrar may make an order converting the private liquidation to official liquidation. Section 85 of Act 1015 provides that:

- “(1) The Registrar may make a winding up order to convert a private liquidation into an official winding up if the liquidator gives notice under a private liquidation in accordance with the Companies Act, 2019 (Act 992) alleging that the company may not be able to pay the debts of the company in full within the period stated in the declaration of [solvency].*
- (2) The notice shall be accompanied with a statement in the prescribed form of the assets and liabilities of the company.*
- (3) For the purpose of this section, proceedings taken on a private liquidation are validly taken unless the Court otherwise directs.”*

The Registrar has a discretion upon being notified by the liquidator in private liquidation that the company is insolvent, that is unable to pay the debts and liabilities within the time indicated in the affidavit of solvency, to convert the private liquidation to official liquidation.

24.3.1.3 Official liquidation by special resolution

The members of a company in passing a special resolution to liquidate a company may opt for official

¹⁸⁹⁸ Section 80(5) of Act 1015.

¹⁸⁹⁹ Section 80(6) of Act 1015.

¹⁹⁰⁰ Section 286(3) of Act 992.

liquidation rather than private liquidation. The members may opt for official liquidation because the company is insolvent. However, the members may also opt for official liquidation even though the company is solvent. This may include where the members are unable to get the directors to swear to an affidavit of solvency or for any other reason. Section 82 of Act 1015 provides that:

- “(1) A special resolution of a company for the official winding up of the company shall state that the company shall be wound up by way of an official winding up.*
- (2) A copy of the special resolution and the notice for the meeting shall be served on the Registrar.*
- (3) The Registrar or a representative of the Registrar shall be afforded the opportunity to attend the meeting at which the special resolution is passed.*
- (4) When a company has passed a special resolution for the official winding up of the company, a copy of the resolution shall be sent immediately by the directors of the company to the Registrar.*
- (5) The Registrar shall publish the resolution in the Companies Bulletin after receipt of the resolution.*
- (6) Where the special resolution is passed, the official liquidator shall take immediate control of the assets of the company.*
- (7) After the passage of the resolution, a director, officer, liquidator or the official liquidator shall not dispose of the assets of the company without the approval of the Court unless the disposal is in the normal course of business.*
- (8) Where a person, other than a body corporate, contravenes subsection (7), that person commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than one thousand penalty units or to a term of imprisonments of not less than two years and not more than five years or to both.”*

The official liquidation is resolved by the members of the company by a special resolution. The special resolution must expressly indicate the winding up must be by official winding up. It is required that notice of the meeting and resolution be given to the Registrar. The Registrar must be given the opportunity to attend the meeting where the resolution is passed. A copy of the special resolution must be delivered to the Registrar and published in the Companies Bulletin. The official liquidation commences on the passage of the special resolution. The liquidator is thus required to take immediate control of the assets of the company. From the date of the passage of the special resolution, which marks the commencement of the official liquidation, the liquidator, official liquidator, director or officers of the company are prohibited from disposing of the assets of the company. The disposition of the assets of a company in official liquidation pursuant to a special resolution can only be done with the approval of the court unless the disposition is in the normal course of business of the company. The disposition of assets of the company by any person contrary

to this requirement amounts to an offence punishable by a fine or term of imprisonment, or both fine and term of imprisonment.

24.3.1.4 Petition to the Registrar

A creditor, member or contributory may apply to the Registrar to officially wind up a company. Section 83 of Act 1015 provides that:

- “(1) Subject to subsections (2) and (3), a person who is*
(a) a creditor of a company, or
(b) a member or contributory of a company may present a petition to the Registrar for the official winding up of the company.
(2) A member of a company with shares is not entitled to present a winding up petition unless the shares or some of the shares of that member
(a) were originally allotted to that member;
(b) have been held by that member, and registered in the name of that member for at least six months preceding the date of the presentation of the petition; or
(c) have devolved on that member by operation of law.
(3) The Registrar shall not consider a winding up petition presented by a contingent or prospective creditor
(a) unless a security for costs that the Registrar considers reasonable has been given, and
(b) until a prima facie case for winding up has been established to the satisfaction of the Registrar.”

Three persons are entitled to apply to the Registrar for the official winding up of the company. A member of the company provided that in relation to a company with shares, the shareholder must hold the shares for at least six months within the eighteen months preceding the application to wind up the company or has acquired the shares through subscription or transmission by operation of law. A contributory may also make an application to Registrar for official winding up. A contributory refers to a person liable to contribute to the assets of the company in the event of winding up of the company.¹⁹⁰¹ This covers past shareholders provided it is not more than a year between when the shareholder ceases to be a shareholder and the winding up order.¹⁹⁰² Contributories also include members who have given an undertaking to contribute to the assets of a company limited by guarantee in event of liquidation. A contributory also includes a person alleged to be a contributory.

¹⁹⁰¹ Section 169 of Act 1015.

¹⁹⁰² Section 40(4) of Act 1015.

A creditor may also present a petition to a Registrar for official liquidation. However, a contingent or prospective creditor is not entitled to present a petition to the Registrar unless the contingent or prospective creditor provided security for cost to the Registrar and established a prima facie case for winding up to the satisfaction of the Registrar. A contingent creditor refers to a person to whom the company owe an existing obligation which may or will become a liability on the occurrence of a future event. A prospective creditor refers to a person to whom a company is indebted in a sum of money that is not immediately payable.

Section 83 of Act 1015 provides for the ground upon which the Registrar may grant an order to officially wind up the company. Section 83 of Act 1015 provides that:

“(4) The Registrar may order the official winding up of the company on the petition if the Registrar is satisfied that the company is unable to pay the debts of the company.

(5) For the purpose of sections 80 to 148, a company is unable to pay the debts of the company if

(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum of money of not more than ten thousand currency points then due, has served on the company a written demand requiring the company to pay the sum of money that is due and the company has for thirty days after the demand, neglected to pay the sum of money or to secure or compound for the sum of money to the reasonable satisfaction of the creditor;

(b) an execution or any other process issued on a judgment or order of the Court in favour of a creditor of a company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Registrar that the company is unable to pay the debts of the company.

(6) The Registrar shall in determining whether a company is unable to pay the debts of the company, take into account the contingent and prospective liabilities of the company.”

The Registrar can only order the winding up of the company on the ground that the company is unable to pay its debt. A company is unable to pay its debts in one of three situations:

- (a) when a debt of ten thousand currency units or more is due, notice has been served on the company, thirty days have elapsed without payment to or satisfactory arrangement with the creditor;
- (b) judgment obtained by the creditor has been returned unsatisfied wholly or partially after attempted execution; or
- (c) it is proved to the satisfaction of the Registrar that the company is unable to pay its debts.

In making the determination by the Registrar whether the company is unable to pay its debt, the Registrar is to consider both contingent and prospective debts of the company.

The petitioner is to serve a copy of the petition on the company on or before the date the petition is presented to the Registrar.¹⁹⁰³ Where two or more petitions are presented for winding up of a company, a winding up order made in respect to one petition is deemed to be in respect of the other.¹⁹⁰⁴ A further petition is not to be presented to the Registrar for a winding up of a company going through winding up unless the initial winding up has been terminated.¹⁹⁰⁵ The Registrar shall on issuing a winding up order, place the order on record and publish same in the Companies Bulletin.¹⁹⁰⁶

24.3.1.5 Petition to the Court

The Court may order the winding up of a company on a petition by the Registrar, a creditor of the company, a member of a company with shares or a contributory of the company or the Attorney-General. Section 84 of Act 1015 provides that:

- “(1) The following persons may present a petition to the Court for the official winding up of the company only on grounds specified in paragraphs (c), (d) and (e) of subsection (2):*
- (a) the Registrar,*
 - (b) a creditor of the company,*
 - (c) a member of a company with shares or contributory of the company, or*
 - (d) the Attorney-General.”*

The subsection confers on four categories of persons the right to petition the court for the winding up of the company. The subsection also seeks to suggest that the four categories of persons may petition on only three grounds out of the seven grounds provided under subsection (2). Subsection (2) of section 84 of Act 1015 provides that:

- “(2) The court may order the official winding up of a company on a petition being presented where*
- (a) the company*
 - (i) does not commence the business which the company is authorised by the constitution of the company to carry on,*
 - or*
 - (ii) suspends business for a year within a year after the*

¹⁹⁰³ Section 83(7) of Act 1015.

¹⁹⁰⁴ Section 83(8) of Act 1015.

¹⁹⁰⁵ Section 83(9) of Act 1015.

¹⁹⁰⁶ Section 83(10) of Act 1015.

- incorporation of the company;*
(b) the company does not have members;
(c) the business or objects of the company are unlawful;
(d) the company is operated for an illegal purpose;
(e) the business being carried out by the company is not authorised by the constitution of the company;
(f) the company is unable to pay the debts of the company; or
(g) the Court is of the opinion that it is just and equitable that the company should be wound up."

The subsection provides for eight grounds on which a petition may be granted. However, subsection (1) restricts the grounds on which a petition may be brought to three. The restriction in subsection (1) of the grounds must clearly be a mistake since it means no petition can be presented on the other five grounds for the winding up of the company. Under the corresponding section under the repealed Bodies Corporate (Official Liquidation) Act, 1963 (Act 180)¹⁹⁰⁷, the only limitation is on the ground on which the Attorney-General may present a petition for winding up a company. It is suggested that the Registrar, a creditor of a company or a member with shares or a contributory may petition on any of the grounds stated under subsection (2) of section 84 of Act 1015.

It has been held that, where the petition is brought by a creditor or member for the official winding up of the company, the petitioner is required to show the winding up is not for the individual benefit of the petitioner but for a class of people to which the petitioner belongs.¹⁹⁰⁸ The grant of the order for the winding-up of a company is at the discretion of the court and the court has the unfettered discretion subject to the nature of the remedy of a winding-up order and the importance of the interests of the company's general body of creditors.¹⁹⁰⁹ Given the nature of the remedy of winding up, it has been held to be a remedy of last resort.

Charles Forte Investments Ltd v. Amanda¹⁹¹⁰ - A minority shareholder complained of the board's refusal to register transfers of his shares to a third party. He threatened to present a winding up petition unless the board registered the transfers. The court held that he would be restrained from presenting such a petition. That winding up is properly a remedy of last resort. He had other and more suitable remedies available to him, namely an action for rectification of the register or proceeding by way of motion under section 116, and his threat to employ the machinery of winding up was an attempt to bring pressure on the board to reverse its decision and was an abuse of the

¹⁹⁰⁷ Section 1 of Act 180. Act 1015 repealed and replaces Act 180. Most of the provisions in Act 180 have been reproduced in Act 1015. It, therefore, serves as basis for comparison.

¹⁹⁰⁸ *Re Crigglestone Coal Company Limited* [1906] 2 Ch. 327.

¹⁹⁰⁹ *Ibid.*

¹⁹¹⁰ [1963] 2 All ER 940.

process of the court which would cause unnecessary damage to the company. Buckley J stated @ pgs. 330 to 331:

"First, as between the creditor and the company, who are his debtors, the unpaid creditor who shows insolvency is entitled ex debito justitiae to a winding up order... but then some another consideration viz., that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiae is not his individual right, but his representative right."

*Billy v. Kuwor*¹⁹¹¹ - on a winding up order, Benin J. stated @ pgs. 531 – 532 that:

"I find from the evidence that the respondents have dismissed the applicant as a member and as an employee of the company. This they did without hearing him at all. This act of dismissal, I declare, is wrongful. And in the circumstances of this case whereby the respondents are the only two directors who also have between them 74.29% of the total shareholding of the company as against 25.71% by the applicant, this arbitrary exercise of power I hold is clearly oppressive of the applicant who cannot control their actions even at company member's meetings. The traditional remedy in such circumstances is to wind up the company on the ground that it is just and equitable to do so. But it has been observed that the courts are generally reluctant to wind up a company that is solvent and moreover it is a remedy that may severely hurt the remaining shareholders. This is exactly the position in this case, and I think a winding up, even if properly asked for, will not be an appropriate remedy in this instance."

The courts have further held that the right of members to petition for the liquidation of the company cannot be taken away either by the constitution of the company or agreement among the members.

*Re Peveril Gold Mines Ltd*¹⁹¹² – the articles of the company prohibited the members from petitioning for liquidation unless two directors consent in writing, a general meeting so resolved, or the petitioner has at least twenty percent of the issued shares. It was held that a member can still petition notwithstanding the prohibition. Lindley MR stated:

"Anyone who is familiar with the Companies Act knows perfectly well that registered limited companies are incorporated on certain conditions, they continue to exist on certain conditions; and they liable to be dissolved on certain conditions. The important sections ... states the persons who may petition for a dissolution. Any article contrary to these sections – any article which says that the company is formed on the condition that its life shall not be terminated when any of the

¹⁹¹¹ [1991] GLR 522.

¹⁹¹² [1898] 1 Ch 122.

circumstances mentioned in s. 79 exist, or which limits the rights of a contributory under s. 82 to petition for a winding up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid. It is no answer to say that the right to petition may be waived by the contributory personally. I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of the company. That point does not arise now. But to say that a company is formed on the condition that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act is to say that it is formed contrary to the provisions of the Act, and upon conditions which the court is bound to ignore."

It has been held that an agreement that does not take away the right of the members to petition for liquidation but defers the right to petition for liquidation to a future date is valid and enforceable.

*In Re Timber and Transport Kumasi-Krusevac Co. Ltd: Zastava v. Bonsu and Another*¹⁹¹³ - the petitioner, a Yugoslav company, entered into an agreement with another company to set up an enterprise to operate in the timber industry. The agreement, inter alia, stated that no member of the company formed could make an application to the court seeking the winding-up or liquidation of the company within the first 10 years of the company's existence. That notwithstanding, the petitioner brought an application for the official winding-up of the company before the said time under the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). At the hearing of the petition before the High Court, counsel for the respondents successfully raised a preliminary objection that the petition was incompetent and should be dismissed. On appeal, it was held that even though the agreement was valid, it was not enforceable since the respondent by conduct has terminated the agreement and the respondent could not rely on it. The court per Sowah JSC @ pg. 262 stated that:

"It seems to us that the averments contained in the petitioner's affidavit, if established, do indicate that by 1978 the respondents had clearly shown by conduct that they did not regard the 1971 contract as binding. If this is so, then the petitioner will be justified in treating the agreement as at an end and fortify its position by taking such steps as are necessary. We are of the view that the respondents ought not to be allowed to approbate and reprobate their contract. The agreement of 1971 in which clause 15 forms part is either effective and binding on all the parties or it is not. The respondents cannot be permitted in equity to plead against the appellants an agreement which they themselves have so clearly spited."

¹⁹¹³ [1981] GLR 256.

24.3.2 Grounds for court order of official liquidation

The grounds for the grant of an order of winding up is provided in section 84 of Act 1015. Section 84 of Act 1015 provides that:

“(2) The Court may order the official winding up of a company on a petition presented where

(d) the company

(i) does not commence the business which the company is authorised by the constitution of the company to carry on, or

(ii) suspends business for a year within a year after the incorporation of the company.

(e) the company does not have a member;

(f) the business or objects of the company are unlawful;

(g) the company is operated for an illegal purpose;

(h) the business being carried out by the company is not authorised by the constitution of the company;

(i) the company is unable to pay the debts of the company; or

(j) the Court is of the opinion that it is just and equitable that the company should wound up.”

There are eight grounds upon which a court may order the winding up of a company on a petition being presented to the court. These are where:

- (a) the company has failed to commence business after its incorporation. No period is provided. A similar provision in the repealed Act 180 provides for a specific time of one year period that the company does not commence business. The failure to state the time leaves it to the discretion of the Court to determine.
- (b) the company suspends its business for a year within the year after incorporation. The provision in Act 1015 restricts the ground to the suspension for a year occurring within the year after incorporation. Under the repealed Act 180, suspension of business for more than a year at any time is a ground for an order to wind up the company. It means that under Act 1015, once a year has elapsed from the date of incorporation, a suspension for any long period is not a ground for an order by the Court to wind up the company.¹⁹¹⁴ Alternatively, the section may be read as a company suspending its business for a year after the year of incorporation. Failure to commence business after commencement will be taken care of under the first ground in (a) above. Any suspension after the year from commencement will come

¹⁹¹⁴ This may be a mistake in the provision and may be corrected by the Statute Law Review Commission.

under (b). It is suggested that the second interpretation makes more sense than the first interpretation and should be adopted.

- (c) the Court can also make an order for the winding up of a company if it is determined at any time that the company does not have a member.
- (d) the business or object of the company is unlawful, that is the business is contrary to law.
- (e) The company is operated for an illegal purpose.
- (f) the business being carried out by the company is not authorised by the constitution of the company. That is the company is engaged in ultra vires business.
- (g) the company is unable to pay its debt. A company is unable to pay its debt when:
 - (i) when a debt of ten thousand currency units or more is due, notice has been served on the company, thirty days have elapsed without payment to or satisfactory arrangement with the creditor;
 - (ii) judgment obtained by the creditor has been returned unsatisfied wholly or partially after attempted execution; or
 - (iii) it is proved to the satisfaction of the Registrar that the company is unable to pay its debts.

The order will not be made if the debt is disputed.

*Stonegate Securities Ltd v. Gregory*¹⁹¹⁵ – a petition was presented for the winding up of the plaintiff company. The defendant in accordance with the applicable law served a notice on the company demanding the debt and the time indicated for payment had lapsed. The company while admitting the liability disputed the debt was due. The company applied to set aside the petition. It was held by Buckley LJ that:

“Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petition is a creditor whose debt is presently due, or one whose debt is contingent or prospective.... If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way, but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a

¹⁹¹⁵ [1980] Ch 576.

legitimate means of seeking to enforce payment of a debt which is bona fide disputed."

In the case of *Lacontha Foundation v. GBI Investment Ltd*¹⁹¹⁶, the court held that there may be exceptional circumstances where the court may permit proceeding with the application for winding up even where the debt is disputed including where the company is a foreign company and petitioner may be left without a remedy or suffer an injustice.

- (k) Where the Court is of the opinion that it is just and equitable that the company be wound up. The scope covered by this ground is wide. Importantly, the petitioner must lead evidence to establish to the satisfaction of the Court that it is just and equitable to wind up the company.

*Ebrahimi v. Westbourne Galleries Ltd*¹⁹¹⁷ - Ebrahimi and Nazar were partners. They converted their partnership business of buying and selling expensive rugs into an incorporated company. Ebrahimi and Nazar were the two shareholders and directors of the company. They both took dividends rather than director's salary for tax reasons. A few years later, when Nazar's son came of age, he was appointed to the board of directors. Ebrahimi and Nazar both transferred shares to the son of Nazar. After a falling out between the directors, Nazar and son called a company meeting, at which they passed an ordinary resolution to have Ebrahimi removed as a director. Ebrahimi, unhappy at this, applied to the court for a remedy to have the company wound up. In considering the just and equitable ground for winding a company, Lord Wilberforce stated:

"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that

¹⁹¹⁶ [2010] EWHC 37.

¹⁹¹⁷ [1973] AC 360.

is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

It has, therefore, been held just and equitable to order the winding up of a company in the following circumstances:

- (i) It has been held that establishing a ground under section 219 of Act 992 may permit the Court to order the winding up of a company on this ground – that it is just and equitable.

Billy v. Kuwor¹⁹¹⁸ – the applicant was an employee of an agricultural company. He was allegedly informed by the respondents that the company had been dissolved, he had been dismissed and his shares forfeited. He applied to the court for an order to wind up the company on the ground that the respondents' actions were oppressive. The court held that winding up order is normally granted where the court found oppression to be established. However, in this particular case, the court will not grant the order for winding up. On the winding up order, Benin J. stated @ pgs. 528 to 532 that:

"Under the Draft Proposals of the Companies Code, it was proposed that a company may be wound up by the court, if, among others, it is proved to the satisfaction of the court that it is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Although section 247 of Act 179, as eventually enacted, does not contain this proposal, I think in considering a

¹⁹¹⁸ [1991] GLR 522.

winding up order a court should not fail to take these factors into consideration, for it is my view that the court must look at the business realities of the situation and should avoid taking a narrow legalistic view that because the company is owing, it should be wound up.

When it comes to consider the just and equitable rule, it is a question of fact and as such each case must depend on its own circumstances. The court therefore has an unfettered discretion in this exercise since it is not possible to lay down a general guide to the solution of what are essentially individual cases. It was thus held in In re Suburban Hotel Co. (1867) 2 Ch App 737 that the fact that the company's business has been carried on at a heavy loss (if the company is not insolvent) is not per se a ground for winding up.

On the fact of this case the applicant himself deposed to facts in an affidavit which I believe were self-defeating right from the start. By paragraph 7 he deposed that the company began with only one tractor but now has two tractors, among other equipment, to its credit. So that in terms of fixed assets the company no doubt is doing well. He said also that the company was owing. He called their bankers to testify. The testimony of the bank official was that as at the end of December 1987 the company owed them €684,174.50. On 19 January 1988 the company paid €200,000 out of this amount owed, and in cross-examination he stated that as far as the bank was concerned the company was a going concern and that they were prepared to re-finance it, if necessary. I believe a bank would not throw away good money for nothing. Moreover the company has been paying its debts as borne out by bank pay-in-slips exhibits 3 and 6, and bank receipts - exhibits 4 and 5. I find therefore that the company is a viable one. The fact that it owes the bank is not enough, for it has assets whose value (put conservatively at €5 million) far exceed its debts.

Finally the applicant also deposed to and spoke of some proceeds from some ploughing operations which they have not accounted for. This was denied by the respondents. It seems that the company from its inception has not kept any proper books of accounts as stipulated in its regulations, exhibit 2, and they have no qualified auditor. The first respondent explained that they cannot afford the services of a qualified accountant. Whilst I disapprove of this conduct as an infringement of section 133 of Act 179, I think this per se should not be a ground for winding up. The applicant has been aware of this situation all along and has taken part in this irregularity all these years; for not until 5 February 1988, he had nothing to complain about against the respondents, and this explains why by the relief numbered (viii) he only seeks accounts from 5 February 1988, the date of his purported dismissal. He cannot now be heard to complain about any irregularity prior to 5 February 1988. At any rate I am satisfied on the evidence that the allegation of diversion of company funds by the respondents is not proved. Exhibits

1, 7 - 9 must speak for themselves. Exhibits 1, 7 and 8 were operational accounts for the years 1985, 1986 and 1987 respectively. The applicant never complained against any of them. Exhibit 9 is a resolution whereby the three of them agreed that the second respondent be made a signatory to their account in addition to the first respondent. I therefore find that the company is not being run at a loss and moreover its finances have not been mismanaged. Thus the order for winding up on this ground also cannot be granted. ...

I find from the evidence that the respondents have dismissed the applicant as a member and as an employee of the company. This they did without hearing him at all. This act of dismissal, I declare, is wrongful. And in the circumstances of this case whereby the respondents are the only two directors who also have between them 74.29% of the total shareholding of the company as against 25.71% by the applicant, this arbitrary exercise of power I hold is clearly oppressive of the applicant who cannot control their actions even at company member's meetings. The traditional remedy in such circumstances is to wind up the company on the ground that it is just and equitable to do so. But it has been observed that the courts are generally reluctant to wind up a company that is solvent and moreover it is a remedy that may severely hurt the remaining shareholders. This is exactly the position in this case, and I think a winding up, even if properly asked for, will not be an appropriate remedy in this instance."

- (ii) It has also been held that it is just and equitable when a company carries on business at a loss and it is insolvent.

*Billy v. Kuwor*¹⁹¹⁹ - Benin J. stated @ pg. 528 that:

"The second and more important ground canvassed was financial mismanagement. He cited a number of instances of this. In law it may be just and equitable to wind up a company where it is carrying on business at a loss and its remaining assets are insufficient to pay its debts: see In re Diamond Fuel Co. (1879) 13 Ch.D. 400, C.A. But as was said in Davis & Co. Ltd. v. Brunswick (Australia) Ltd. [1936] 1 All E.R. 299 at 309, P.C. the mere fact that the company is being run at a loss is insufficient; it must be shown that there is no reasonable hope of ultimate profit."

- (iii) It has been held that it is just and equitable to wind up a company when the object or purpose of the company is no longer in existence, which has been expressed as loss of substratum.

¹⁹¹⁹ [1991] GLR 522.

Re German Date Coffee Co¹⁹²⁰ - a company was incorporated for the purpose of manufacturing a coffee substitute out of dates fruits based on a specific German patented invention in Germany and other business. In order to do this, the company required the German patent. The German Empire did not grant the patent to the company. Even though the company engaged in other businesses, including getting a Swedish patent, setting up and manufacturing coffee from dates without patent, it was held that the company had been set up with the aim of working a specific patent and that once that failed as the patent is not granted, the shareholders were entitled to renege on carrying on any other business. It was just and equitable to wind up the company as the object was no longer in existence. It was stated per Kay J.:

“Therefore the law so far is established thus, that if the whole substratum of the company is gone, it is within sect. 79 “just and equitable” that the company should be wound up. ... I cannot really doubt that the meaning of this memorandum is that the first purpose, the main object of the company, is to acquire an invention patented in Germany, and to work that invention, and that it is not to acquire an invention which is not patented ... I therefore think the whole substratum of the company has failed, and that the authorities I have referred to are sufficient not only to authorise but to oblige the Court to put a stop to the further proceedings of this company, which will, in my opinion, be neither more nor less than employing moneys obtained from the shareholders, in carrying on a business which practically is not authorised by the memorandum of association. I therefore make the usual winding-up order.”

Re Kitson & Co Ltd¹⁹²¹ – the company was incorporated to acquire and take over the business carried on at Airedale Foundry Hunslet under the name Kitson & Co, and to carry on the business of locomotive engine manufacturers, iron-founders, mechanical engineers and manufacturers of agricultural implements and other machinery. The company later sold the business carried out at Airedale Foundry Hunslet and acquired another business to continue an engineering business. On application to liquidate on the ground that the substratum had gone, the application was dismissed. Lord Greene MR stated in construing the memorandum that:

“In my opinion, the main and paramount object of this company was to carry on an engineering business of a general kind. It was such a business that was carried on by Kitson & Co. and I cannot bring myself to construe this memorandum as limiting the paramount object and restricting the contemplated adventure of the shareholders to the carrying on of what would be called the business of Kitson & Co. The impossibility of applying such a construction seems to me to be manifest when one remembers that a business is a thing which changes. It grows or contracts. It changes; it disposes of the whole of its plant; it moves its factory; it entirely

¹⁹²⁰ (1882) 20 Ch D 169.

¹⁹²¹ [1946] 1 All ER 435.

changes its range of product, and so forth. It is more like an organic thing.”

- (iv) It has also been held that it is just and equitable that where the members of the company can no longer reach an agreement on the business or conduct of the affairs of the company, the company may be wound up.¹⁹²²

*Symington v. Symington's Quarries Ltd*¹⁹²³ – Two brothers who had carried on a partnership business decided to transfer it to a private limited company. Each brother held the shares equally except for a small holding for a third brother held for voting. A resolution was passed in a general meeting by the votes of one brother together with other members having nominal interests that he should be the sole director. The other two brothers petitioned for a winding up under the just and equitable provision and the court so ordered based on the reasons expressed in terms of lost substratum or deadlock. Lord M'Laren stated @ pg. 130, that the company was not formed by appeal to the public: it was a domestic company, the only real partners being the three brothers:

“In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, ...”

*Re Yenidje Tobacco Co Ltd*¹⁹²⁴ – the Company had two shareholders with equal shares and both were directors. They could not agree on how the company could be managed. There was no provision for breaking the deadlock. Even though the company was prosperous and making large profits, an application was made for the company to be wound up. The court per Lord Cozens-Hardy MR stated @ pg. 95 that:

“I think that in a case like the present we are bound to say that circumstances which would justify the winding-up of a partnership by action are circumstances which should induce the court to exercise its jurisdiction under the ‘just and equitable’ clause and to wind-up the company. Astbury J dealt with this case, as it seems to me, in a most satisfactory way. At the end of his judgment he said that he tried to suggest a solution. He suggested that the two shareholders should ‘continue for six months to see if they can get on better, or that they should appoint one or more additional directors to assist them in the business.’ But this neither would do. If ever there was a case of deadlock I think that it exists here. But, whether it exists or not, I think that the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law, and to say that this company is now in a state

¹⁹²² *Symington v. Symington's Quarries Ltd* (1905) 8 F. 121; *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426; *Loch v. John Blackwood Ltd* [1924] A.C. 783l and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

¹⁹²³ (1905) 8 F. 121.

¹⁹²⁴ [1916] 2 Ch 426.

which could not have been contemplated by the parties when the company was formed and ought to be terminated as soon as possible."

- (v) It has also been held that it is just and equitable to wind up a company for lack of confidence in the management of the affairs of the company.

Janet Livingstone Loch & Another v. John Blackwood Ltd¹⁹²⁵ - The appellants are petitioners for an order for the winding up of John Blackwood Ltd, the respondent company. The Company was set up after the death of John Blackwood by McLaren, as trustee, for the benefit of three beneficiaries of John Blackwood's estate (which included McLaren's wife). Even though the business was run profitably, the trustee began to run the business for the benefit of himself and the wife to the exclusion of the other beneficiaries. A petition was brought for the winding up of the company. It was found that the directors had omitted to hold general meetings, to submit accounts and to recommend a dividend, and that they had laid themselves open to the suspicion that their object in so omitting was to keep the petitioners in ignorance of the company's position and affairs and to acquire the petitioners' shares at an under value. The trial court (the Court of Common Pleas of Barbados) allowed the petition which was reversed on appeal. The petitioner appellants then appealed to the West Indian Court of Appeal and in granting the application, Lord Shaw stated:

"It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter and it is under the statute just and equitable that the company be wound up."

- (vi) It has also been held that a company may be wound up on the ground that it is just and equitable where the company is formed for a fraudulent purpose.

Re Thomas Edward Brinsmead & Sons Ltd¹⁹²⁶ – the company was formed by a former employee of another reputable company which manufactures piano. The employee in forming the company intended to manufacture and pass off the piano as that of the reputable company. An injunction was obtained to restrain the employee and the company. Meanwhile, the public had subscribed to acquire the shares of the company in a promotion fraud led by Consolidated Contract Corporation.

¹⁹²⁵ [1924] AC 783.

¹⁹²⁶ [1897] 1 Ch. 406.

It was held that the company could be liquidated as it was just and equitable to do so. The Court stated:

“in our judgement it has been provided that this company – ie Thomas Edward Brinsmead & Sons Limited – was initiated to carry out a fraud, and that, until restrained by injunction, it continued therein, and that a strong prima facie case has been made out that the Consolidated Contract Corporation are at the present moment dishonestly keeping the shareholders’ money to which the shareholders, and not they, are entitled, and are resisting the petition to wind up in order to continue to do so. If the sums which they have improperly obtained from the company can be recovered from them, there will probably be something to distribute among the shareholders and, although the petitioner is a fully paid-up shareholder, he cannot be said to have no locus standi. The company is hopelessly embarrassed by the actions already brought against it, and there will, no doubt, be many more of the same sort if this petition is dismissed; and if it is not wound up the £35,000 obtained from it by its promoters will remain in their hands. Although the words ‘just and equitable’ have had a narrow construction put upon them, they have never been construed so narrowly as to exclude such a case as this. If ever there was a case in which it was just and equitable that a company should be wound up by the court, we cannot doubt that the case is this case.”

The above case law positions have been codified by statute in section 84 of Act 1015 which provides that:

- “(4) On the hearing of the winding up petition, the Court may*
 - (a) Dismiss the petition,*
 - (b) adjourn the hearing conditionally or unconditionally, or*
 - (c) make an interim order, or any other appropriate order subject to subsection 5.*
- (5) The Court shall not refuse to make a winding up order only on the ground that*
 - (a) the assets of the company have been mortgaged to an amount equal to, or in excess of, those assets; or*
 - (b) the company does not have assets.*
- (6) Where the petition is presented by members or contributories of the company on the grounds that it is just and equitable that the company should be wound up, the Court shall make a winding up order if the Court is of the opinion that*
 - (a) the petitioner is entitled to relief by winding up of the company or by some other means, and*
 - (b) in the absence of any other remedy, it is just and equitable that the company should be wound up.*
- (7) Despite subsection (6), where the Court finds that, an alternative remedy is*

available to the petitioners and that the petitioners acted unreasonably in seeking to have the company wound up instead of pursuing the alternative remedy, the Court shall not make a winding up order."

Subsection (4) emphasized the discretionary nature of the court's power to order the winding up of a company. Notwithstanding the discretionary nature of the power, subsection (5) makes it clear that the order shall not be refused on the simple ground that the company has no assets or has mortgaged its assets to amount equal to or in excess of the value of the assets.

Subsections (6) and (7) emphasized the nature of the remedy of winding up as the remedy of last resort. The remedy of winding up is to be granted by the Court on a petition by a member or contributories of the company on the ground of just and equitable where:

- (a) the petitioners are entitled to relief by winding up of the company or by some other means; and
- (b) in the absence of any other remedy, it is just and equitable that the company should be wound up.

In other words, where there is an alternative remedy to the petitioners and the petitioners acted unreasonably in seeking to have the company wound up instead of pursuing the alternative remedy, the Court shall not make a winding up order.¹⁹²⁷

It has, therefore, been held that the remedy of winding up of a company is a remedy of last resort and the court will not likely order the winding up of a company if there are other appropriate remedies to right the wrong complained against for which the order of winding up is sought.

Charles Forte Investments Ltd v. Amanda¹⁹²⁸ - A minority shareholder complained of the board's refusal to register transfers of his shares to a third party. He threatened to present a winding up petition unless the board registered the transfers. The court held that he would be restrained from presenting such a petition. That winding up is properly a remedy of last resort. He had other and more suitable remedies available to him, namely an action for rectification of the register or proceeding by way of motion under section 116, and his threat to employ the machinery of winding up was an attempt to bring pressure on the board to reverse its decision and was an abuse of the process of the court which would cause unnecessary damage to the company.

The same point was made by Benin J. in the case of ***Billy v. Kuwor***¹⁹²⁹ (supra).

¹⁹²⁷ Section 84(7) of Act 1015.

¹⁹²⁸ [1963] 2 All ER 940.

¹⁹²⁹ [1991] GLR 522.

The Registrar, creditor, member or contributory of the company, or the Attorney-General who petitioned the Court must establish one of the above eight grounds to the satisfaction of the Court for the Court to order the winding up of the company. Even where the ground is satisfied, as indicated in the case of *Billy v. Kuwor* (supra) winding up order will only be made if there are no alternative remedies and it is just and equitable to do so.¹⁹³⁰ After the winding up order is granted, the Registrar of the Court shall forward a copy to the Registrar of companies.¹⁹³¹ The Registrar of companies shall make a minute of the winding up order in the books of the Registrar and publish the order in the Companies Bulletin.¹⁹³² The Court may appoint the Registrar as the liquidator to exercise all or any of the powers of a liquidator at any time between the presentation of the petition and making the order for winding up.¹⁹³³

24.3.3 Consequences of official liquidation

A number of consequences follow upon commencement of official liquidation or winding up of a company. Official winding up of a company commences on the passing of a special resolution by the company or when the winding up order is made by the Court.¹⁹³⁴ Upon commencement of the winding up, a number of consequences follow. These include the following:

- (a) On commencement of the winding up against a company, all civil proceedings against the company must be stayed.¹⁹³⁵ Section 87(1) of Act 1015 provides that:
- “(1) On the commencement of winding up proceedings against a company, civil proceedings against the company shall be stayed and any transfer of shares of the company within that period shall be void.*
- (2) The Court may, on an application made by a party to the petition or the Registrar, stay the proceedings by or against the company or regarding the property of the company during the interval between the presentation of a petition for an official winding up and the commencement of the winding up.*
- (3) In accordance with subsection (2), a disposition of the property of the company, including things in action and a transfer of shares is void, unless the Court otherwise directs.”*

A plaintiff or applicant in a civil proceeding against the company cannot proceed with the action unless leave is granted by the court. Even prior to the order of the court, the Act permits the Court, on application by a party to the petition or the Registrar, to stay any proceedings

¹⁹³⁰ Position now restated under section 84(6) and (7) of Act 1015.

¹⁹³¹ Section 84(8) of Act 1015.

¹⁹³² Section 84(9) of Act 1015.

¹⁹³³ Section 84(10) of Act 1015.

¹⁹³⁴ Section 89 of Act 1015.

¹⁹³⁵ Section 87(1) of Act 1015.

by or against the company, or regarding the property of the company during the interval between the presentation of a petition and commencement of the winding up.¹⁹³⁶ Proceedings against the company are automatically stayed upon commencement of winding up against the company. If the proceeding is not stayed automatically, the petitioner or Registrar can make an application to the Court to stay any proceeding. The stay of proceedings under subsection (1) of section 87 of the Act is limited to instances where a petition is presented against the company.¹⁹³⁷ It, therefore, excludes instances where the liquidation is commenced by special resolution of a company to wind up the company.

- (b) On commencement of the winding up, a person is not entitled to proceed with or commence an action or civil proceedings against the company, other than proceedings taken by a secured creditor for the realisation of the security of that secured creditor.¹⁹³⁸ The Court may grant leave, subject to terms the Court may impose, to a person to commence or proceed with the action or civil proceedings against the company.¹⁹³⁹ Any proceedings by creditors to enforce judgment including attachment must all be stayed except with the leave of the Court unless the creditor is a secured creditor. This covers any of the modes of commencement of official winding up of a company. That is, whether the official winding up was initiated by or against the company. Section 97 of Act 1015 provides that:

“A person shall not, on the commencement of a winding up proceed with or commence an action or civil proceedings against the company, other than proceedings by a secured creditor for realisation of the security of that secured creditor, except

(a) by leave of the Court; and

(b) subject to the terms that the Court may impose.”

The case of *Pioneer Construction Products Ltd v. Faddool*¹⁹⁴⁰ explains the distinction between the above two grounds under the Act. In the case, the plaintiff, a creditor of the defendant company, brought an action by originating motion. Before the action was heard, the company passed a resolution for winding up which was duly gazetted. That notwithstanding, proceedings continued and ended in favour of the plaintiff. The defendant company brought the present application for an order to set aside the judgment on the ground that it is against the provisions of section 17 of the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). The court held that the judgment obtained was void and set it aside. The court per Charles Crabbe J. @ pgs. 82 to 84 stated that:

¹⁹³⁶ Section 87(2) of Act 1015.

¹⁹³⁷ *Pioneer Construction Products Ltd v. Faddool* [1974] 1 GLR 76 (HC).

¹⁹³⁸ Section 93 of Act 1015.

¹⁹³⁹ *Ibid.*

¹⁹⁴⁰ [1974] 1 GLR 76.

"The winding up of a company comes under the provisions of sections 246 to 261 of the Companies Code, 1963 (Act 179), much of which deal with private liquidations. For the purposes of this application, the power for the liquidation is the Bodies Corporate (Official Liquidations) Act, 1963. By section 6 of that Act, a civil proceeding against a company in an official winding up "shall be stayed." The word "against" in subsection (1) of this section 6 is important. Its importance can be realised when one reads section 6(2) of Act 180 which provides that:

- "6. (1) On the commencement of winding up proceedings against a company all civil proceedings against the company shall be stayed and any transfer of shares of the company shall be void.*
- (2) During the interval between the presentation of a petition for an official winding up and the commencement of the winding up, the Court may, on application being made by a party thereto or the Registrar stay any proceedings by or against the company or in respect of its property; and accordingly any disposition of the property of the company, including things in action and any transfer of shares shall, unless the Court otherwise directs, be void."*

This provision does not mention the special resolution winding up and the conversion winding up. It mentions in effect petitions addressed to the registrar and to the court. As regards a petition to the registrar a creditor of the company or a member or a contributory of the company could petition. With regard to a petition to the court, the registrar and the Attorney-General are added as creditors of the company. The registrar would thus be a party to a petition for the official winding up of a company in a petition to the court, but not in a petition to him. Why then is the registrar specifically mentioned in subsection (2) of section 6? I do not think it is intended to draw a distinction between him and the others for the purposes of the word "against" in subsection (1) I believe, however, that it does give him additional powers to act in his discretion since under section 17 of Act 180 "proceedings by a secured creditor for the realisation of this security" could be proceeded with or commenced. Under such circumstances the registrar could set in and exercise any of his powers regarding liquidation where there are facts which make such exercise possible, for example, that "the company is unable to pay its debts." So if it is accepted that a winding up by virtue of the provisions of paragraph (a) of subsection (1) of section 1 of Act 180 does not fall within the ambit of section 6 of that Act, what happens between the passing of the resolution for the winding up and the sending of a copy of the resolution to the registrar? Could the company dispose of its property or transfer shares? I think not. For under sections 13 and 14 of Act 180, on the passing of the resolution for the winding up of the company the directors cease to exercise any of their functions unless the liquidator authorises, that is,

sanctions the directors to continue to exercise such functions. And the functions of the directors, no doubt, include the power to sue on behalf of the company, and to represent the company when it is sued.

Equally in subsection (2) of section 6 appears also the word "by." For that purpose the expression "stay any proceedings by or against the company or in respect of its property" contains three elements, that is to say,

- (a) any proceedings by the company;*
- (b) any proceedings against the company; and*
- (c) any proceedings in respect of the property of the company.*

It would not, therefore, be wrong, to base an argument on the word "against," within the context of section 17 of Act 180.

Moreover, subsection (2) also contains the words "any disposition of the property of the company, including things in action and any transfer of shares shall, unless the Court otherwise directs, be void." To dispose of a chose in action involves the determination of an issue or issues in proceedings before a court. And it cannot be gainsaid that an interest in a deed of assignment involving a lease falls under the broad definition of a personal chattel. My view is that under subsection (2) of section 6 of the Act, proceedings taken or commenced by the company, as well as against the company, could be stayed."

*Brown v. Hoeks (Ghana) Ltd*¹⁹⁴¹ – plaintiffs obtained a judgment against the defendant company. They recovered about ten per cent of the judgment debt in attachment proceedings they instituted against the defendant company's garnishees. The plaintiffs later applied for a writ of fi. fa. to issue in respect of the unexpired terms of leases on properties owned by the defendant company. The defendants thereupon applied for a stay of execution and pleaded for a three-month adjournment to enable them to discharge the judgment debt. The court acceded to the defendant company's request. The defendant company then petitioned the official liquidator to wind up the company. Consequently, the plaintiffs brought an application on notice for an order for leave to proceed with execution notwithstanding the winding up petition. The court granted the application in the absence of a representative of the official liquidator. On a subsequent application for a review of that order counsel for the official liquidator in opposing the motion contended, inter alia, that the order offended sections 17 and 30(4) of Act 180 and that since the plaintiffs' debt could be proved in the winding up petition it should not be given any preferential treatment. The court granted leave to the plaintiff to continue with the enforcement proceeding. The court stated per Griffiths-Randolph J. @ pgs. 19 and 20 that:

"The pertinent question therefore is: In the circumstances of the instant application, is it right and fair for the court to exercise its discretion in making an order

¹⁹⁴¹ [1977] 2 GLR 15.

permitting the said motions to be proceeded with and for the applicants to go into execution or both?

Now in this case, the applicants over fifteen months ago obtained judgment for the equivalent in cedis of DM 143,292.00 plus interest thereon at the rate of eight per cent and €700.00 costs. They spared neither the time nor effort in trying to reap the benefits on the judgment; but their efforts were not amply rewarded, for they succeeded in collecting only a little more than ten per cent of it; also more than twelve months ago they tried to levy execution against the defendant-judgment-debtor which applied for a stay of execution, and apart from the affidavits it filed in which it was maintained that it had enough funds to pay off the debt it owed the applicants, the chairman of the directors of the company and his counsel made further representations in court that it was in a position to pay off the debt, and pleaded to be allowed to do so within three months. It was on that understanding that the court acceded to the request of the judgment-debtor for a three-month adjournment. However, it is now obvious that it was only a dirty trick that was played on the applicants, so as to enable the company to be wound-up; and that the judgment-debtor never intended to satisfy the judgment-debt, etc. In fact, I greatly deprecate the unseemly attitude of chairman Asiedu, who contrived to delay the levying of execution by the plaintiffs-judgment-creditors, and then hit below the belt, by applying to the official liquidator to wind-up his company.

In circumstances such as these, it is just to allow the plaintiffs-judgment-creditors to proceed with the said motions, and execution to issue. Hence the order made on 20 February 1974 will not be varied: vide Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd. [1911] 2 K.B. 143, C.A. where after the plaintiff company had obtained judgment against the defendant company the latter's solicitor informed the solicitor of the former that a cheque would be sent in settlement of the judgment-debt, and he therefore delayed the issuing of execution; but while he was waiting for it, a meeting of the company had been convened, at which a resolution had been passed for the voluntary liquidation of the latter company, and it was held that the issue of the execution had been prevented by a series of tricks on the part of the defendant company, and that the plaintiff company, therefore, ought to be permitted to obtain the benefit of their judgment by means of execution; also the latter case of In re Grosvenor Metal Co., Ltd.[1950] Ch. 63 where the earlier case was considered, and it was held that the Companies Act, 1948, had enlarged the discretion of the court by empowering it to do what was right and fair according to the circumstances of each case, and superseded the previous jurisdiction, under which nothing short of a trick or some actual dishonesty justified interference by the court; and In re Suidair International Airways, Ltd.[1951] Ch. 165 at p. 168 where Megarry argued that "In re Grosvenor Metal Co.,

Ltd... shows that the court has a completely free hand to intervene and that ... the present case is a very strong one for the exercise of that discretion by allowing the applicants to implement their execution."

The plaintiffs-judgment-creditors can now proceed with the said motions, and execution will also issue against the defendant-judgment-debtor."

- (c) On commencement of the winding up, there can be no transfer of shares without approval by the Court or the transfer is to the liquidator. The Act provides that transfer of shares on commencement of a winding up proceeding against the company is void unless the Court otherwise directs.¹⁹⁴² Section 87 of Act 1015 provides that:

"(1) On the commencement of winding up proceedings against a company, ... any transfer of shares of the company within that period is void.

(3) In accordance with subsection (2) ... a transfer of shares is void, unless the Court otherwise directs."

The Act provides in section 94 that: *"A transfer of shares after the commencement of any winding up is void unless the transfer is made to the liquidator or with the approval of the Court."* A transfer of shares can be made to a liquidator and such transfer will be valid even though no approval has been obtained from the court. A Court can also approve a transfer of shares to any other person.

- (d) On commencement of winding up, other than the realisation of assets by the liquidator or secured creditors, the disposition of the property of the company including things in action is void, unless the Court otherwise directs.¹⁹⁴³ Section 87 of Act 1015 provides *"(2) In accordance with subsection (2), a disposition of the property of the company, including things in action ...is void, unless the Court otherwise directs."* And section 93 of the Act permits a secured creditor to commence an action or proceed with the realisation of the security of that secured creditor without leave of court.

- (e) On the commencement of the winding up, the powers of the directors cease and vest in the liquidator.¹⁹⁴⁴ The directors are rendered *functus officio*. The liquidator assumes the functions of the directors and there is a fiduciary relationship created between the liquidator and the company.¹⁹⁴⁵ Section 90 of Act 1015 provides that: *"On the commencement of a winding up, the functions of the directors of the company shall vest in the liquidator who assumes a*

¹⁹⁴² Section 87(3) of Act 1015.

¹⁹⁴³ Section 87(3) of Act 1015.

¹⁹⁴⁴ Section 90 of Act 1015.

¹⁹⁴⁵ *Ibid*.

fiduciary position to the company."

*Pioneer Construction Products Ltd v. Faddool*¹⁹⁴⁶ – Charles Crabbe J. at page 83 stated that: "So if it is accepted that a winding up by virtue of the provisions of paragraph (a) of subsection (1) of section 1 of Act 180 does not fall within the ambit of section 6 of that Act, what happens between the passing of the resolution for the winding up and the sending of a copy of the resolution to the registrar? Could the company dispose of its property or transfer shares? I think not. For under sections 13 and 14 of Act 180, on the passing of the resolution for the winding up of the company the directors cease to exercise any of their functions unless the liquidator authorises, that is, sanctions the directors to continue to exercise such functions. And the functions of the directors, no doubt, include the power to sue on behalf of the company, and to represent the company when it is sued."

- (f) On commencement of the winding up, the company must cease to carry on its business except where the company is required to carry on the business for the benefit of the winding up.¹⁹⁴⁷ This does not negate the perpetual succession right of the company. The company continues to have the corporate status and powers and continues to be in existence until dissolved in accordance with the Act.¹⁹⁴⁸ Section 91 of Act 1015 provides that:

"(1) On the commencement of a winding up, the company shall cease to carry on the business of the company except where the company is required to do so for the beneficial winding up of the company.

(2) The corporate status and the powers of the company shall continue until the company is dissolved despite any provision to the contrary in the constitution of the company."

- (g) On commencement of the winding up, the property of the company is vested in the liquidator during the winding up proceeding except as directed by the liquidator.¹⁹⁴⁹ The liquidator is, therefore, required to take into custody or keep under control the property and things in action to which the company is or appears entitled.¹⁹⁵⁰ For this purpose, the law assumes that property in possession of the company at any time within six months before the commencement of the winding up is property of the company unless otherwise established.¹⁹⁵¹ The liquidator may by publication in the Company Bulletin vest in the official

¹⁹⁴⁶ [1974] 1 GLR 76.

¹⁹⁴⁷ Section 91(1) of Act 1015.

¹⁹⁴⁸ Section 91(2) of Act 1015.

¹⁹⁴⁹ Sections 92(1) and 102 of Act 1015.

¹⁹⁵⁰ Section 92(2) of Act 1015.

¹⁹⁵¹ Section 92(3) of Act 1015.

name of the liquidator, properties held by trustees of the company.¹⁹⁵² The liquidator may take or defend actions in relation to the property for the purposes of the winding up and recovery of the property.¹⁹⁵³

Section 92 of Act 1015 provides that:

- “(1) The property of a company shall be vested in the liquidator during winding up proceedings except as otherwise directed by the liquidator.*
- (2) Subject to subsection (1), the liquidator shall take into custody or keep under control, the property and things in action to which the company is or appears to be entitled.*
- (3) The property in the possession of the company at any time within the six months before the commencement of a winding up shall be presumed to be vested in the company unless the contrary is shown.*
- (4) The liquidator may require a member or contributory and a trustee, receiver, banker, an agent or officer of the company after the commencement of a winding up, to pay, deliver, convey, surrender or transfer to the liquidator immediately, or within a reasonable time that the liquidator may direct, the money, property or books, records, returns, and other relevant documents in the possession of the person to which the company is entitled.”*

Section 102 of Act 1015 provides that:

- “(1) On the commencement of the winding up, the liquidator shall by notice in the Company Bulletin direct that the whole property or a part of the property of whatever description that belongs to the company or that is held by trustees on behalf of the company, shall vest in the liquidator in the official name of the liquidator and the property to which the notice relates shall vest accordingly.*
- (2) The liquidator may bring or defend the acts or any other legal proceedings which relate to the property of the company or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering the property of the company.”*

- (h) Clawback of floating charge – the Companies Act, 2019 (Act 992), under section 93 permits the benefits of a floating charge to be clawed back if within twelve months of the creation of the floating charge, the winding up of the company commences. The charge will be declared invalid in that instance unless it is established the company is solvent immediately after the

¹⁹⁵² Section 102(1) of Act 1015.

¹⁹⁵³ Section 102(2) of Act 1015.

creation of the charge. The invalidity does not affect cash paid to the company at the time of or subsequent to the creation of the floating charge as consideration. Section 93 of Act 992 provides that:

"Where the winding up of the company commences within twelve months of the creation of a floating charge on the undertaking or property of the company, the charge is invalid, unless it is proved that the company was solvent immediately after the creation of the charge, except to the amount of the cash paid to the company at the time of, or subsequent to, the creation of the charge and in consideration for the charge, together with interest on that amount at the yearly rate applicable to the ninety-one day government treasury bill."

- (i) Payment or transfer of property, or any obligation incurred within twelve months to the grant of the winding up order with the intent that a creditor will benefit at the expenses of other creditors, creation of preferential creditors, must be restored or surrendered upon notice to the creditor by the liquidator.¹⁹⁵⁴ The liquidator has the power to clawback the sums of money or property transferred to the creditor, to give the creditor preference over other creditors. This is to avoid preferential treatment of a creditor. This is applicable where the intent is to benefit one creditor at the expense of other creditors and at the time of the payment or transfer of property, the company was insolvent. Section 121 of Act 1015 provides that:

"Where, at the time between the making of a winding up order and the end of the liquidation of the company, it appears to the liquidator that, during the twelve months ending with the commencement of the winding up and at a time when the company was insolvent the company

(a) made a payment or any other transfer of property,

(b) paid a mortgage or other charge, or

(c) suffered a judgment or incurred any other obligation

with the intent that any of the creditors should benefit at the expense of others, the liquidator shall give notice to the creditor so preferred and require that creditor, within the period specified in the notice, to restore to the liquidator whether by payment of money, transfer of property or surrender of rights, the benefit which has accrued to the creditor by reason of the creditor being preferred."

- (j) On commencement of winding up, payment of money or transfer of property during the relevant period to creditors is to be restored to the liquidator on receipt of notice from the liquidator.¹⁹⁵⁵ The relevant period is twenty-one days prior to the presentation of the first

¹⁹⁵⁴ Section 121 of Act 1015.

¹⁹⁵⁵ Section 122(1) of Act 1015.

petition on which a winding up order is made.¹⁹⁵⁶ Under this heading, there is no need to establish that the payment or transfer was to benefit one creditor at the expense of other creditors. A number of exceptions are created provided in subsection (3) of the section. Section 122 of Act 1015 provides that:

- “(1) On the commencement of a winding up, a person who received payment of money or any other transfer of property during the relevant period regarding a debt owed to that person by the company, shall restore the property or the value of the property to the liquidator on receipt of a notice given in that behalf by the liquidator.*
- (2) For the purpose of subsection (1), the expression “relevant period” means the period that commences twenty-one days before the presentation of the petition on which the winding up order was made or, if made on two or more petitions, before the presentation of the first petition, and ends with the making of the winding order.*
- (3) Subsection (1) does not apply to a payment or any other transfer of property*
- (a) made by the company to the banker of the company in so far as the payment has been subsequently made by the bank in meeting cheques drawn by the company,*
 - (b) made regarding a debt incurred during the relevant period,*
 - (c) made in respect of a secured debt, or*
 - (d) made on the enforcement against a third party of a guarantee or indemnity or of a mortgage, charge or lien on the property of that party.*
- (4) On the commencement of the winding up, the property in the possession of the bailiff at the time of the making of the winding order, which is property of which possession was taken under an execution shall be transferred to the liquidator, after deduction of the charges of the bailiff for the execution.*
- (5) Where a person has complied with subsection (1) or a notice given under section 121, that person may lodge a proof of debt or require the liquidator to amend the proof within one month after the notice was given, to enable the debt regarding the notice given to rank for dividend at the value which is appropriate in view of the compliance.”*

- (k) On the commencement of the winding up, all invoices, orders, business letter or any other document issued by or on behalf of the company on which the name of the company appears must have “in official liquidation” or “in liquidation” attached to the name of the company.¹⁹⁵⁷ This is to notify any person who is dealing with the company of the fact that the company is

¹⁹⁵⁶ Section 122(2) of Act 1015.

¹⁹⁵⁷ Section 143 of Act 1015.

in official liquidation. Section 143 of Act 1015 provides that:

- “(1) Where a company is being wound up, an invoice, order or business letter or any other document issued by or on behalf of the company on which the name of the company appears, shall contain a statement that the company is being wound up and shall have the phrase “in official liquidation” or “in liquidation” as is applicable, affixed after the name of the company.*
- (2) An officer of the company or a liquidator, who fails to comply with subsection (1) commits an offence and is liable on summary conviction to a fine of not less than two hundred penalty units and not more than five hundred penalty units or to a term of imprisonment of not less than one year and not more than two years or to both.”*

24.3.4 Powers and duties of official liquidator

The liquidator appointed in an official liquidation stands in a fiduciary relationship with the company. The liquidator assumes the powers of the directors of the company. As earlier indicated, the liquidator for official liquidation is the Registrar. However, creditors can nominate and appoint a person qualified as an insolvency practitioner as liquidator rather than the Registrar.¹⁹⁵⁸ Section 96 of Act 1015 provides that:

- “(1) In an official winding up, the liquidator stands in a fiduciary relationship to the company as if the liquidator were a director of the company.*
- (2) The Companies Act, 2019 (Act 992) applies to the liquidator in the manner and to the extent that the Act applies to a director.*
- (3) A liability shall not attach to the*
- (a) liquidator in respect of a breach of duty imposed on the liquidator by or under this Act; or*
 - (b) Republic in respect of a breach of duty referred to in paragraph (a) except for the reimbursement of the moneys lost to the company through the default of the liquidator.*
- (4) This section does not affect the institution against a public officer of criminal proceedings or of disciplinary proceedings under the Civil Service Act, 1993 (P.N.D.C.L. 327).”*

There is, therefore, a fiduciary relationship created between the company and the liquidator when the liquidator is appointed. Act 992 is applicable to the liquidator. However, the application of Act 992 does not impose liability on the liquidator for anything done in accordance with Act 1015. The exercise of the powers of the liquidator under Act 1015 is also not subject to the limitation under Act 992. For example, the liquidator in entering into what constitutes a major transaction does not

¹⁹⁵⁸ Section 95 of Act 1015.

require approval by ordinary resolution from the shareholders of the company.

Extensive powers are given to a liquidator for the purpose of winding up a company. Section 97 of Act 1015 lists the powers conferred on the liquidator. Per section 97 of Act 1015, the specific powers of the liquidator include the power to:

- (a) bring or defend an action or any other legal proceeding in the name and on behalf of the company;
- (b) carry on the business of the company to the extent beneficial for the winding up;
- (c) appoint a legal practitioner or other professional to assist the liquidator in the winding up;
- (d) pay any class of creditors in full;
- (e) make a compromise or an agreement with creditors or persons claiming to be creditors who have present or future claims, certain or contingent, ascertained or unascertained damages against the company or whereby the company may be rendered liable subject to Act 992;
- (f) make a compromise on calls and liabilities, debts and liabilities capable of resulting in debts, present or future claims, certain or contingent, ascertained or possible only as damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory, or any other debtor or person attributing liability to the company and the questions relating to or affecting the assets or the winding up of the company on the terms that may be agreed.
- (g) take security for the discharge of the calls, debts, liabilities or claims and give complete discharge in respect of any of them;
- (h) sell the property and things in action of the company by public auction or private contract, with power to transfer the property or those things to a person or company;
- (i) do the acts and execute, in the name of and on behalf of the company, the agreements, receipts and any other documents and for that purpose use, when necessary, the seal of the company;
- (j) prove and rank the claims in the bankruptcy and insolvency of a contributory for a balance against the estate of the contributory, and may receive dividends in the bankruptcy or insolvency regarding the balance, as a separate debt due from the bankrupt or insolvent and proportionately with the other separate creditors;
- (k) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company in the course of the business of the company;
- (l) raise the requisite money on the security of the assets of the company;
- (m) take out letters of administration of a deceased contributory and perform in the name of the liquidator or do any other act necessary to obtain payment for money due from the contributory or the estate of the contributory which cannot conveniently be done in the name of the company, and in those cases, the money due shall for the purposes

- of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator; and
- (n) do any other act necessary for winding up the affair of the company and distribution of the assets of the company.

In the discharge of the duties imposed on the liquidator under Act 1015, the liquidator may exercise any of the above powers. The liquidator is to conduct the official winding up of the company. The official winding up covers gathering the assets of the company which includes the liquidator collecting debts owed to the company¹⁹⁵⁹ and vesting of assets of the company in the liquidator¹⁹⁶⁰. The liquidator must call on contributories to contribute to the assets of the company to pay the debts or liabilities of the company and cost and fees of the winding up, or adjustment of the rights of the shareholders.¹⁹⁶¹ The liquidator may also recover properties of the company transferred or payments made to creditors which come under sections 121 and 122 of Act 1015. The liquidator may reverse transactions entered into within either two years before the winding up order, or eight years before the two years where the company is insolvent, which confer excess benefit on the other party.¹⁹⁶² The excess benefit must be restored to the liquidator.¹⁹⁶³ The liquidator is required to realise the assets, not in cash, for the purpose of payment to the creditors.¹⁹⁶⁴ The liquidator is, however, not under obligation to realise assets that cannot be readily or advantageously disposed of.

For the purpose of gathering the assets of the company, the liquidator is entitled to conduct an investigation into the affairs of the company and may by a written notice to any person request the person to submit a statement of the affairs of the company together with an affidavit verifying that statement.¹⁹⁶⁵ The statement must include particulars of assets and liabilities of the company, particulars of creditors, a statement of insolvency of the company and any other matter that may be relevant to the liquidator.¹⁹⁶⁶ The current directors of the company and the Company Secretary are to provide the statement.¹⁹⁶⁷ Officers of the company and persons who take part in the formation of the company within one year of the commencement of winding up are also to provide the statement.¹⁹⁶⁸ A person who fails to provide the statement commits an offence and liable to a fine of not more than two hundred penalty units for each day the default continues.¹⁹⁶⁹ A person who makes

¹⁹⁵⁹ Section 101 of Act 1015.

¹⁹⁶⁰ Section 102 of Act 1015.

¹⁹⁶¹ Section 126 of Act 1015.

¹⁹⁶² Section 123 of Act 1015

¹⁹⁶³ *Ibid.*

¹⁹⁶⁴ Section 103 of Act 1015.

¹⁹⁶⁵ Section 108(1) of Act 1015.

¹⁹⁶⁶ Section 108(2) of Act 1015.

¹⁹⁶⁷ Section 108(3) of Act 1015.

¹⁹⁶⁸ *Ibid.*

¹⁹⁶⁹ Section 108(5) of Act 1015.

a false statement to indicate the person is a creditor, member or contributory of the company commits an offence and is liable on summary conviction for contempt of court.¹⁹⁷⁰

In calling on contributories to make contributions to the assets of the company, the liquidator must settle the list of contributories.¹⁹⁷¹ In so doing, the liquidator has the power to rectify the register of members.¹⁹⁷² But where it is not necessary for the contributories to be called to contribute to the assets of the company, the liquidator is not required to settle the list of contributories.¹⁹⁷³

The liquidator as part of the winding up must pay the debts and liabilities owed to creditors by the company. In order to do that, creditors are to lodge proof of debt with the liquidator.¹⁹⁷⁴ The liquidator is to examine the proof of debt and may object to the proof of debt or admit the proof of debt if satisfied.¹⁹⁷⁵ A notice of the objection or admission of the proof debt must be given to the creditor.¹⁹⁷⁶ Where the liquidator objects to a proof of debt, the creditor must lodge an amended proof of debt within the time indicated in the notice.¹⁹⁷⁷ The liquidator may reject the amended proof of debt and fix a time for the creditor to prove the debts or claims.¹⁹⁷⁸

The liquidator must also call a meeting of creditors by notice to the creditors and publication in a daily newspaper of national circulation.¹⁹⁷⁹ The liquidator must give a copy of the statement of affairs of the company to the creditors.¹⁹⁸⁰ A quorum for a creditors' meeting is at least three creditors with admitted proof of debts, or all creditors if less than three, either in person or by representatives holding proxies.¹⁹⁸¹ An agreement with creditors at the meeting must be approved by at least seventy-five percent of votes cast.¹⁹⁸² The meeting with creditors must be held within six weeks of the appointment of the liquidator and concluded within eight weeks of the appointment of the liquidator.¹⁹⁸³ Questions at the meeting must be decided by a simple majority of votes cast by creditors with admitted proof based on the proportion of the debts owed to the creditor in proportion to the total debts owing to all creditors of the class to which the creditor belongs.¹⁹⁸⁴

¹⁹⁷⁰ Section 108(7) of Act 1015.

¹⁹⁷¹ Section 109(1) of Act 1015.

¹⁹⁷² *Ibid.*

¹⁹⁷³ Section 109(2) of Act 1015.

¹⁹⁷⁴ Section 111(1) of Act 1015.

¹⁹⁷⁵ Section 111(7), (8) and (9) of Act 1015.

¹⁹⁷⁶ *Ibid.*

¹⁹⁷⁷ Section 111(9) of Act 1015.

¹⁹⁷⁸ Section 111(10) of Act 1015.

¹⁹⁷⁹ Section 112(1) of Act 1015.

¹⁹⁸⁰ Section 112(2) of Act 1015.

¹⁹⁸¹ Section 112(6) of Act 1015.

¹⁹⁸² Section 112(4) of Act 1015.

¹⁹⁸³ Section 112(1) and (5) of Act 1015.

¹⁹⁸⁴ Section 112(12) of Act 1015.

Upon conclusion of the meeting, the liquidator is to take practical steps to verify admitted debts.¹⁹⁸⁵ The liquidator may give notice to secured creditors that in the event the charged assets are not realised within a stated period, not less than six months, the security is to be treated as surrendered.¹⁹⁸⁶ A debt rank for payment at any time must be included in the admitted proof and the value of the debt is the value shown at that time in the admitted proof.¹⁹⁸⁷

Prior to the liquidator making payment to the creditors, the liquidator must classify and rank the debts in order of priority as provided under section 107 of the Act. Section 107 of Act 1015 provides that:

- “(1) On the commencement of liquidation, the liquidator shall, in relation to each debt which ranks for dividend, ascertain into which class the debt or part of the debt falls.*
- (2) A debt shall be classified according to the ranking specified in subsection (3).*
- (3) A debt classified as a*
 - (a) Class A debt is a debt in respect of Post-Commencement Financing which takes priority over all other creditor claims including secured and preferential class and shall be paid in full;*
 - (b) Class B is preferential debt which*
 - (i) ranks equally between other preferential debts against the estate of the company;*
 - (ii) shall be paid in full unless the remainder of the estate is insufficient to meet the preferential debt in which case the preferential debt shall be paid in equal proportions; and*
 - (iii) is debt or part of a debt which answers to either of the following*
 - (aa) remuneration owed to an employee of the company regarding employment during the whole or a part of the four months preceding the date of commencement of administration or winding up; or*
 - (bb) rates, taxes or similar payments owed to the Republic or a local authority which have become due and payable within the year preceding the date of the commencement of winding up;*
 - (c) Class C debt is a secured debt and shall be secured by a fixed charge*

¹⁹⁸⁵ Section 104(1) of Act 1015.

¹⁹⁸⁶ Section 104(2) of Act 1015.

¹⁹⁸⁷ Section 104(3) of Act 1015.

- against an asset of the company;*
- (d) Class D debt is a debt or a part of a debt which does not fall within a Class E debt and is, or was, within the year preceding the commencement of winding up, owed to a director or former director of the company;*
- (e) Class E debt is a debt or a part of a debt which satisfies any of the following considerations:*
- (i) Excess benefit restored to the liquidator under section 123; or*
 - (ii) Excess interest that is a portion of a debt which, whether it is stated to do so or not, represents interests at a rate in excess of five percent above the Bank of Ghana policy rate;*
- (f) Class F debt is an unsecured debt that is not secured by a charge of any kind over an asset of the company and does not fall into any of the other classes in this section;*
- (g) Class G debt is debt in respect of preference shareholders; and*
- (h) Class H debt is debt in respect of ordinary shareholders."*

The section requires the classification and ranking of debts for the purposes of payment of creditors. The liquidator must first classify the debts into categories. That is, the debt must be classified into classes. The class into which a debt falls depends on how the debt was incurred and on the terms of the agreement under which the debt was incurred. Debts arising may be due to post-commencement financing, payment due to employees (salaries and wages), debt due to directors, etc. In addition, the terms of the agreement may classify the debt as secured or unsecured. Once the manner in which the debt is incurred and the terms are examined, the debt is classified into a particular class. The classes of debt are ranked passed on the priority principle. The principle of priority requires that payment of debts to creditors take precedent over payment to shareholders.¹⁹⁸⁸ The debts are also ranked into an order of priority for the purpose of payment. Class A debts are paid prior to class B debts, which are paid prior to class C debt and so on.¹⁹⁸⁹ In this respect, once funds are not sufficient to pay all the debts falling in the classes, the class ranking in priority will be paid with available funds and once exhausted, debts within other class will not be paid.

As within a particular class, the debts are ranked simultaneously and equally.¹⁹⁹⁰ In relation to the payment of the debts in one class, the proportionality principle is applicable. That is, where there are not enough funds to fully pay all debts in the class, the creditors with debt in that class are paid a proportion of the amount owed in relation to the total funds available. This enables all creditors in the class to get a pro rata of the available fund based on the debt of each creditor in the class in

¹⁹⁸⁸ Section 131 of Act 1015.

¹⁹⁸⁹ Section 130(2)(a) of Act 1015.

¹⁹⁹⁰ Section 130(2)(b) of Act 1015.

proportion to the amount available.

The ranking under section 107(3) of Act 1015 are as follows:

- Class A debts – post-commencement financing;
- Class B debts – remuneration owed to employees as a result of the employment for a maximum of four months, and taxes, rates, charges or similar imposition owed to central and local government;
- Class C – secured debts resulting from a fixed charge;
- Class D – debts owed to directors which do not fall into class C or class E;
- Class E – debts resulting from excess benefit restored to the company and excess interest on debts in excess of five percent above Bank of Ghana policy rate;
- Class F – unsecured debts which do not fall into any other class;
- Class G – payment to preference shareholders with preference shares as to liquidation; and
- Class H – payment to other shareholders, that is equity shareholders and holders of preference shares except preference shares as to liquidation.

Fees and outgoings relating to the liquidation are deducted and paid into the Fee Account prior to the distribution in accordance with the order of priority indicated above. Secured creditors are permitted to realise the charged assets and use proceeds to satisfy the debts and liabilities due to the secured creditors. However, a secured creditor who has not proceeded against charged assets is ranked under Class C. In addition, secured creditors who surrendered assets that the secured creditor was unable to realise within the period indicated by the liquidator, which should not be more than six months as prescribed under section 104(2), is ranked under Class C. Post-commencement financing which is ranked as Class A debt and take priority over all other debts is defined under section 169 to cover:

- (a) remuneration, reimbursable expenses and other amounts that have become due and payable to employees during the business restructuring or administration proceedings of the company; and
- (b) financing obtained during the administration or restructuring proceedings of the company.

This will, therefore, be applicable where the company first goes through administration and restructuring proceedings prior to the official liquidation. The ranking of post-commencement financing as the first debt to be paid is to give comfort to financial institutions or lenders to lend money to a company in financial distress which is restructuring in a formal administration under Act 1015. Lenders or financial institutions are comforted that in the worst case, the money provided will be paid as a priority ranked debt prior to any other payment including even payment to employees and taxes payable to the government.

The payments to shareholders are also ranked in order of priority with preference shareholders as

to winding up being paid prior to payment to the other class of shareholders including other preference shareholder and ordinary shareholders. Generally, the distribution to shareholders must be in accordance with the rights and interests of the shareholders in the company subject to the constitution of the company.¹⁹⁹¹

The liquidator has the power to delegate any of the functions the liquidator is to perform to a public officer.¹⁹⁹² However, the liquidator is not relieved of ultimate responsibility for the act.¹⁹⁹³ The liquidator may also, where the liquidator considers it necessary, engage other professionals to assist the liquidator in the performance of functions of the liquidator.¹⁹⁹⁴

24.3.5 Powers of the Court

The Court is given powers upon application of a person aggrieved by any act done by the liquidator to make an appropriate order. The Court also has the power to assist the liquidator in the performance of the functions of the liquidator. Section 99 of Act 1015 provides for the powers of the Court as follows:

- “(1) A person aggrieved by an act done by the liquidator in the performance of functions of the liquidator under this Act, may apply to the Court which shall make an appropriate order.*
- (2) Where a person refuses or fails to comply with a requirement by the liquidator under this Act, the liquidator may apply to the Court, which may order the requirements to be carried out.*
- (3) Where the liquidator is in doubt as to a matter in connection with the functions of the liquidator under this Act, the liquidator may apply to the Court for directions.”*

Anyone aggrieved by any act done by the liquidator may make an application to the Court for the appropriate order. The Court also assists the liquidator where a person fails to comply with the requirements of the liquidator. The Court will order compliance with the requirement. Where the liquidator is in doubt on what actions to take, the liquidator may apply to the Court for direction. The liquidator may also apply to the Court to conduct an enquiry into the conduct of a person as regards the activities of that person in relation to the company.¹⁹⁹⁵

In addition to the above general powers, a person who has commenced an action against the

¹⁹⁹¹ Section 131 of Act 1015.

¹⁹⁹² Section 98(1) of Act 1015.

¹⁹⁹³ Section 98(2) of Act 1015.

¹⁹⁹⁴ Section 98(4) of Act 1015.

¹⁹⁹⁵ Section 116 of Act 1015.

company may seek leave of the Court to proceed with the action when liquidation commences.¹⁹⁹⁶ Similarly, a person may seek leave of Court to bring an action against the company.¹⁹⁹⁷ Shareholders may seek approval of the Court to transfer shares even when the company is in liquidation.¹⁹⁹⁸

Where the company is in official liquidation, the liquidator, a member or contributory, or a creditor may apply to the Court for the veil of incorporation to be lifted to enable persons who carried on business in the name of the company with the intent to defraud creditors to be personally held liable for that debt.¹⁹⁹⁹ In addition to being held liable, such persons are guilty of an offence and are liable on summary conviction to a fine between five hundred penalty units and thousand penalty units or a term of imprisonment between two years and five years, or both a fine and imprisonment.²⁰⁰⁰ If the person is a director, the person is disqualified from being a director for a period of five years. These punishments are without prejudice to any other criminal liability on the person.²⁰⁰¹

The Court also has the power to stay the liquidation proceedings on the application of the liquidator, creditor, member or contributory.²⁰⁰² The applicant must prove to the satisfaction of the court that the liquidation must be stayed.²⁰⁰³ The Court may make the order to stay the liquidation proceeding completely or for a limited period, and on terms that the Court may determine.²⁰⁰⁴

Under section 139 of Act 1015, the Court has the power to order the arrest, by the issue of an arrest warrant, of a person who the court considers relevant for the liquidation but whom it appears to the court may:

- (a) impede the winding up,
- (b) abscond or has absconded,
- (c) remove, conceal, destroy or damage property of the company, or has already done so, or
- (d) fail to attend Court, meeting of creditors or meet with the liquidator.

Upon making an order for winding up of the company, the Court may also make an order that the creditors, members or contributories be permitted to inspect all books, records and other relevant documents of the company.²⁰⁰⁵

¹⁹⁹⁶ Section 93 of Act 1015.

¹⁹⁹⁷ Section 93 of Act 1015.

¹⁹⁹⁸ Section 94 of Act 1015.

¹⁹⁹⁹ Section 117 of Act 1015.

²⁰⁰⁰ Section 118(1) of Act 1015.

²⁰⁰¹ Section 118(3) of Act 1015.

²⁰⁰² Section 138(1) of Act 1015.

²⁰⁰³ *Ibid.*

²⁰⁰⁴ Section 138(2) of Act 1015.

²⁰⁰⁵ Section 142 of Act 1015.

The Court may also on its own motion or the application of an interested person, where it appears to the Court that during the official winding up that a past or present member or officer of the company has committed an offence in relation to the company for which the officer or member is criminally liable, refer the matter to the Attorney-General to conduct an investigation and take necessary action.²⁰⁰⁶

24.3.6 Duty of the directors to prevent insolvent trading

Directors of a company do not escape liability for engaging in business that leads to the insolvency of a company resulting in official liquidation of the company. Section 119 of Act 1015 provides that:

“(1) A director who causes a company to engage in any form of business or trade or incur a debt or liability where that director

(a) has reasonable grounds to believe that the company is insolvent, or will become insolvent; or

(b) ought to have known at the time of causing the company to engage in the business or trade or incur the debt or liability that the company was insolvent or would become insolvent as a result of incurring that debt

commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than one thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or both.”

The section is to prevent acts of directors that may lead a company to insolvency and to prohibit directors from engaging in insolvency trading. Directors are therefore punished for running a company into insolvency. The Act imposes punishment on a director who causes a company to carry on a business or trade or causes a company to incur debt or liability which was done at the time the company was insolvent or which led to the insolvency of the company. However, to be held liable, it must be established that the director has reasonable ground to believe or ought to have known that causing the company to engage in the business or trade or incurring the debt or liability will lead to insolvency of the company. Once established, the director is liable to a fine or term of imprisonment or both.

24.3.7 Liquidation Fund and Fee Account

In order to ring-fence all monies received by the liquidator and effect payment out of those monies, the Act establishes a Liquidation Fund. Section 100 of Act 1015 provides that:

“(1) There is established by this Act the Liquidation Fund.

²⁰⁰⁶ Section 141 of Act 1015.

- (2) The moneys received by the liquidator referred to under sections 101 to 111 and sections 120 to 127 shall be paid into the Liquidation Fund and the moneys disbursed by the liquidator referred to under those sections shall be paid out of the Liquidation Fund.***
- (3) There shall be a Fees Account within the Liquidation Fund.***
- (4) The moneys received by the liquidator by way of fees and any other charges shall be credited to the Fees Account.***
- (5) The payments required or authorised to be disbursed from the Liquidation Fund are charged on that Fund."***

The Act requires that all payments to the liquidator must be paid into the Liquidation Fund. Additionally, all payments made by the liquidator must be made from the Liquidation Fund. Payments to be made into the Liquidation Fund include debts recovered by the liquidator, amounts refunded to the liquidator, amounts realised from disposition of assets of the company, and amounts received on calls from contributories. Payments to be paid out of the Liquidation Fund include payments to creditors and distributions to members. Fees due are transferred from the Liquidation Fund to the Fees Account which is opened under the Liquidation Fund.

In order not to commingle amounts received and disbursed in relation to each company during liquidation, the Act provides that the liquidator must open an Official Account for each company under the Liquidation Fund.²⁰⁰⁷ The Act provides that a person is not entitled to payment in liquidation other than out of funds from the Official Account.²⁰⁰⁸ As such, if there is no fund standing in the credit to the Official Account, no payments can be made to a person entitled to payment.

Fees due the liquidator are transferred from the Official Account opened for the company under the Liquidation Fund to the specific Fees Account opened for those fees.²⁰⁰⁹ The cost awarded against the liquidator in litigation proceedings is to be paid out of the Fees Account.²⁰¹⁰

24.3.8 Termination of official liquidation

Official liquidation comes to an end when the Court terminates the official liquidation on application by the liquidator. The liquidator will apply to the Court where the winding up is completed and after the liquidator has prepared the financial statement which has been audited and approved by an auditor appointed by the creditors. Section 134 of Act 1015 provides that:

"(1) After the completion of the winding-up of a company and the drawing up of the

²⁰⁰⁷ Section 127 of Act 1015.

²⁰⁰⁸ Section 133(1) of Act 1015.

²⁰⁰⁹ Section 129 of Act 1015.

²⁰¹⁰ Section 134(2) of Act 1015.

financial statements which have been approved by an auditor appointed by the creditors, the liquidator shall apply to the Court for an order to terminate the liquidation proceedings.

- (2) The liquidator shall give notice of the application to each creditor with an admitted proof together with a summary of the financial statements.*
- (3) The liquidator shall send a copy of the financial statements to the Registrar for registration and shall attach to the financial statements a statement that shows
 - (a) that an application has been made for an order under section 117, or*
 - (b) that grounds do not exist for an application.**
- (4) The Court shall grant the application if satisfied with the application by the liquidator.*
- (5) The Registrar of the Court shall send a copy of the order made by the Court to the Registrar for registration."*

Upon completion of the winding up process, the liquidator is required to prepare a financial statement which must be audited. The audited statement must be given to creditors who are to approve the financial statement. A copy of the financial statement with an attachment of a statement indicating whether an application has been made for a person to be held personally liable for fraudulent trade or that there is no ground for such application must be submitted to the Registrar by the liquidator. On satisfying these requirements, the liquidator makes an application to the Court to terminate the liquidation. The liquidation terminates where the Court makes the order terminating the liquidation. The Court will only make an order terminating the liquidation when satisfied with the application of the liquidator. That is, the winding up has been completed and the requirements on the financial account has been complied with. Upon the grant of the order, a copy of the order is sent by the Registrar of Court to the Registrar of companies.

24.3.9 Dissolution

The dissolution of the company is done by the Registrar. Section 135 of Act 1015 provides that: *"Where satisfied that the official winding up of a company is complete, the Registrar shall strike the name of the company off the register and notify that fact in Companies Bulletin and in a daily newspaper of national circulation, and the company is, for the purposes of this Act dissolved as at the date of the publication of the notification in the Companies Bulletin and in a daily newspaper of national circulation."*

The dissolution is done when the Registrar is satisfied that the winding up is complete. That is dependent on the Court making an order terminating the liquidation proceeding. The company is dissolved when the Registrar strikes the name of the company from the register of companies and

makes a publication to that effect in the Companies Bulletin and a daily newspaper of national circulation.

After the dissolution, the liquidator must preserve the books, records, returns and other documents of the company and of the liquidation for seven years.²⁰¹¹ The documents may be destroyed by the liquidator after the seven years or may be returned to the Registrar if so directed after the seven years.²⁰¹²

Just as the Court can restore a company dissolved after private winding up or without winding up under the Companies Act, 2019, the Court is also permitted to restore a dissolved company after official winding up. Section 137 of Act 1015 provides that:

- “(1) The Court may, where a company is dissolved, make an order within five years after the date of the dissolution, on the terms determined by the Court, to declare the dissolution as void and to order the name of the company restored to the register on application by*
- (a) the Registrar,*
 - (b) a former officer, member or creditor of the company, or*
 - (c) a person claiming through or under any of the persons named in paragraph (b) for the purpose.*
- (2) The Registrar shall, on the order of the Court, restore the name of the company to the register and the company shall be deemed to have continued in existence as if the company had not been dissolved.*
- (3) An official copy of the order made under subsection (1) shall be delivered to the Registrar for registration and the Registrar shall publish the copy in the Companies Bulletin.*
- (4) For the purposes of a period of limitation, time does not run during the period between the dissolution and the restoration.*
- (5) The Court may give directions and make provisions as the Court considers just for placing the company and any other person in the same position as nearly as possible as if the name of the company had never been struck off.”*

Restoration refers to the revival of the company. Restoration can only be done by Court order on an application brought before the Court within five years after the dissolution of the company after official winding up. The application can be made by the Registrar, a former officer, member or creditor of the company or a person claiming through any of them. The section does not indicate the grounds upon which the application must be made or the grounds upon which the Court must grant the order of restoration. It is also not automatic that the order of restoration must be made by the

²⁰¹¹ Section 136(1) of Act 1015.

²⁰¹² Section 136(2) of Act 1015.

Court upon application. There must be valid grounds which indicate that it is in the interest of justice for the order to be made. The order of restoration means the dissolution of the company is void and the name must be restored on the register of companies. The Registrar must thus, restore the name of the company to the register of companies.

Where the order is made, an official copy must be delivered to the Registrar for publication. In determining the period of limitation for any action, the period between the dissolution and restoration is not to be counted.

The Court has the power, in making an order for restoration, to do so on terms the Court deems fit. In addition, the Court is to give direction and make provisions that seem just to place the company and any other person in the same position, as nearly as possible, as if the company was not dissolved.²⁰¹³

24.3.10 Liquidation of other body corporates

The Corporate Insolvency & Restructuring Act, 2020 (Act 1015) applies to corporate bodies other than companies incorporated under the Companies Act, 2019 (Act 992). Section 145 of Act 1015 provides that:

“Subject to this section and to sections 146 to 149, a body corporate which,
(a) has or had an office or place of business in Ghana, or
(b) has assets situated in Ghana
may be wound up by way of official liquidation under this Act and sections 81 to 144 shall apply to the body corporate as if that body were a company.”

The scope of application of Act 1015 is, therefore, not limited to companies. Other corporate bodies may be liquidated in accordance with the Act provided that the entity has or had an office or place of business in Ghana or has assets in Ghana. Excluded from the body corporates that can be liquidated are a firm or partnership incorporated under the Incorporated Partnership Act, 1962 (Act 152), or the enactment under which the body corporate has been established provides for the winding up of the body corporate.²⁰¹⁴ The Incorporated Private Partnership Act, 1962 has provisions that regulate the liquidation of a firm or partnership. Other enactments that provide for the establishment of a body corporate may also provide for the manner of liquidation of that body corporate. Once the law provides for the manner of liquidation of such body corporate, the Corporate Insolvency & Restructuring Act, 2020 is not applicable to the liquidation of such bodies corporate.

²⁰¹³ Union Maritime et Commerciale v. Rabensteiner and another [1968] GLR 504.

²⁰¹⁴ Section 146 of Act 1015.

In addition, Act 1015 is not applicable to companies that operate in a sector where the sector specific legislations make provision of the official liquidation of the company. Section 1(3) of Act 1015 provides that *“(3) Subsection (1) does not apply to companies carrying on the business of banking, insurance or any other business which is subject to special legislation, except where the special legislation does not provide for a rescue provision.”* Where the special legislation makes provision for official liquidation, the provisions of Act 1015 will not be applicable.

24.3.11 Application to foreign bodies corporate

From the scope of application under section 145 of Act 1015, the Act is applicable to foreign bodies. Section 145 of Act 1015 does not require that a body corporate be incorporated in Ghana for the application of the Act, but only requires that the body corporate has an office or assets in Ghana. Section 147 of Act 1015 further provides that:

- “(1) A body corporate incorporated outside the Republic may be wound up under this Act although the body corporate has been dissolved or otherwise ceased to exist under or by virtue of the laws of the country under which that body corporate was incorporated.*
- (2) Where an order is made for the official winding up of a body corporate incorporated outside the Republic, the Court may, in the winding up order or on a subsequent application by the liquidator, direct that*
- (a) the branch of that body corporate in Ghana shall be treated as a separate body corporate,*
 - (b) the assets and liabilities in Ghana shall be treated as the assets and liabilities of that body corporate for the purposes of the winding up, and*
 - (c) the transaction by or with that branch shall be deemed to be validly done although that transaction occurred after the date when the body corporate was dissolved or otherwise ceased to exist under or by virtue of the laws of the country under which that body corporate was incorporated.”*

Under the section, a foreign body corporate dissolved or that ceased to exist under the laws of that foreign country may still be wound up under Act 1015. The court in making an order for the winding up the foreign body corporate dissolved or no longer in existence in the foreign country may order on its own or upon subsequent application by the liquidator direct the treatment of the branch of the body corporate in Ghana as a separate body corporate, the treatment of the assets and liabilities as that of the separate body corporate, and things done by the branch are deemed validly done although the body corporate ceases to exist at the time it is done.

The winding up of a body corporate, other than the company incorporated in Ghana, can only be by an order of the Court.²⁰¹⁵ Section 149 of Act 1015 provides for the grounds upon which the Court can order the winding up of a foreign body corporate as follows:

- (a) the body corporate is dissolved or ceased to carry on business, or is carrying on business only for the purpose of winding up the affairs of the company;
- (b) the body corporate is unable to pay the debts of the company as determined under section 83 of Act 1015;
- (c) the Court is of the opinion that the business or object of the body corporate is unlawful;
- (d) the Court is of the opinion that the body corporate is being operated for an illegal purpose;
- (e) the Court is of the opinion that the body corporate is carrying on business operation not authorised by the constitution of that body corporate; or
- (f) the Court is of the opinion that it is just and equitable to wind up the body corporate.

The Act also provides for the framework of cooperation that must be extended by the Court and Registrar in cross-border insolvency proceedings.²⁰¹⁶ The framework is provided in the Schedule attached to Act 1015 and requires the Court and the Registrar to cooperate with foreign counterparts relating to a cross-border insolvency proceeding.

24.3.12 Insolvency Practitioner

An administrator, restructuring officer or liquidator under Act 1015 must be an insolvency practitioner. In addition, the Act provides that a receiver must be an insolvency practitioner.²⁰¹⁷ The Companies Act, 2019 (Act 992) provides for the qualification of a liquidator in private liquidation and, a receiver and a manager. The requirements for an insolvency practitioner under Act 1015 go beyond what is stated in Act 992. However, the requirement is only applicable to a receiver and manager under Act 992 and not a liquidator. Act 992 thus provides for qualification of liquidators involved in private liquidation under the Companies Act, whilst liquidators nominated and appointed by creditors for official liquidation must qualify as an insolvency practitioner under Act 1015. This position is supported by the fact that section 154 of Act 1015, which provides that the receiver and manager under Act 992 must be an insolvency practitioner did not mention the liquidator appointed under Act 992. By the application of the *expressio unius est exclusio alterius* rule of interpretation, liquidator under Act 992 is excluded from the ambit of Act 1015.

Section 154 of Act 1015 provides that:

- “(1) Insolvency practitioner means***
(a) a receiver under the Companies Act, 2019 (Act 992);

²⁰¹⁵ Section 148 of Act 1015.

²⁰¹⁶ Sections 151 to 152 of Act 1015.

²⁰¹⁷ Section 169 of Act 1015.

- (b) a manager under the Companies Act, 2019 (Act 992);**
 - (c) an administrator under this Act; or**
 - (d) a trustee in bankruptcy under the Insolvency Act, 2006 (Act 708).**
- (2) Sections 154 to 163 do not apply to the official liquidator."**

A liquidator under Act 1015 (except the Registrar), an administrator, a restructuring officer, a receiver under Act 1015, a receiver or manager under Act 992, and a trustee in bankruptcy under Act 708 must qualify as an insolvency practitioner to be appointed. The Registrar who is the default official liquidator does not need to be an insolvency practitioner.

Under section 155 of Act 1015, a person qualifies as an insolvency practitioner if:

- (a) the person is a chartered accountant, lawyer or banker in good standing with the Institute of Chartered Accountant, Ghana Bar Association or Chartered Institute of Banker respectively;
- (b) that person is certified as a restructuring and insolvency practitioner; and
- (c) has a professional indemnity insurance to indemnify for act or omission in the performance of duties of an administrator

A person qualified as provided above is incapable of being appointed an administrator if the person:

- (a) is a minor,
- (b) is a body corporate,
- (c) has been declared an undischarged bankrupt,
- (d) is declared by a court of competent jurisdiction to be of unsound mind,
- (e) is a subject of disqualification under the Companies Act on grounds of fraudulent trading,
- (f) is disqualified under the Companies Act from holding an office,
- (g) has been convicted within the last five years of an offence under this Act or a crime involving moral,
- (h) is disqualified from acting as a liquidator, administrator, receiver, trustee or supervisor under Act 1015 or any other enactment, or
- (i) is subject to a disciplinary proceeding or punishment under any law.

Per the section, only a natural person can be appointed as an insolvency practitioner. The person at a minimum must be a chartered accountant, a lawyer or a banker in good standing, and must be certified to be a restructuring and insolvency practitioner. The person must have a professional insurance indemnity. A person otherwise qualified is disqualified if the person falls into any of the disqualification criteria or is ineligible to be so appointed.

A person who is not qualified as indicated above but who acts as an insolvency practitioner commits an offence and is liable on summary conviction to a fine of between five hundred and thousand

penalty units or terms of imprisonment of between two and five years, or both.²⁰¹⁸ The Registrar may enquire into the conduct and performance of an insolvency practitioner.²⁰¹⁹ The enquiry may be where on reasonable ground, the Registrar suspects the insolvency practitioner has not complied with the Act in a manner that materially affects or will affect creditors, contributories or persons who deal in good faith with a debtor.²⁰²⁰ An enquiry may also be where the Registrar is satisfied based on reasonable ground that the insolvency practitioner has been suspended or removed from practice as a lawyer, banker or chartered accountant.²⁰²¹ The Registrar may make an application to the Court based on the outcome of the enquiry for a prohibition order against the insolvency practitioner.²⁰²² Where the Court is satisfied that the insolvency practitioner has failed to comply with the Act, there has been misconduct or incompetence on the part of the insolvency practitioner or any other sufficient reason, the Court may order suspension of the insolvency practitioner.²⁰²³ The Registrar is to maintain a register of insolvency practitioners including the particulars of the insolvency practitioner.²⁰²⁴

The Ghana Association of Restructuring and Insolvency Advisors is to be established by an Act of Parliament to regulate insolvency practitioners.²⁰²⁵ Until the establishment by an Act of Parliament, the Association in its current form as a company limited by guarantee is to assist the Registrar to train and license existing insolvency practitioners.²⁰²⁶

²⁰¹⁸ Section 156 of Act 1015.

²⁰¹⁹ Section 158 of Act 1015.

²⁰²⁰ Section 158(5(a) of Act 1015.

²⁰²¹ Section 158(1)(b) of Act 1015.

²⁰²² Sections 159 of Act 1015.

²⁰²³ Sections 159 and 160 of Act 1015.

²⁰²⁴ Section 161 of Act 1015,

²⁰²⁵ Section 171(1) of Act 1015.

²⁰²⁶ Section 171(2) of Act 1015.

25.0 ACCOUNTING RECORDS, FINANCIAL STATEMENTS AND REPORTS

25.1 Introduction

Companies obtain resources from 'owners' and creditors which become the capital of the company. The capital of the company is expended towards the business or objects of the company. The board of directors are responsible for the management of the business or object of the company, and hence the use to which the capital of the company is expended. In order to ensure effective utilisation, the board of directors must account to the 'owners' and creditors the use to which the capital of the company – both equity capital and debt capital – has been put. As such, the board of directors are to prepare and keep accounts that show the position of the assets and liabilities of the company, as well as show the income and expenditure of the company. In short, there must be financial statements that show the financial position of the company.

The Companies Act, 2019 (Act 991) mandates all companies to keep proper accounting records showing the financial position of the company. In addition to the requirement for the company to keep proper books of account, the company are to prepare and circulate to members and debenture holders the financial statements prior to annual general meetings. The financial statement must be attached to annual returns that companies are mandatorily required to file with the Registrar.

25.2 Accounting Records and Financial Statements

A company must keep accounting records of all transactions. This will cover records of all sums of money received and expended by the company. This will require the company to keep ledger entry of all such transactions and out of the ledger records, the company prepares a trial balance. The trial balance is a bookkeeping worksheet that shows the closing balances of each individual accounts opened in the ledger. Out of the trial balance, the company prepares the profit and loss account, showing the position of the revenue, cost and expenditure incurred by the company for a stated period. In addition, the company out of the trial balance prepares the balance sheet, which shows the position of the company's assets, liabilities and shareholders' equity.

The responsibility is on the company to keep accounting records and prepare the accounts. Section 127 of Act 992 provides that:

“(1) A company shall keep proper accounting records with respect to the financial position and changes in the accounting records, and with respect to the control of and accounting records, whether for resale or for use in the business of the company, and, in particular with respect to

- (a) the sums of money received and expended by, or on behalf of, the company and the matters in respect of which the receipt and expenditure takes place;*
- (b) the sales and purchases by the company of property, goods and services; and*
- (c) the assets and liabilities of the company and the interests of the members in the company.*
- (2) For the purposes of subsection (1), accounting records which do not give a true and fair view of the state of affairs of the company and are not necessary for the preparation of the proper income statements and statement of financial position in accordance with sections 129 to 135 are not proper accounting records.*
- (3) The accounting records may be kept by making entries in bound volumes, or, subject to compliance with subsection (2) and (3) of section 293, by a system of electronic recordings, or otherwise.*
- (4) The accounting records shall be kept at the registered office of the company or at any other place in Ghana that the directors consider fit, and shall be open to inspection by the directors, Company Secretary and auditors of the company."*

It is the responsibility of the company to keep accounting records and prepare the accounts. Under section 144(3) of Act 992, the directors of the company are vested with the power to administer the business of the company. As part of the exercise of the power to administer the business of the company, the directors must ensure the proper accounting records are kept and the accounts prepared. That means, the company must open accounts in the ledger, make the necessary entry for each transaction undertaken by the company relating to:

- (a) sums received and expended by the company with a narrative on the receipts and expenditure;*
- (b) sales and purchases of property, goods and services by the company;*
- (c) assets and liabilities of the company; and*
- (d) the interest of members in the company.*

Out of the accounting records kept by the company, the trial balance is prepared which shows the closing balance on each of the accounts. The company must then prepare the set of accounts which together constitutes the financial statements of the company. Section 127(5) of Act 992 provides:

- "(5) The financial statements of a company shall*
 - (a) comprise a*
 - (i) statement of financial position,*
 - (ii) statement of comprehensive income,*
 - (iii) statement of cash flows,*

- (iv) statement of changes in equity, and*
- (v) summary of significant accounting policies and other explanatory notes to the financial statement statements;*
- (b) be prepared in compliance with International Financial Reporting Standards adopted by the Institute of Chartered Accountants, Ghana or any other standard approved or adopted by the Institute."*

The financial statements of a company must, therefore, be prepared by the International Financial Reporting Standards (IFRS). The IFRS are accounting standards issued by IFRS Foundation and International Accounting Standard Board, which are both international standards-setting bodies. The IFRS has been adopted by the Institute of Chartered Accountants, Ghana and applicable to the preparation of financial statements by companies incorporated under the Companies Act, 2019 (Act 992). The financial statements comprise:

- (a) statement of financial position;
- (b) statement of comprehensive income;
- (c) statement of cash flow;
- (d) statement of change in equity; and
- (e) summary of significant accounting policies and other explanatory notes to the financial statement.

(a) Statement of financial position

The statement of financial position is also known as the balance sheet which shows the position of the assets, liabilities and stated capital of the company. Assets include both fixed and current assets, and liabilities include long-term and short-term or current liabilities. For fixed assets, the value of the assets less the depreciation is shown, or if there is appreciation, that is shown. Section 130 of Act 992 states:

- "(1) The statement of financial position as part of the financial statements referred to in paragraph (a) of subsection (1) of section 128 shall give a true and fair view of the state of affairs of the company as at the end of the financial year of the company and shall comply with the requirements of section 131 to 135 and Part Two of the Sixth Schedule.*
- (2) The Registrar may, on the application or with the consent of directors of the company, modify any of the requirements in Part Two of the Sixth Schedule for the purpose of adapting them to the circumstances of the company, but a modification shall not derogate from the obligation imposed by subsection (1) to give a true and fair view of the state of affairs of the company."*

The statement of financial position must, therefore, reflect the true and fair position of the assets, liabilities and stated capital of the company. In so doing, it must comply with the requirements of Part Two of the Sixth Schedule of Act 992. Part two of the Sixth Schedule of Act 992 provides for the details of assets, liabilities and stated capital that must be reflected in the statement of financial position. There are:

“PART TWO
PROVISIONS AS TO STATEMENT OF FINANCIAL POSITION
General

- 13. *The assets and liabilities shall be classified under headings appropriate to the business of the company, distinguishing between current and non-current assets including property, plant and equipment, and between current liabilities and other liabilities, and each class shall be described in a way adequate to indicate the general nature of the assets or liabilities included in that class in accordance with the International Financial Reporting Standards and consistent with industry best practice.***

Assets

- 14. *Without limiting paragraph 13, the following classes of assets shall, so far as they are appropriate to the affairs of the company, be distinguished:***
- (a) *interest in land, distinguishing between land owned absolutely and land held for a term of years or other period;***
 - (b) *goodwill, patents, trademarks, development expenditure, and other intangible assets of a like nature;***
 - (c) *trade investments;***
 - (d) *loans and advances;***
 - (e) *trading inventory, distinguishing where practicable between,***
 - (i) *inventory of raw materials and components;***
 - (ii) *work-in-progress;***
 - (iii) *inventory of finished products; and***
 - (iv) *other inventory;***
 - (f) *trade debtors;***
 - (g) *bills of exchange and promissory notes;***
 - (h) *payments-in-advance;***
 - (i) *marketable securities; and***
 - (j) *cash in hand and in the bank.***

15. *A class of assets shall not stand in the statement of financial position at a value, which, after deduction of aggregate depreciation or replacement provision relating to the assets in the opinion of the directors greater than,*
- (a) the value which those assets could reasonably be expected to realise in the market after deduction of any expenses incurred in order to realise them, or*
 - (b) the value which is reasonably justified by the expected contribution of those assets to the business, whether by sale in the ordinary course of business or otherwise; but in the case of a company whose sole or main objects is that of carrying on the business of extracting a mineral deposit, the Registrar may, on the application of the company, and on conditions that the Registrar considers appropriate, authorise a wasting asset held for the purpose of the business in question to be shown in the statement of financial position at cost.*
16. (1) *Assets shall be shown at a value after deduction of the aggregate depreciation or replacement provision relating to those assets or at a value before this deduction, in the Schedule described as the gross value.*
- (2) *If shown at the gross value, the aggregate depreciation or replacement provision relating to that value shall be shown as a separate item and shall be so described as to identify it with the class of assets to which it refers.*
17. (1) *There shall be included in or attached to the statement of financial position in respect of each class of property, plant and equipment shown in the statement of financial position, a statement containing the following information:*
- (a) the gross value;*
 - (a) the original cost, if this differs from the gross value;*
 - (b) the aggregate depreciation or replacement provision;*
 - (c) if the gross value differs from the original cost, a statement explaining how the gross value has been calculated, and as at what date;*
 - (d) whether the depreciation or replacement provision has been calculated on the basis of,*
 - (i) the original cost of the assets;*
 - (ii) the replacement value of the assets;*
 - (iii) some other basis;*
- and where the depreciation or replacement provision is not based on original cost, the general principle used in calculating the replacement cost or other valuation on which it is based shall be stated;*

- (a) *a statement reconciling both the gross value and the aggregate depreciation or replacement provision with the equivalent figures at the end of the immediately preceding financial year, and in particular,*

 - (i) *the amount of an addition to the gross value and to a depreciation or replacement provision relating to the addition indicating the nature of the addition; and*
 - (ii) *the amount of a deduction from the gross value and from the aggregate depreciation or replacement provision relating to that amount arising from sale or otherwise, indicating the reason for the deduction and showing any profit or loss arising from the transaction.*
- (2) *So far as information required to be shown by this paragraph relating to matters arising before the commencement of this Act cannot be ascertained without unreasonable delay or expense, the paragraph may be modified with respect to that information as the directors consider appropriate, and in that case the statement in or attached to the statement of financial position in accordance with this paragraph, shall indicate in what respects the information shown has been modified as the result of the operation of this paragraph.*
- 18. *There shall be included in or attached to the statement of financial position, statements reconciling respectively, the amounts stated in accordance with sub-subparagraph (f) of subparagraph (1) of paragraph 17 of this Schedule in respect of additions to and deductions from the depreciation or replacement provision with the amount stated in the profit and loss account or statement of comprehensive income from depreciation or replacement provision in accordance with subparagraph (f) of paragraph 1 of Part One of this Schedule, and reconciling a profit or loss on the sale, realisation or disposal of any property, plant and equipment stated in accordance with paragraph 17 with the amount stated in the profit and loss account or statement of comprehensive income in accordance with subparagraph (m) of paragraph (1) of Part One of this Schedule.*
- 19. *For each class of current assets there shall be provided, by way of note or otherwise, information sufficient to indicate the basis of valuation and in particular the nature of the valuation procedure following in arriving at the statement of financial position value.*
- 20. *Assets in respect of which different methods or basis of valuation or provision for depreciation or replacement are used shall for the purpose of this Schedule, be regarded as assets of different classes.*

21. *There shall be shown the aggregate of the amounts due to the company at the end of the financial year which are included in the sums disclosed in accordance with section 133 of this Act together with a statement, by way of note, of the other information required to be disclosed by that section.*
22. *There shall be shown the aggregate of the amounts due to the company in respect of advances made in accordance with section 60 of this Act.*
23. *The amount of any preliminary expenses, and expenses incurred on the issue of shares or debentures, including any sums paid by way of commission or brokerage on the issue of shares or debentures, shall be debited to the profit and loss account and shall not be treated as an asset.*
24. *The expenses incurred on the issue of shares when determined to be direct and incremental shall be deducted from the total proceeds on issue and any other expenses that are not direct and incremental shall be debited to the profit and loss account or statement of comprehensive income.*

Liabilities

25. *For the purposes of this Act, current liabilities are liabilities due and payable, other than liabilities, the payment of which may, at the option of the company, be postponed within twelve months of the date of the statement of financial position together with any other liabilities that are under the International Financial Reporting Standards appropriately so classified.*
26. *Without limiting paragraph 13 of this Schedule, each of the following classes of liabilities shall, so far as they are applicable to the business of the company, be distinguished:*
 - (a) *bank borrowing and overdrafts;*
 - (b) *bills of exchange and promissory notes payable;*
 - (c) *trade creditors;*
 - (d) *the net amount payable to members in respect of dividends declared or recommended;*
 - (e) *any amount due to directors and other officers of the company other than items arising in the ordinary course of business;*
 - (f) *income tax, distinguishing between different taxes and between amounts due in respect of different fiscal periods;*
 - (g) *debts secured by debentures, other than those shown under subparagraph (a) stating in respect of each class of debentures the dates on or after which the company has the option of redemption, and the date or dates on or before which the company is under the obligation finally to redeem the loans or debentures or any part of*

the loans or debentures specifying in each case the proportion of the total issue that may or must be redeemed, and the redemption price;

(h) any borrowing other than those stated in this paragraph; and

(i) other accrued liabilities.

27. *A liability shall not stand in the statement of financial position at a value less than the amount at which the liability is repayable other than at the option of the company, at the statement of financial position date or, if the liability is not then repayable at an earlier date after that date, where appropriate, a reasonable deduction for discount until that date.*
28. *If a liability of the company is secured otherwise than by the operation of law on any assets of the company, the fact that the liability is so secured shall be stated, together with a statement of the assets upon which it is secured, and, where more than one class of liabilities is so secured, their relative priorities with respect to payment of interest and redemption.*
29. *If any of the debentures of the company have been beneficially acquired by the company or by a nominee acting on behalf of the company, the amount of these debentures, calculated on the same basis as the total amount standing in the statement of financial position in respect of the debentures of that class, shall, unless the debentures so purchased are cancelled, be shown as a deduction from that total; and if the amount of the debentures purchased is different shall be shown in the profit and loss account or statement of comprehensive income as if it were a premium or discount on debentures.*
30. *There shall be stated by way of note or otherwise, particulars of any debentures of the company that have been redeemed or purchased by or on behalf of the company which the company has power to re-issue.*
31. *There shall be included in or attached to the statement of financial position in respect of each class of liabilities referred to in subparagraphs (f) and (g) of paragraph 26 of this Schedule that is shown in the statement of financial position at the end of the immediately preceding financial year, a statement containing the following information:*
- (a) the balance shown at the end of the immediately preceding financial year;*
 - (b) the amounts of additions to, and deductions from, the statement of financial position during the financial year ending on the date of the statement of financial position, with particulars of the additions and deductions sufficient to identify clearly the source of each item; and*
 - (c) the balance at the date of the statement of financial position.*

Reserves

32. *There shall be recorded in an account, to be called the reserves account, the amount by which the reserves, as defined in section 70 of this Act, exceeds the credit balance on the share deals account plus the balance on the retained earnings if a credit, or minus if that balance is a debit.*
33. (1) *There shall be shown*
- (a) *the stated capital of the company distinguishing between amounts relating to different classes of shares;*
 - (b) *the amount standing to the credit of the share deals account;*
 - (c) *the amount standing to the credit of the share deals account;*
 - (d) *the balance of retained earnings, and if that balance is a debit balance, it shall be deducted from the sum of the three preceding amounts.*
- (2) *There shall be included in or attached to the statement of financial position in respect of each item referred to in subparagraph (1) of this paragraph that is shown in the statement of financial position at the end of the immediately preceding financial year, a statement containing the following information:*
- (a) *the balance shown at the end of the immediately preceding financial year;*
 - (b) *the amounts of any additions to, and deductions from, that balance during the financial year, with particulars of the additions and deductions sufficient to identify clearly the source of each item; and*
 - (c) *the balance at the date of the statement of financial position.*
- (3) *The aggregate amounts of dividends paid or recommended, net of the tax deductible from those amounts distinguishing between dividends on different classes of shares, shall be debited to retained earnings.*
34. *There shall be shown in the statement of financial position, or in a schedule attached to the statement of financial position,*
- (a) *the amount of stated capital attributable to each of the items specified in subsection (1) of section 68 of this Act, distinguishing, in the case of items (a) and (b) between different classes of shares;*
 - (b) *the number of authorised shares of each class;*
 - (c) *the number of issued shares of each class;*
 - (d) *the number of treasury shares of each class;*
 - (e) *the amount of any unpaid instalments or calls on shares which are due and payable and the number and class of shares concerned;*
 - (f) *in the case of a company limited by shares,*

- (i) *the amount of the unpaid liability, on the shares of each class, which is not yet due for payment; and*
 - (ii) *the amount of the unpaid liability which, pursuant to section 57 of this Act, the company has resolved shall not be capable of being called up except in the event and for the purpose of the company being wound up;*
 - (g) *in respect of any shares on which there are any arrears of fixed dividends, the total amount of the arrears, stating whether the amount is net or gross of the tax that may be deducted;*
 - (h) *if an issue of shares has been made in contemplation of the redemption of preference shares out of the proceeds of the issue, a statement to that effect and of the total amount made available for use in the redemption; and*
 - (i) *the number of shares which a person has an option to subscribe for, distinguishing those in respect of which the option can be exercised by directors of the company, together with the following particulars of each option:*
 - (i) the period or periods during which it is exercisable; and*
 - (ii) the price or prices during each period to be paid for shares subscribed for under the option.*
35. *There shall be stated by way of note an amount standing to the credit of the retained earnings which the company is, in accordance with paragraph 9 of this Schedule or otherwise, under an obligation not to distribute by way of dividend.*

Supplementary

36. *There shall be stated by way of note or otherwise,*
- (a) the basis on which foreign currencies have been converted into Ghanaian currency;*
 - (b) particulars of a charge on the assets of the company to secure the liabilities of any other person, including a statement of the amount or estimated amount secured;*
 - (c) the general nature of any contingent liabilities not provided for and not otherwise disclosed and the amount or estimated amount of those liabilities;*
 - (d) the general nature of contracts for capital expenditure not provided for and the amount or estimated amount of those contracts; and*

- (e) *the general nature of any credit facilities available to the company under a contract, other than trade credit available in the ordinary course of business, and not taken up at the end of the financial year.*
37. *Except in the case of the first statement of financial position drawn up after the commencement of this Act there shall be shown the corresponding amount of each item for the immediately preceding financial year.*
38. *Where an item shown in the statement of financial position or included in amounts shown in the statement of financial position cannot be determined with substantial accuracy, an estimated amount described as such shall be included in respect of that item and shall be distinguished, by way of note or otherwise, together with description of the item.*
39. *A provision of this Schedule with respect to the information to be shown in the statement of financial position does not require the amount of an item that is of no material significance to be shown separately."*

(b) Statement of comprehensive income

Statement of comprehensive income covers what is also known as the profit and loss account²⁰²⁷ which shows the net profit or income of a company and other comprehensive income which are gains or losses on assets that are not reflected in the income statement (profit and loss account). The statement of comprehensive income is, therefore, a financial statement that shows a summary of the net profit or income and other comprehensive income. The statement of comprehensive income which also covers net income shown in the profit and loss account must show the true and fair view of the profit or loss and other comprehensive income of the company.²⁰²⁸ The statement of comprehensive must comply with the requirements of Part One of the Sixth Schedule of Act 992. Part One of the Sixth Schedule of Act 992 provides:

"PART ONE PROVISIONS AS TO PROFIT AND LOSS ACCOUNT OR STATEMENT OF COMPREHENSIVE INCOME

1. *There shall be separately shown,*
- (a) *gross sales, less discounts, returns, and allowances, or whether appropriate, the amount of operating or other equivalent revenues;*

²⁰²⁷ In instances of trading company, it will be the Trading, Profit and Loss Account. For companies engaged in manufacturing and trading, it will be the Manufacturing, Trading, Profit and Loss Account.

²⁰²⁸ Section 129(4) of Act 992.

- (b) *the cost of goods sold as normally computed under the International Financial Reporting Standards or, where appropriate, the operating or other equivalent expenses;*
- (c) *selling, general and administrative expenses, and any other expenses that, under the International Financial Reporting Standards, would normally be deducted in arriving at the trading profit;*
- (d) *income from investments distinguishing between, income from*
 - (i) *associated companies;*
 - (ii) *other trade investments; and*
 - (iii) *other investments;*
- (e) *income from any other sources, distinguishing between each significant source of income;*
- (f) *the amount charged to revenue by way of provision for the loss, diminution in value, depreciation, renewal or replacement of assets, in the Schedule referred to as depreciation or replacement provision in respect of property, plant and equipment;*
- (g) *interest on the debentures and other loans of the company other than those classified in the statement of financial position as current liabilities;*
- (h) *interest in respect of other loans and indebtedness of the company;*
- (i) *the aggregate of the amounts paid or payable by the company to the directors of the company for the financial year required to be disclosed in accordance with section 132 of this Act, together with a statement, by way of note, of the amounts paid or payable by other persons than the company;*
- (j) *the remuneration of the auditors of the company including the sums paid by the company in respect of the expenses of the auditors;*
- (k) *the amounts of the charges and credits for income tax showing, by way of note or otherwise, the amounts of each distinct tax with a description of the tax and a statement of the period in respect of which the tax is payable;*
- (l) *the amounts of charges and credits in respect of discount or premiums on debentures;*
- (m) *a profit or loss arising on the sale, realisation or disposal of property, plant and equipment;*
- (n) *any preliminary expenses, and expenses incurred on the issue of shares or debentures, including the sums paid by way of commission or brokerage on the issue of shares or debentures;*

- (o) *the amount of the voluntary contributions to any charitable or other funds, other than pension funds for the benefit of employees of the company or an associated company; and*
 - (p) *any other expenses, distinguishing between each significant class of expenses.*
- 2. *If any of the items shown in the profit and loss account or statement of comprehensive income are stated net of income tax relating to the account, this shall be indicated.*
- 3. *There shall be stated by way of note or otherwise, any material respects in which any items shown in the profit and loss account or statement of comprehensive income are affected by*
 - (a) *a change in the basis of accounting;*
 - (b) *an amount relating to an earlier financial year; and*
 - (c) *an adjustment arising from the over or under statement of revenue or expenses in the profit and loss account or statement of comprehensive income of earlier financial year;**and a statement made under this paragraph shall indicate the amount by which the profit and loss account or statement of comprehensive income has been affected and whether that represents an addition to or a deduction from the profit that would otherwise have been shown.*
- 4. *If an item in the profit and loss account or statement of comprehensive income includes an amount in respect of money provided under paragraph (c) of section 60 of this Act, this fact shall be indicated by way of note or otherwise and the amount of the item stated, and so far as any money provided under that subsection is included in the amount stated in accordance with section 132 of this Act, the amount so included shall also be indicated.*
- 5. *The balance of the profit and loss account or statement of comprehensive income after the inclusion of the items required by paragraphs 1 to 4 so far as these are relevant to the figures in the account, shall be transferred to an account to be called the retained earnings.*
- 6. *An amount shall be credited to the profit and loss account or statement of comprehensive income that cannot properly enter into the composition of the retained earnings in accordance with section 71 of this Act.*
- 7. *An amount shall not be debited to the profit and loss account or statement of comprehensive income in respect of an addition to a reserve other than by way of transfer of the balance of the profit and loss account or statement of comprehensive income for the financial year to the retained earnings, clearly indicated and in particular amount shall not be debited to the profit and loss account or statement of comprehensive income other than as a transfer to the*

- retained earnings, unless it is the amount of an actual money outlay to provide for known future expenditure or for a known liability, which term includes a disputed or contingent liability, or for a known or estimated loss in value of current assets, or as a depreciation or replacement provision.*
8. *An amount shall not be credited to the profit and loss account or statement of comprehensive income in respect of a withdrawal from a reserve other than by way of transfer of the balance of the profit and loss account or statement of comprehensive income for the financial year to the retained earnings clearly indicated.*
 9. *If a company is under an obligation to transfer or set aside a sum to reserve out of profits of the company, this obligation is fulfilled if the sum is transferred to stated capital or if a note is made upon the statement of financial position in accordance with paragraph 35 of this Schedule to the effect that the company is under an obligation to withhold from distribution as dividend a corresponding part of the retained earnings.*
 10. *Except in the case of the first profit and loss account or statement of comprehensive income drawn up after the commencement of this Act the corresponding amount of each item for the immediately preceding financial year shall be shown.*
 11. *Where the amount of an item shown in the profit and loss account or statement of comprehensive income or included in an amount shown cannot be determined with substantial accuracy, an estimated amount described as an estimated shall be included in respect of that item and shall be distinguished, by way of note or otherwise, together with a description of the item.*
 12. *A provision of this Schedule with respect to the information to be shown in the profit and loss account or statement of comprehensive income does not require the amount of an item that is of no material significance to be shown separately."*

A company limited by guarantee is also required as part of its financial statements to provide a statement of comprehensive income even though a company limited by guarantee are not to carry on business for the purpose of making profit other than profit for the furtherance of its object.²⁰²⁹

(d) Statement of cash flow, statement of changes in equity and notes

The other three items that are included as part of the financial statements of a company are a statement of cash flow, statement of changes in equity and summary of significant changes in accounting policies and explanatory notes on items in the financial statement.

²⁰²⁹ Section 134(2) of Act 992.

The statement of cash flow is a financial statement that shows the manner in which the changes in the balance sheet accounts and income affect cash and cash equivalent. The statement of cash flow is to show the cash position of the company to meet its short-term debts as and when due. It is, therefore, concerned with the flow of cash in and out of the business. The financial statements also include statements of changes in equity which explains the changes in the company's share capital, accumulated reserve and retained earnings for a period. The statement of changes in equity generally indicates shareholders' interest in the company, application of reserves and retained earnings from one financial year to another. It must, therefore, show profits or losses, dividends paid, issue or redemption or purchase of shares, reserves, unrealised appreciation in the value of fixed assets, among others.

The financial statements must also contain a summary of significant account policies and other explanatory notes to the financial statements. The Sixth Schedule, in Part One and Part Two of Act 992 indicates various notes that must be provided for in the financial statement. Section 134(1) of Act 992 also provides that reference to financial statements of the company includes the notes on those financial statements and a document annexed to the financial statements giving information required under the Act. In addition, section 132 of Act 992 requires notes in the financial statement on the particulars of emoluments and pensions of directors. Section 132 of Act 992 provides that:

- “(1) There shall be shown in accordance with this section, in a note to the financial statements of a company, the following information as it is contained in the accounting records of the company, or the company has obtained the information from the persons concerned or has the right to obtain the information from the persons concerned or has the right to obtain it under section 134, namely, the individual and aggregate amounts of the*
- (a) emoluments of the directors;*
 - (b) pensions of the directors or past directors; and*
 - (c) emoluments of the directors or past directors in respect of loss of office.*
- (2) The amount to shown under paragraph (a) of subsection (1) includes fees, salaries and percentages, expenses, allowances, contributions paid under a pension scheme, and the estimated value of benefits in kind, except benefits of the character and value that are customarily afforded to employees other than directors, paid to, or receivable by, a director in respect of the services of the director as an officer of the company or of an associated company.*
- (3) The amount to be shown under paragraph (b) of subsection (1) shall include the pension paid or receivable in respect of services as a director or past director of the company, or in respect of services, or as an officer of the company or an associated company, whether that pension is paid to, or receivable by, the director or past director or any other person.*

- (4) For the purposes of subsection (3), it is not necessary to include a pension paid or receivable under a pension scheme where the contributions are substantially adequate for the maintenance of the scheme.*
- (5) The amount to be shown under paragraph (c) of subsection (1) shall include*
 - (a) the sums of moneys paid to or receivable by a director or past director of the company or for the loss, while a director of the company, or in connection with that person ceasing to be a director of the company, or of any other office in the company or of an office in an associated company; and*
 - (b) a sum of money and value of any other valuable consideration paid or receivable in connection with retirement from office, or as damages for breach of contract; and shall be deemed to be paid or received by way of compensation for loss of office.*
- (6) The amounts to be shown under each paragraph of subsection (1) shall include the relevant sums of money paid by, or receivable from, the company or any other person.*
- (7) The amounts to be shown under this section for a financial year shall be the sums money receivable in respect of that year period, the sums paid during that year.*
- (8) For the purposes of subsection (7), the sums paid in advance of the financial year to which the sums are expressed to relate shall be shown in the accounts for the financial year in which the sums are paid.*
- (9) Where it is necessary to do so for the purposes of making a distinction required by this section, the directors may apportion, in a manner that the directors think appropriate, the payments between the matters in respect of which they have been paid or are receivable."*

The details of particulars of emoluments and pensions of directors need to be disclosed for transparency for the members to ensure that the amounts determined or approved by members by ordinary resolution of the company are what have been paid to the directors.²⁰³⁰ This is to avoid situations where the directors disbursed the monies and assets of the company to themselves to the detriment of the company's business.

The financial statements must also show particulars of the amount due from officers. That is, where officers of the company which include directors, employees, Company Secretary, a receiver and manager, and a private liquidator, are either liable or have monies that must be paid to the company.

²⁰³⁰ Section 185 of Act 992 requires all payment to the directors must be determined or approved by ordinary resolution of the members.

This will include loans given to the officers. There must be a note in the financial statements providing for the particulars of such amount due. Section 133 of Act 992 provides:

“(1) Subject to this section, there shall be separately shown in a note to the financial statements of a company, the following:

- (a) the individual and aggregate amounts of money due to the company or an associated company at the end of the financial year of the company from an officer of the company or an associated company; and*
 - (b) the maximum amount of money due to the company and an associated company at any time during the financial year of the company from any officer of the company or an associated company.*
- (2) Where the company or an associated company gives a guarantee or security to a person in respect of an indebtedness of an officer of the company or an associated company, the amount guaranteed or in respect of which the security was given, shall be included in the amounts to be shown under subsection (1).*
- (3) Despite subsection (1) and (2), the following do not require to be separately shown:*
- (a) an indebtedness incurred as a result of a transaction in the ordinary course of business by the company or an associated company unless the indebtedness has not been discharged as and when the payment was due;*
 - (b) a loan made in the ordinary course of business by a company, the ordinary business of which includes the lending of money; or*
 - (c) a loan made by the company or an associated company to an officer of the company or associated company if the loan does not exceed five thousand currency points or two percent of the stated capital of the company concerned, whichever is less, and is certified by the directors of the company concerned to have been made in accordance with a practice adopted, or about to be adopted, by that company with respect to loans to those employees.*
- (4) Paragraph (b) and (c) of subsection (3) shall not include a loan made by a company under a guarantee from or on security provided by an associated company.*
- (5) A reference in this section to an associated company includes a company which is an associated company at the end of the financial year of the company, whether or not an associated company at the date of the transaction concerned.*
- (6) This section does not derogate from section 328 prohibiting loans by public companies to directors of the company or directors of associated companies.”*

The essence of keeping proper accounting records is to enable the company to reflect a true and fair view of the financial state of affairs of the company. The accounting records must be kept in accordance with the Act. Accounting records which do not give a true and fair view of the financial state of affairs of the company, and are not necessary for the preparation for the proper income statements and statement of the financial positions of the company are not proper deemed not to be proper accounting records. The accounting records kept must be for the preparation of the financial statements. The accounting records can be kept in hard copies in bound volumes or electronically. Where the company intends to keep accounting records electronically, it must comply with sections 292(2) and (3) of Act 992. The subsections require precaution to be taken to avoid the risk of falsification and the company must be able to make the records available in intelligible form inspections.

Part Four of the Sixth Schedule of Act 992 permits some exemption for compliance with the full requirements for financial statements concerning specific companies. However, unless so permitted, the accounting records and financial statements must comply with the requirements of the Act.

As indicated, the financial statements must be prepared by the directors. This is, however, done by a qualified accountant engaged by the company. The financial statements as prepared must be approved by the directors.²⁰³¹ There must, therefore, be a board of directors' resolution approving the financial statements. In addition, after the approval, the financial statements must be signed by two directors on behalf of the board of directors.²⁰³² The company cannot issue, publish or circulate a copy of the financial statements unless the financial statements are approved by the directors and signed by two directors on behalf of the board.²⁰³³

25.3 Consolidated Financial Statement

The Act requires that for a holding company, the financial statements must also cover the subsidiary or subsidiaries. The financial statements of a holding company must therefore be a consolidated financial statement of the company and its subsidiaries. This is because, the shares of the subsidiary are one of the assets of the holding company, and income received like dividends must be accounted as part of the revenues of the holding company. The performance of the subsidiaries must therefore be taken into account in a report on the state of affairs of the holding company.

Section 131 of Act 992 provides that:

“(1) At the end of the financial year of a company, this section shall apply where a company has subsidiaries.

²⁰³¹ Section 135(1) of Act 992.

²⁰³² Ibid.

²⁰³³ Ibid.

- (2) Financial statements dealing with the operating results and the state of affairs of the company and the subsidiaries, that is, the consolidated financial statements, shall be sent to the members and debenture holders of the company with the financial statements of the company pursuant to section 128.*
- (3) The consolidated financial statements shall comprise*
 - (a) statement of financial position,*
 - (b) statement of comprehensive income,*
 - (c) statement of changes in equity,*
 - (d) statement of cash flow, and*
 - (e) notes to the consolidated financial statements.*
- (4) The consolidated financial statement shall*
 - (a) give a true and fair view of the profit or loss and other comprehensive income and of the state of affairs of the company and the subsidiaries dealt with by the consolidated financial statements as a whole, in so far as it concerns the interest of the company; and*
 - (b) be prepared in compliance with International Financial Reporting Standards as adopted by the Institute of Chartered Accountants, Ghana.*
- (5) The financial statements of the company and the consolidated financial statements, shall comply with the requirements of Part Three of the Sixth Schedule.*
- (6) The Registrar may, on the application or with the consent of the directors of the company, modify in relation to that company any of the requirements of Part Three of the Sixth Schedule for the purpose of adapting those requirements to the circumstances of the company; but a modification shall not derogate from the obligation imposed by subsection (4) to give a true and fair view of the profit or loss and other comprehensive income and the state of affairs of the company and the subsidiaries as a whole, in so far as it concerns the interests of the company.*
- (7) Directors of a holding company shall secure that, except where in the opinion of the directors there are good reasons against the company, in which case reasons of the directors shall be stated in a note on the financial statements of the company, the financial year of the company, and the consolidated financial statements shall deal with the affairs of the holding company and the subsidiaries for the same financial year.*
- (8) Where it appears to the Registrar that it is desirable for a holding company or subsidiary company to extend its financial year so that the financial year of the subsidiary may end with that of the holding company, and for that purpose to postpone the despatch of the financial statement and reports referred to in section 128, from one calendar year to another, the Registrar may direct that*

the despatch of the financial statements by one or other of these companies shall not be required in the earlier years of the calendar.

- (9) *Where the financial year of the subsidiary does not coincide with that of the holding company, the consolidated financial statements shall, unless the Registrar otherwise directs, deal with the profit or loss and other comprehensive income of the subsidiary, and the state of affairs as at the end of the financial year of the subsidiary ending last before that of the holding company."*

Section 131(5) of Act 992 requires the financial statement and consolidated financial statement of the holding company to comply with the requirements of Part Three of the Sixth Schedule of Act 992. Part Three of the Sixth Schedule of Act 992 provides:

**"PART THREE
PROVISIONS APPLICABLE TO HOLDING COMPANIES**

40. *This Part of this Schedule shall apply where the company is a holding company as defined in the First Schedule.*
41. *There shall be stated by way of note or otherwise,*
- (a) *the total number of shares held by or on behalf of the company in each of its associated companies, and*
 - (b) *the total number of the shares and amount of debentures of the company held by or on behalf of subsidiaries, but excluding in both cases shares and debentures held as personal representative or as trustee of a trust in which neither the company nor any of the associated companies is beneficially interested otherwise than by way of security in the ordinary course of business, distinguishing shares and debentures of different classes, and stating the total number of shares and the amount of debentures of each class in issue at the date of the balance sheet.*
42. *Where it is reasonably practicable, the amount included under each head of revenue or expenses shown in the income statement that is received or receivable from, or paid or payable to, an associated company shall be distinguished.*
43. *The amount included in each class of assets shown in the statement of financial position in respect of financial interests in associated companies shall be distinguished.*
44. *The amount included in each class of liabilities show in the statement of financial position in respect of indebtedness to associated companies shall be distinguished.*

45. *Where consolidated financial statements are not prepared, there shall be attached to the statement of financial position, a statement showing,*
- (a) the reasons why subsidiaries are not dealt with in the consolidated financial statements;*
 - (b) the net agreement amount, so far as it concerns the interests of the holding company, of the balances transferred from the income statements of the subsidiaries to the retained earnings accounts of the holding company, or the equivalent amount in the case of foreign or other subsidiaries not having retained earnings account,*
 - (i) for the respective financial years of the subsidiaries ending with or during the financial year of the company giving, so far as is practicable, the same information with respect to that amount as is required by paragraph 3 of this Schedule to be given with respect to the statement of comprehensive income of the company;*
 - (ii) for the total period covered by the previous financial years of the subsidiaries since they respectively became subsidiaries of the holding company so far as it has not been dealt with in the accounts of the company of a previous financial year;*
 - (c) the net aggregate amounts so transferred so far as this amount is dealt with in the accounts of the company for the financial year; and*
 - (i) any qualifications contained in the report of the auditors of the subsidiaries on the financial statements of the subsidiaries for their respective financial years ending as stated in subparagraph (i) of paragraph (b), and any note or saving contained in those financial statements to call attention to a manner which, apart from the note or savings, would properly have been referred to in that qualification in so far as the matter, which is the subject of the qualification or note is not covered by the financial statements of the company, and is material from the point of view of the interest of the company, or, in so far as the information required by this paragraph is not obtainable, a statement that it is not obtainable.*
46. *Subparagraphs (b) and (c) of paragraph 45 shall apply only to the amounts that could properly enter into the composition of the retained earnings of the holding company.*

47. *There shall be stated by way of note, in accordance with subsection (9) of section 131 of this Act, in relation to subsidiaries, whose financial years do not coincide with that of the company.*
- (a) *the reasons why the directors of the company consider that the financial years of the subsidiaries should not coincide; and*
 - (b) *the name of each subsidiary whose financial year does not coincide with that of the holding company and the date on which its relevant financial year ended.*
48. *The consolidated financial statements, if prepared as consolidated financial statements, shall combine the information contained in the separate statement of financial position and income statements of the holding company and of the subsidiaries dealt with by the consolidated financial statements with the adjustments, that the directors consider appropriate, and the consolidated financial statements shall, in giving information, comply so far as practicable, with the requirements of this Act as if they were the financial statements of a single company.*
49. *Where consolidated financial statements are prepared and the financial statements of some subsidiaries are not incorporated in the consolidated financial statements, the consolidated financial statements shall incorporate with respect to those subsidiaries, information equivalent to that required to be given in the financial statements of the holding company.*
50. *Where consolidated financial statements are prepared other than in the form of consolidated financial statements, they shall provide the same information, so far as is relevant and material, as would have been provided by consolidated financial statements."*

25.4 Directors' Report

It is the responsibility of the directors to ensure the proper accounting records are kept, the accounts and financial statements are prepared in accordance with Act 992. Before the circulation and publication of the accounts, the directors are required to prepare a report on the financial statements.²⁰³⁴ The report of the directors is to indicate the state of affairs of the company relating to the financial statements of the company. A company cannot issue, publish or circulate a copy of the financial statement unless the directors' report is attached to the report.²⁰³⁵ Section 136 of Act 992 provides that:

"(1) The report of the directors referred to in paragraph (1) of section 128, shall consist of a report on the

²⁰³⁴ Section 128(1)(b) of Act 992.

²⁰³⁵ Section 135(1) of Act 992.

- (a) *details on the state of affairs of the company and, if the company is holding company, on the state of affairs of the company and the subsidiaries of the company as a group, and the amount of money which the directors recommend to be paid by way of dividend;*
 - (b) *particulars of entries in the interests register during financial year;*
 - (c) *corporate social responsibility of the company and a subsidiary and the amounts spent during the financial year; and*
 - (d) *details of steps taken to build the capacity of directors to discharge their duties.*
- (2) *The report shall deal, as far as is material for the appreciation of the state of affairs of the company, with any change during the financial year in the nature of the business of the company or of the associated companies, or in the classes of business in which the company has an interest, whether as a member of another company or otherwise.*
- (3) *The report shall contain list of bodies corporate in relation to which is fulfilled at the end of the financial year of the company, the condition that*
 - (a) *the body corporate is a subsidiary of the company, or*
 - (b) *although the body corporate is not a subsidiary of the company, the company is beneficially entitled to equity shares of the body corporate conferring the right to exercise more than twenty-five percent of the votes exercisable at a general meeting of the body corporate.*
- (4) *The list referred to in subsection (3) shall distinguished between bodies corporate falling within paragraphs (a) and (b) of that subsection and shall state as regards each company, the*
 - (a) *name;*
 - (b) *country of incorporation; and*
 - (c) *nature of the business carried on by the company.*
- (5) *If the company is, at the end of the financial year, the subsidiary of another, the report shall also state the name and country of incorporation of the holding company.*
- (6) *If, on an application made by the directors, the Registrar is satisfied that, mention of any of the matters referred to in subsections (2), (3), (4) and (5) would be harmful to the business of the company or any of the associated companies, the Registrar may direct that the matter need not be mentioned in the report of a financial year.*
- (7) *The report shall be approved by the board of directors and signed on behalf of the board by two directors.*

- (8) A director who fails to take reasonable steps necessary to comply with this section is liable to pay to the Registrar, an administrative penalty of one hundred and fifty penalty units.”***

The Act requires that directors must provide the directors' report which must be on the state of affairs of the company and include particulars required under the section. Failure of the directors to be diligent in complying with providing the report is punishable by administrative penalty payable to the Registrar. A copy of the Financial statements of a company cannot be issued, published or circulated without a copy of the directors' report.

25. 5 Auditor's Report

Every company incorporated under Act 992 is required to have an auditor. The requirement of an auditor under Act 992 refers to external auditors who are to serve as a control unit over the financial matters of a company with reporting responsibility to the shareholders or members of a company. An auditor under the Act, therefore, does not refer to an internal officer of the company, who is an employee of the company.²⁰³⁶ There is, therefore, a distinction between an external auditor and an internal auditor of a company. Reference under Act 992 is to the external auditor and not an internal auditor. The external auditor is an independent outsider charged to give an independent opinion or report on the financial state of the company to the shareholders or members. The auditor is, therefore, a person duly qualified who is charged with the duty to review and verify the accuracy of financial records of a company, ensure compliance with accounting and tax regulations as well as accepted accounting principles, and report to the members of the company. The auditor must be qualified and appointed in accordance with the Act.²⁰³⁷

The reporting requirement of an auditor is provided for under section 137 of Act 992. The financial statements that are published or circulated to members and debenture holders must have attached to it, the auditor's report.²⁰³⁸ Section 137 of Act 992 provides that:

“(1) The report by the auditors referred to in paragraph (c) of subsection (1) of section 128, shall

(a) consist of a report, addressed to the members of the company, by an auditor or auditors duly qualified and appointed as auditors of the company in accordance with sections 138 and 139 on

- (i) the accounting records of the company, and***
(ii) financial statements of the company as listed in subsection (5) of section 127 and the consolidated financial statements

²⁰³⁶ Section 142(1) of Act 992 makes it explicitly clear that an auditor is not an officer or agent of the company.

²⁰³⁷ Sections 138 and 139 of Act 992.

²⁰³⁸ Section 128(1)(c) of Act 992.

to be sent to the members and debenture holders of the company in accordance with sections 128 and 131; and
(b) contain statements as to the matters mentioned in the Seventh Schedule.

- (2) Where, in the case of the accounts, any of the particulars required to be shown under sections 132 and 133 are not shown, the report, in addition to stating that the accounts do not give the information required by this Act, shall contain a statement giving the required particulars so far as the auditors are reasonably able to do so.*
- (3) The audit of the financial statements shall, in the case of a public or private company be carried out in compliance with international standards on auditing adopted by the Institute of Chartered Accountants, Ghana and it shall be sufficient if the report of the auditor complies with those standards and accords with terminology approved by the Institute of Chartered Accountants, Ghana.*
- (4) The report shall be open for inspection by a member or debenture holder of the company at the registered office of the company during usual business hours and shall be read at an annual general meeting of the company held within three months after the report is sent to members and debenture holders in accordance with section 128."*

Auditors are constituent in the corporate governance system to serve as a check in relation to the financial statements of the company by providing an independent report on the financial performance of the company to members or shareholders of the company. Section 128 of the Act requires directors to submit financial statements including directors' and auditor's reports to members of the company. The auditor is required to submit a report as provided in section 137 of the Act. One distinctive feature of a company is the separation of ownership and management. Due to that separation, auditors are required to serve as checks to provide an independent opinion on the financial state of affairs of the company as recorded by management to the owners (shareholders or members) to assure them of the financial position of the company as reflected in the financial statements prepared and submitted by the directors together with the director's report. The auditing and reporting requirements of an auditor under the Act are therefore a risk reduction measure. Auditors are therefore watchdogs for shareholders and not stooges of the directors. Auditors are, therefore, not officers of a company.

The auditor's report must cover reporting on accounting records, financial statements and requirements under the Seventh Schedule of Act 992. The Seventh Schedule of Act 992 provides:

"Matters to be Expressly Stated in the Report of the Auditors

1. *Whether the auditors have obtained the information and explanations which to be best of the knowledge of the auditors and belief were necessary for the purposes of the audit.*
2. *Whether, in the opinion of the auditors, proper books of account have been kept by the company, so far as appears from the examination of those books, and proper returns adequate for the purposes of the audit have been received from branches not visited by the auditors.*
3. *Whether the statement of financial position of the company and, unless it is designated as a consolidated profit and loss account or statement of comprehensive income, profit and loss account or statement of comprehensive income dealt with by the report, are in agreement with the accounting records and returns.*
4. *Whether, in the opinion of the auditors and to the best of their information and according to the explanations given to the auditors, the accounts give the information required by this Act in the manner so required and give a true and fair view,*
 - (a) *in the case of the statement of financial position, of the state of affairs of the company at the end of the financial year, and*
 - (b) *in the case of the profit and loss account or statement of comprehensive income, of the profit or loss for the financial year, of the statement of financial position or the profit and loss account or statement of comprehensive income subject to the non-disclosure of any matters to be indicated in the report, which by virtue of Part Four of the Sixth Schedule to this Act, are not required to be disclosed.*
5. *In the case of a holding company submitting group accounts, whether, in the opinion of the auditors, the group accounts have been properly prepared in accordance with this Act so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries dealt with so far as it concerns the interests of the company or so as to give a true and fair view of those affairs or of the profit or loss subject to the non-disclosure of any matters to be indicated in the report, which by virtue of Part Four of the Sixth Schedule to this Act are not required to be disclosed.*

Whether the auditors were independent of the company under audit pursuant to section 143 of this Act."

The auditor's report must cover reporting on the accounting records, financial statements and the particulars referred to under the Seventh Schedule as provided above. The auditor's report is a report for the members, even though is circulated by the company or published by the company.

25.6 Circulation of financial statements and reports

The purpose of the financial statement is to provide information on the financial performance of the company. The information must therefore be provided to those who have invested in the company. These are the members or shareholders and the debenture holders, who are the lenders, to the company. Once the company prepares the financial statements, the financial statement is approved by the board of directors, who must prepare a report, and the accounting records and financial statements are audited by the auditor, who prepares a report, the approved signed financial statements and the reports must be circulated to the members and debenture holders of the company.

Section 128 of Act 992 provides as follows:

“(1) The directors of a company shall, at a date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year at intervals of not more than fifteen months, prepare and send to every member of the company and to every holder of debentures of the company a copy of the following documents:

(a) financial statements prepared and signed in accordance with sections 129 to 135;

(b) a report by the auditors in accordance with section 137.

(2) Subsection (1) does not require a copy of the documents to be sent to a member or debenture holder or whose address the company is unaware, but that member or debenture holder is entitled to be furnished on demand without charge with a copy of the last of the financial statements and reports of directors and auditors.

(3) Unless the holding of an annual general meeting is duly waived by the members in accordance with subsection (5) of section 157, the document referred to in subsection (1) of this section shall be laid before the company in general meeting.

(4) The Registrar may extend the periods of eighteen months and fifteen months referred to in subsection (1) and, in the circumstances referred to in subsection (8) of section 131, may waive requirements of this section in respect of a calendar year.”

The financial statements of a company are required to be prepared for each financial year which is the calendar year that must start from the period of the last financial statement. The circulation of the financial statements to members and debenture holders of the company must be done every calendar year but not more than fifteen months apart. In practice, the requirement is for the financial statements to be prepared and circulated within three months after the calendar year. This means it must be circulated before the expiration of March in a year for the last calendar year. As indicated, the financial statements must be approved and signed and must be circulated together with the

reports of the directors and auditors. The only exception to the circulation of the financial statements and reports to a member or debenture holder is where the company is unaware of the address of the member or debenture holder.

In addition, the financial statements and reports must be laid before the annual general meeting unless the annual general meeting is waived. The requirement of a valid waiver of an annual general meeting is the written consent of all the members entitled to attend and vote at the meeting and the auditor of the company.²⁰³⁹

The Registrar is given the power to extend the periods for the circulation of the financial statements and reports. In addition, the Registrar has the power to waive the requirement in respect of a calendar year.

The Act provides for the date the account must be prepared from. In the event of the first financial statements after incorporation of a company, the date must be the date of incorporation and for an existing company, from the date since the last financial statements.²⁰⁴⁰ The date of the statement of comprehensive income and statement of cash flows must be at the end of the financial statement.²⁰⁴¹

25.7 Non-compliance with requirements of accounting records, financial statements and report

It is the responsibility of directors to ensure the proper accounting records are kept, the financial statements and reports are prepared, and the financial statements and reports circulated to members and debenture holders in accordance with the terms of the Act. Failure to ensure this is done attracts a punishment in the form of fines imposed on the directors or imprisonment or both. Section 134 of Act 992 provides for the punishments as follows:

“(3) Where a person, who is a director of a company, fails to take the reasonable steps necessary to secure compliance with sections 127 to 133, that person commits an offence and is, in respect of each offence liable on summary conviction to a fine of not less than two hundred and fifty penalty units and not more than five hundred penalty units or to a term of imprisonment of not less than one year and not more than two years of both the fine and imprisonment.”

Failure to comply with the requirements on accounts, financial statements and reports is, therefore a criminal offence. The person that can be convicted is restricted to directors of the company, and not the officer of the company appointed as an accountant. A director charged with the offence has a number of defences open to the director. Section 134 of Act 992 provides that:

²⁰³⁹ Section 157(5) of Act 992.

²⁰⁴⁰ Section 129(1) of Act 992.

²⁰⁴¹ Section 129(3) of Act 992.

“(4) For the purposes of subsection (3),

- (a) in proceedings against a person for an offence, that person may as a defence prove that, that person had reasonable cause to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that those provisions were complied with and was in a position to discharge that duty; and*
- (b) a person shall not be sentenced to imprisonment for an offence unless, in the opinion of the Court, the offence was committed wilfully.”*

Where the company has employed or engaged a competent accountant who was in a position to discharge the duties relating to keeping accounting records, preparing accounts and financial statements, and ensuring the necessary reports are prepared, the director charged with the offence if the director with reasonable belief in that fact may escape liability imposed for the offence. Even where the director is convicted, the term of imprisonment can only be imposed where the Court is satisfied that the director did commit the offence wilfully.

25.8 Annual Returns

Related to the financial statements is the annual returns which the company must submit to the Registrar, as the name indicate, annually. The annual report is to provide an update to the Registrar every year on the information of the company. It is related to the financial statement in the sense that first, the annual return must have attached to it the financial statements of the company, and second, must be submitted to the Registrar within thirty-six days from the date of the financial statements.

Section 126 of Act 992 provides as follows:

- “(1) A company shall, at least once in every year, deliver to the Registrar for registration an annual return including particulars of every member of the company, every beneficial owner of the company and in the form and relating to the matters prescribed in the Firth Schedule.*
- (2) A company need to not make an annual return,*
 - (a) in the year of incorporation, or*
 - (b) in a year ending less than eighteen months after the date of incorporation, so long as the company makes a return within thirty-six days after the first despatch to the members and debenture holders of the statements, accounts and reports referred to in section 128.*
- (3) The annual return shall be completed within thirty-six days from the date on which the financial statements, reports of the directors and auditors of the*

company are sent to the members and debenture holders pursuant to section 128, and signed by at least one director and the Company Secretary in accordance with section 213.

- (4) The annual return shall state the position of the company as at the date of the annual general meeting or, if the holding of the annual general meeting is waived in accordance with subsection (5) of section 157, at the twenty-first day after the despatch of the documents referred to in subsection (3).*
- (5) The Registrar, after registering the annual return, shall publish in the Companies Bulletin a notice that the annual return in respect of the company has been registered.*
- (6) In the case of a private company, the annual return shall be accompanied by the documents specified in section 298 and in the case of a public company by the documents specified in section 323.*
- (7) Where a company defaults in complying with this section, the company and every officer of the company that is in default is liable to pay the Registrar, an administrative penalty of twenty-five penalty units for each day during which the default continues."*

It is therefore mandatory for a company to deliver the annual return for each year. For a newly incorporated company, the annual return need not be delivered in the years of incorporation or the year ending eighteen months after the incorporation but must be delivered within thirty-six after despatch of financial statements and reports to members and debenture holders of the company.

The details of information or particulars that must be stated in the annual report are provided in the Fifth Schedule of Act 992. The Registrar has a form that must be filled to provide all the required information in the Fifth Schedule. The Fifth Schedule of Act 992 provides:

"CONTENTS OF ANNUAL RETURN

- 1. The name of the company.*
- 2. The nature of the authorised business or businesses of the company or, if the company is not formed for the purpose of carrying on a business, the nature of its objects.*
- 3. The address of the registered office of the company, the number of the post office box of the registered office and the telephone contact of the company.*
- 4. The address of the principal of business of the company in Ghana and where applicable the website address.*

5. *The particulars with respect to the person who at the date of the return are the directors and Company Secretary of the company as are required by section 215 of this Act to be contained in the register of directors and Company Secretary.*
6. *The following personal particulars of every member of the company:*
 - (a) *the names and surnames and all former forenames and surnames;*
 - (b) *the nationality;*
 - (c) *the residential and postal addresses;*
 - (d) *business occupation; and*
 - (e) *the number of shares held at the date of the return.*
7. *The following particulars of each beneficial owner of the company:*
 - (a) *the full name and any other former or other names;*
 - (b) *the date and place of birth;*
 - (c) *the telephone number;*
 - (d) *the nationality, national identity number, passport number or other appropriate identification, and proof of identity;*
 - (e) *residential, postal and e-mail address, if any;*
 - (f) *place of work and position held;*
 - (g) *the nature of interest including the details of the legal, financial, security, debenture or informal arrangement giving rise to the beneficial ownership; and*
 - (h) *confirmation as to whether the beneficial owner is a politically exposed person.*
8. *Particulars of shares transferred since the last return by persons who are still members of the company, that is, the number of the shares and the date of registration of the transfer.*
9. *Particulars of share transferred since the last return by persons who have ceased to be members of the company, that is, the number of the shares and the date of registration of the transfer and the folio of the register containing particulars of that member.*
10. *If the register of members of the company is kept and maintained elsewhere than at the registered office of the company, the address at which it is kept,*
11. *If the company maintains a register of debenture holders elsewhere than at the registered office of the company, the address at which it is kept.*
12. *Particulars of the total amount of the indebtedness of the company in respect of the charges, particulars of which are required to be registered with the Registrar pursuant to Part L of Chapter Two of this Act.*
13. *The names, countries of incorporation, and nature of the business of the subsidiaries of the company and of the bodies corporate in which the company is beneficially entitled to equity shares conferring the right to exercise more than*

twenty-five percent of the votes exercisable at a general meeting of the body corporate, but the information required by this paragraph need not be given if, and to the extent that, the information would conflict with a direction given by the Registrar under subsection (6) of section 136 of this Act.

14. *The number of directors meeting held within the year.*
15. *The date of the last Annual General Meeting and the number of Extraordinary General meetings held within the year.*
16. *The financial statements and audited independent report.*
17. *If the company has share,*
 - (a) *the amount of the stated capital, distinguishing between amounts attributable to each of the items specified in subsection (1) of section 68 of this Act;*
 - (b) *the number of the authorised shares of each class;*
 - (c) *the number of the issued shares of each class;*
 - (d) *the number of treasury shares of each class;*
 - (e) *the total amount of any unpaid instalments or calls which are due and payable and the number and class of shares concerned;*
 - (f) *the total number of shares of each class which have been forfeited;*
 - (g) *in the case of a company limited by shares,*
 - (i) *the total amount of the unpaid liability, on the shares of each class, which is not yet due for payment, and*
 - (ii) *the amount, if any, of the unpaid liability on the shares which, pursuant to section 57 of this Act, the company has resolved shall not be capable of being called up except in the event, and for the purpose of the company being wound up.*
18. *The date of filing the last Annual Returns.*
19. *Unclaimed dividends."*

In addition to the above information or particulars that must be contained in the annual return, there must be additional documents that must be added or attached to the annual report for delivery to the Registrar.

Section 298 of Act 992 which provides for the documents to be annexed to the annual report of a private company provides:

- "(1) With the annual return required by section 126, a private company shall send to the Registrar for registration,*
- (a) a certification that the company has not, since the date of the last return, or, in the case of the first return, since the date of incorporation*

- of the company, issued an invitation to the public to acquire shares or debentures of the company or to deposit money with the company; and*
- (b) a certification that the number of members and debenture holders of the company does not exceed fifty or that an excess of fifty consists solely of persons who are genuinely in the employment of the company and persons, who having been formerly genuinely in the employment, of the company were, while in that employment, and have continued after the determination of that employment to be, members or debenture holders of the company.*
- (2) In addition to complying with subsection (1), a private company shall send to the Registrar for registration,*
- (a) a copy of every statement of financial position and consolidated financial statements circulated to the members and debenture holders pursuant to section 128 during the period to which the return relates, and a copy of the report of the directors and of the report of the auditors accompanying those accounts; or*
- (b) a written statement by the auditors of the company that, to the best of the knowledge and belief of the auditors, the financial statements and reports referred to in section 128 have been sent to the members and debenture holders in accordance with that section; and*
- (c) a copy of the report so sent; and*
- (d) a certificate that to the best of the knowledge and belief of the persons signing the certificate, a body corporate is not or has not been at any time beneficially interested, otherwise than by way of security, in an issued share of the company, or that if a body corporate is or has been so interested, it is an exempted body corporate as defined in subsection (6).*
- (3) The certification required by paragraphs (a) and (b) of subsection (1) and paragraph (b) of subsection (2) shall be signed by a director and by the Company Secretary.*
- (4) The copies required by paragraph (a) of subsection (2) shall be certified by a director and by the Company Secretary to be true copies.*
- (5) The copy of the report of the auditors required by paragraph (b) of subsection (2) shall be certified by the auditors to be a true copy and the statement referred to in that paragraph shall be signed by the auditors.*
- (6) For the purposes of this section, a body corporate is an exempted body corporate if,*

- (a) *it is not a public company;*
- (b) *it has not at any time issued an invitation to the public to acquire any of its shares or debentures or to deposit money with the body corporate; and*
- (c) *at all times, it became beneficially interested in any shares of the company,*
 - (i) *it has not had more than fifty members and debenture holders, not including persons who are genuinely in the employment of the body corporate and persons who, having been formerly genuinely in the employment of the company were, while in that employment, and continued after the determination of that employment to be, members or debenture holders of the company; and*
 - (ii) *another body corporate, other than an exempted body corporate, has not been beneficially interested, other than by way of security, in any issued shares of the body corporate."*

Section 323 of Act 992 which provides for the documents to be annexed to the annual returns of a public company provides:

"The annual return of a public company required by section 126 shall be accompanied by a copy, certified by a director and the Company Secretary to be a true copy, of each statement of financial position, statement of comprehensive income, statement of changes in equity and statement of cash flows, report of directors and report of auditors sent to the members and debenture holders of the company in accordance with section 128 during the period to which the return relates."

As indicated, failure to comply with the requirement of completing the annual return and delivering the annual returns together with the documents required to be annexed to the Registrar for registration is punishable by a fine imposed on the company and every officer of the company in default. In practice, the Registrar does not also work on any request made by the company where the company fails to submit the annual returns within the prescribed time.